



**Furthering Democracy through the  
European Union's Development Policy:  
Legal Limitations and Possibilities**

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DIIS Working Paper 2010:09

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This paper has been based upon work that was solicited and used as background material by International IDEA for regional consultations within the framework of that organisation's 'Swedish EU Presidency Project' in 2009.

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**DIIS WORKING PAPER 2010:09**

© Copenhagen 2010  
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Cover Design: Carsten Schiøler  
Layout: Allan Lind Jørgensen  
Printed in Denmark by Vesterkopi AS

ISBN: 978-87-7605-388-8

Price: DKK 25.00 (VAT included)  
DIIS publications can be downloaded  
free of charge from [www.diis.dk](http://www.diis.dk)

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## **ABSTRACT**

This working paper provides an analysis of the efforts by the European Union to support democracy building in developing countries. It focuses on the specific question of the legal obligations of, and limits for, the European Union in seeking to further democracy through its policies directed at developing countries. The core of the paper is an examination of the legal framework governing the Union's relations with developing countries and the possibilities for furthering democracy. The paper considers the European Union's determination of whether a third country complies, in legal terms, with its 'democratic obligations', and how it is able to control and sanction non-compliance. On the basis of these examinations the possibilities of furthering democracy and the rule of law in the Union's development cooperation legislation are analysed.



## I. INTRODUCTION

### I.1 Objective

This paper provides an analysis of the legal aspects of efforts by the European Union (EU) to support democracy building through its policies directed at developing countries. It focuses on the legal obligations of and limits for the EU when seeking to further democracy through its development cooperation policy. It outlines the applicable legal mechanisms that the EU applies in its furtherance of democracy in the developing countries and analyses these mechanisms.

### I.2 Terminology

Prior to the 1<sup>st</sup> of December 2009 when the Lisbon Treaty entered into force, EU law applied an important distinction between the ‘European Community’ and the ‘European Union’. The European Community concerned matters covered by the EC Treaty (often referred to as the ‘first pillar’), whereas the European Union normally concerned matters covered by the Treaty on European Union as well as the matters covered by the EC Treaty (often referred to as the ‘three pillars’).<sup>1</sup> Following the entry into force of the Lisbon Treaty, all references today are to the European Union irrespective of the subject matter.<sup>2</sup> For practical reasons in this paper I have used the designation European Union/EU irrespective of whether the matter in question concerns a situation prior or subsequent to the entry into force of the Lisbon Treaty.<sup>3</sup>

<sup>1</sup> This is a very simplified explanation of the distinction between the EC and the EU. More elaborate explanations may be found, e.g., in chapter 1 of Chalmers et al. (2006) or in chapter 1 of Craig and de Búrca (2008).

<sup>2</sup> Cf. article 2(2)(a) of the ‘Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community’.

<sup>3</sup> This, of course, does not apply to quotations.

References to democracy are rife in EU law, but the precise meaning appears to have been left unsettled. For this reason, in this paper references to democracy should not be read as implying a single definition. Models of democracy can vary substantially and the concept of ‘democracy’, when used in the present paper, is therefore not seen as presupposing a given set of institutions, but rather as a process involving political control and popular control as basic characteristics.<sup>4</sup>

The European Union does not define developing countries, but normally relies on the definition established by the Development Assistance Committee of the Organisation for Economic Co-operation and Development;<sup>5</sup> a definition which is based on per capita income. This paper uses the same definition.<sup>6</sup>

<sup>4</sup> In this respect, see also International IDEA’s determination of ‘democracy’ as set out in the organisation’s FAQ and its State of Democracy methodology as set out in International IDEA (2008). See also Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, [2006] OJ L386/1, recital 9.

<sup>5</sup> See, e.g., Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (note 2), article 14(1)(2), as well as note 2 in Joint Statement by the Council and the representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’, 22 November 2005 (14820/05), (hereinafter ‘The European Consensus’), [2006] OJ C46/1. The European Consensus is sometimes referred to as the development policy statement or the DPS. It may be noted, however, that at para. 52 of Case C-155/07 European Parliament v Council (EIB Guarantee) [2008] ECR I-8103, the Court of Justice explicitly established that the concept of ‘developing country’ as laid down in Title XX of the EC Treaty should be given an autonomous EU interpretation so that it was not possible merely to rely on the OECD definition. It appears likely that the Court of Justice will take the same approach, if it were asked to rule on the scope of Article 212 TFEU, since this provision explicitly lays down that it applies to ‘third countries other than developing countries’.

<sup>6</sup> The list, including the presently applicable income brackets, is available at <[www.oecd.org/dac/stats/daclist](http://www.oecd.org/dac/stats/daclist)>.

### 1.3 Structure

This working paper is composed of four sections. Section 2 examines the legal framework governing the European Union's relations with developing countries and the opportunities it provides for furthering democracy. Section 3 considers how, in legal terms, the European Union may determine whether a third country complies with its democratic obligations and how to control and sanction non-compliance. On the basis of the paper's examinations and analyses, section 4 draws conclusions and also comments on the consequences of the entry into force of the Lisbon Treaty on 1 December 2009.

## 2. THE LEGAL FRAMEWORK

### 2.1 The Legal Foundation and Fundamental Principles of the European Union

Democracy is part of the foundation of the EU. It is a *sine qua non* condition pertaining to any State that has acceded to or is applying for accession to the EU. The prominent position of the democratic principle is reflected in Article 2 of the EU Treaty, which in its first section provides as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Thus, Article 2 not only lays down that the principle of democracy is one of the foundations of the EU, but also makes clear that the principle of democracy must be attributed an importance in its own right.

Turning to the European Union's secondary legislation and in particular to the case law of the European Court of Justice, it is striking how rarely the principle of democracy is mentioned. Where the European Court of Justice makes reference to the principle it seems almost exclusively to have been used to strengthen some other argument.<sup>7</sup> This is not surprising, however, taking into account how ingrained democracy is in the EU; it is simply taken for granted.<sup>8</sup>

It logically follows that democracy is more than a legitimate objective of the European Union; as one of the principles on which the EU is founded it is obligated to defend and, possibly, also to further democracy to the extent possible. This undoubtedly applies to the EU's external policies. There are, however, certain legal limitations that must be observed.

First, it is important to emphasise that the principle of democracy is not a kind of legal panacea that can overrule all other legal provisions. Other legitimate objectives may thus carry greater weight.<sup>9</sup> Second, the so-called principle of conferred powers means that the EU may only act within the limits of the powers that have been conferred on it by

<sup>7</sup> The principle appears primarily to be quoted either where the case involves the European Parliament in the law-making procedure or where the case concerns the application of the rules on access to information. From the practice of the Court of Justice and the General Court, see, e.g., Case C-408/95, Eurotunnel, [1997] ECR I-6315, para. 45, Case T-211/00, Kuyper v. Council, [2002] ECR I-485, para. 52, and Case C-155/07, European Parliament v. Council (EIB Guarantee), note 6 above, para. 78. See also the Advocate General in Case C-68/94, Netherlands v. Council, [1996] ECR I-2169, point 19.

<sup>8</sup> This is also reflected in the Charter of Fundamental Rights of the European Union, [2000] OJ C364/1, which does not quote the principle of democracy as one of the fundamental rights, but only mentions the principle in the preamble. Some of the provisions, however, clearly presuppose a democratic society. See in particular articles 39 and 40 concerning the right to vote and to stand as a candidate in elections.

<sup>9</sup> See, e.g., section 2.3 concerning humanitarian aid.



the Treaties as well as the limits of the objectives assigned to it in the Treaties. This essentially means that the EU may only actively further democracy in third countries to the extent that – explicitly or implicitly – it has been granted the powers to do so.<sup>10</sup>

Third, it is important to observe that the European Union must respect international law in the exercise of its powers.<sup>11</sup> Basically, this means that the EU may only further democracy in developing countries to the extent that this does not conflict with public international law. This is relevant, for example, if the furtherance of democracy in a third country constitutes interference with that country's internal affairs in such a manner that it conflicts with international public law. Thus, in such a situation it is necessary to identify the limitations in applicable international public law. In what follows, due account must be taken of the limitations identified above.

## 2.2 EU Development Policy Objectives and the European Consensus

Developing and consolidating democracy are undoubtedly important objectives of the European Union's development policy. Article 208(1) of the Treaty on the Functioning of the European Union (TFEU) lays down that:

<sup>10</sup> The importance of the principle of conferred powers may be illustrated by an incident that occurred in 1982 in connection with the conflict over the Falkland Islands between Argentina and the United Kingdom. Here the European Commission suggested imposing economic sanctions against Argentina. This resulted in the adoption of Council Regulation No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina, [1982] OJ L102/1. However, in the lead-up to the adoption Denmark argued that the European Union did not (then) have the necessary competence to impose sanctions as suggested. Denmark therefore refused to comply with the Regulation, but instead adopted national measures that were identical to those provided in the Council Regulation.

<sup>11</sup> Cf. Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR I-6019, para. 9.

Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. ...

These principles and objectives have been laid down in Article 21(1) of the Treaty on European Union (TEU) which provides:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

As is apparent from Article 208(1) TFEU read in conjunction with Article 21(1) TEU, within the EU's development cooperation, democracy is not just an incidental policy objective but rather a legal obligation weighing on the EU in its relations with developing countries.

Moreover, according to the second subparagraph of Article 208(1) TFEU, the above objectives not only apply to the EU's policy in the area of development cooperation, but must be taken into account in all the policies implemented by the EU if they are likely to affect developing countries.<sup>12</sup> The impact of

<sup>12</sup> At first glance the obligation laid down in Article 208 may appear rather similar to the general principles laid down in Title One of the EU Treaty establishing (inter alia) the Union's general principles. On closer examination it is clear that there are important differences. Such closer examination, however, falls outside the scope of the present paper.

this general obligation seems to be rather limited, however, and under the present circumstances it appears fairly clear that EU law does not apply a general principle establishing a ‘right to development’.<sup>13</sup>

Development cooperation is a competence that is shared between the European Union and its Member States.<sup>14</sup> By coordinating their development assistance, the EU and the Member States can increase aid effectiveness. To this end, a common vision has been drawn up to guide the action of the EU – at both Member State and Union level – in the field of development cooperation. In addition, a European Union Development Policy has been established to guide implementation of the vision at EU level. This common vision and the guide for implementation together form the so-called ‘European Consensus’.<sup>15</sup> The European Consensus lays down in unequivocal terms that “[t]he primary and overarching objective of EU development cooperation is the eradication of poverty”.<sup>16</sup> However, under the heading ‘common values’, it equally establishes that “EU partnership and dialogue with third countries will promote common values of . . . democracy . . .”.<sup>17</sup> Democracy thus clearly occupies an important position as part of the European Union’s and the Member States’ development policy as is re-

flected in the European Consensus’ numerous references to the notion.<sup>18</sup>

In order to promote democracy – as well as the rule of law and respect for human rights and fundamental freedoms – the European Union in 2006 adopted Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (‘the financing instrument’).<sup>19</sup> This regulation provides the legal basis for financing a large number of initiatives aimed at encouraging respect for democracy and human rights; and it replaced the European Initiative for Democracy and Human Rights.<sup>20</sup> The financing instrument puts in place the legal basis for financing a number of initiatives intended to enhance respect for human rights and fundamental freedoms, and to promote and enhance democracy and democratic reform in third countries. In this way the financing instrument supports “a prime objective of the [Union]’s development policy”.<sup>21</sup> The financing instrument lists four different means for implementing the assistance,<sup>22</sup> and it is explicitly stated that the instrument allows “for assistance independent from the

<sup>13</sup> This may be compared with the United Nations ‘Declaration on the Right to Development’ of 4 December 1986, General Assembly resolution A/RES/41/128, which – at least in theory – recognises a general right to development. On this (possible) right see Rosas (2001).

<sup>14</sup> This does not mean that the European Union cannot conclude international agreements in the field of development cooperation as the sole contracting partner on the EU side, cf. Case C-268/94, Portugal v. Council, [1996] ECR I-6177.

<sup>15</sup> Cf. note 6.

<sup>16</sup> The European Consensus, para. 5.

<sup>17</sup> The European Consensus, para. 13.

<sup>18</sup> Cf. the European Consensus, paras. 12, 13, 16, 17, 42, 53, 60, 86, 87, 89, 101 and 103.

<sup>19</sup> Published in [2006] OJ L386/1. The financing instrument covers the period 2007 to 2013.

<sup>20</sup> See Regulation 975/1999, which sets out the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, [1999] OJ L120/1; and Regulation 976/1999, which sets out the requirements for the implementation of EU operations, other than those of development cooperation, which, within the framework of EC cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, [1999] OJ L120/8. This earlier initiative covered the period 2000 to 2006.

<sup>21</sup> Cf. recital 3 of the financing instrument.

<sup>22</sup> Cf. Article 4 of the financing instrument. These are ‘strategy papers’, ‘annual action programmes’, ‘special measures’ and ‘ad hoc measures’.

consent of third country governments and other public authorities”.<sup>23</sup> Among the fields that EU assistance relates to are the strengthening of the rule of law.<sup>24</sup>

As is clear from the above, the furthering of democracy occupies a prominent position among the legally established objectives of the European Union’s policy on development cooperation.

### 2.3 Humanitarian Aid

While development assistance is concerned with the sustainable economic and social development of developing countries (i.e. the long term and lasting improvement of living conditions) the objective of humanitarian aid is to save lives and to provide immediate relief for people facing severe crisis as a result of either natural disaster or conflict.<sup>25</sup> The European Union together with its Member States form the largest provider of humanitarian aid in the world, and the European Commission alone is among the biggest sources of such aid.<sup>26</sup> The aid is regulated by the Humanitarian Aid Regulation of 1996<sup>27</sup> and in principle EU humanitarian aid may be provided to all people in need. It is, however, first and foremost aimed at developing countries and covers not only short-term relief but also disaster prevention and reconstruction operations. These

operations may last as long as is necessary, but must be targeted at the immediate requirements arising out of the exceptional circumstances.

It has been clearly established in the Humanitarian Aid Regulation that the sole aim of the aid must be to prevent or relieve human suffering. Moreover, the aid must be accorded to victims without any discrimination (including discrimination on the grounds of sex or political affiliation) and it must not be guided by, or subject to, political considerations.<sup>28</sup> Thus, in accordance with fundamental humanitarian principles, the European Union may not guide – or subject – its humanitarian aid to the objective of furthering democracy. This principled approach is essential to the acceptance of aid and the ability of the European Union to deliver aid to the victims of crisis in often complex political and security contexts.<sup>29</sup> It thus follows that the European Union is barred from using its provision of humanitarian aid to further democracy in developing countries.

### 2.4 Human Rights Clauses in International Agreements

In 1995 the European Commission and the Council of the European Union committed themselves to include in all agreements between the EU and third countries a clause requiring respect for democratic principles and

<sup>23</sup> Cf. recital 1 of the financing instrument. As is noted in Section 2.1, the European Union is bound by public international law. This means that the EU may only finance initiatives to the extent that this does not conflict with international law.

<sup>24</sup> Cf. Article 2(1)(a)(ii) of the financing instrument.

<sup>25</sup> Contrast in this regard recitals 3, 4 and 7 of Council Regulation 1257/96 of 20 June 1996 concerning humanitarian aid, [1996] OJ L163/1 with Article 21 of the EU Treaty (following the entry force of the Lisbon Treaty).

<sup>26</sup> Cf. European Commission, Annual Review 2007, Humanitarian Aid, Brussels 2008, pp. 1 and 26.

<sup>27</sup> Cf. note 28.

<sup>28</sup> Cf. recitals 7 and 8 of the Humanitarian Aid Regulation. See also Communication from the Commission to the European Parliament and the Council: Towards a European Consensus on Humanitarian Aid, COM(2007)317 final, which in the annex defines the humanitarian principle of ‘impartiality’ in the following terms: ‘Provision of humanitarian assistance must be impartial and not based on nationality, race, religion, or political point of view. It must be based on need alone.’

<sup>29</sup> Not surprisingly, excluding all political considerations from the European Union’s provision of humanitarian aid may prove difficult in practice. See chapter 6 in Khaliq (2008).

human rights.<sup>30</sup> This commitment applies to all international agreements entered into by the European Union, but it is particularly important with regard to agreements entered into with developing countries. This is not surprising because: (a) breaches of human rights and violations of democratic principles are more likely in developing countries than in developed countries, everything being equal; and (b) the EU will normally be in a much more powerful position *vis-à-vis* developing countries than it would be *vis-à-vis* developed countries.<sup>31</sup>

A fine contemporary example of the use of human rights clauses may be found in the Cotonou Agreement.<sup>32</sup> Article 9 of the Agreement sets out the “essential elements and fundamental element”, which includes a reaffirmation by the parties that:

democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory

system, and the existence of participatory mechanisms. ...<sup>33</sup>

If either the EU and the Member States or one of the ACP States considers that the other party has failed to fulfil an obligation referred to in Article 9(2) – including the ‘democratic principles’ – this matter may be considered during the regular political dialogue that must be conducted under the Agreement. Where the political dialogue does not lead to a solution, Article 96 of the Agreement provides for a consultation procedure. If this consultation procedure is not successful, sanctions may be imposed on the party in breach of the obligations laid down in Article 9.<sup>34</sup>

Using human rights clauses to enforce compliance with democratic principles in other States – and to sanction non-compliance – may give rise to *legal criticism* particularly in two respects. First, it has been argued that human rights belong to a State’s internal sphere. Hence, according to this argument, one State is not entitled to promote human rights in another State. If we were to accept this argument, it would follow that where the European Union requires human rights clauses to

<sup>30</sup> Cf. Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95)216 final and the Council conclusions of 29 May 1995 (reported in EU Bulletin No 5 1995 at point 1.2.3).

<sup>31</sup> There is a fairly extensive literature on human rights clauses, including Fierro (2003), Bartels (2005), Liñán Noguera and Hinojosa Martínez (2001: 307-336) and Horng (2003: 677-701).

<sup>32</sup> Partnership agreement between the members of the African, Caribbean and Pacific (ACP) Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, [2000] OJ L317/3. ‘ACP countries’ refers to a number of primarily former British and French colonies in Africa, the Caribbean and the Pacific.

<sup>33</sup> Cf. Article 9(2)(2). Within the framework of the present paper, it may also be observed that in Article 9(2)(3) the Agreement provides that ‘[t]he structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.’

<sup>34</sup> The European Union has been negotiating Economic Partnership Agreements (EPAs) with a number of groups formed among the ACP countries. An agreement with the group of Caribbean ACP countries (the Cariforum) has been concluded. This agreement does not include a human rights clause, but it does establish that the EPA is ‘based on’ the essential elements and the fundamental element clause in Article 9 of the Cotonou Agreement and that the EPA shall not prevent the adoption of any measures provided for under the Cotonou Agreement’s human rights clause. The Cariforum EPA is available at [www.crn.org/documents/ACP\\_EU\\_EPA/epa\\_agreement/EPA\\_Text\\_15th\\_October08\\_Final.pdf](http://www.crn.org/documents/ACP_EU_EPA/epa_agreement/EPA_Text_15th_October08_Final.pdf).

be introduced into international agreements with third countries, this would conflict with the public international law principle of non-interference. Although this non-interference argument has been voiced during negotiations between the EU and a developing country,<sup>35</sup> it seems that today there is hardly any doubt that the inclusion of a human rights clause in an international agreement does not conflict with the obligation not to interfere in the internal affairs of other States.<sup>36</sup>

Second, it is arguable that where the European Union entered into international agreements with developing countries before the entry into force of the Lisbon Treaty (i.e. before 1 December 2009), some of the legal bases of the then applicable EC Treaty available to the European Union for negotiating international agreements with developing countries did not allow the EU to introduce human rights clauses. However, following the entry into force of the Lisbon Treaty this no longer appears to constitute a problem with regard to future international agreements, since the now applicable EU Treaty in Article 21 provides that “[t]he Union’s action on the international scene shall be guided by ... : democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms ...” It is thus arguable that the EU not only may, but rather is obliged to further democracy whenever it enters into international agreements. The majority of all international agreements to which the EU is a party and which are in force today (i.e. 2010) have, however, been entered into prior to the entry into force of the Lisbon Treaty. With respect to these international agreements with developing countries it is far from obvious that those which have been founded on

legal bases that did not refer to the objectives of furthering democracy and the rule of law must – or may – pursue these objectives. On the one hand, Article 178 of the then applicable EC Treaty obliged the EU to “take account of the objectives referred to in Article 177 in the policies that it implements which are likely to affect developing countries” and Article 177 referred to democracy and the rule of law.<sup>37</sup> On the other hand, the European Court of Justice has on many occasions emphasised that whenever the EU issues a legal act it must state its correct legal basis. Failing this, the European Court of Justice has shown itself ready to annul a legal act where the illegality was more than a purely formal defect.<sup>38</sup> On this background, where prior to the entry into force of the Lisbon Treaty the EU intended to include a human rights clause in an agreement with one or more developing countries, it ought to give due consideration to whether Article 181 of the then applicable EC Treaty should be included as the legal basis in addition to the primary legal basis.<sup>39</sup>

Three points may be noted in this connection. First, it is recalled that the “Communication from the Commission on the inclusion

<sup>37</sup> Perhaps surprisingly the arguably most important international EC agreement in the field of development cooperation, the Cotonou Agreement, is based exclusively on Article 310 of the EC Treaty, which concerned association agreements.

<sup>38</sup> See, e.g., Case 45/86, *Commission v. Council (re: GSP)*, [1987] ECR I 493, Case 165/87, *Commission v. Council (Commodity Coding)*, [1988] ECR 5545, Case 275/87 *Commission v. Council*, [1989] ECR 259 and Case C-155/07, *European Parliament v. Council*, note 6 above.

<sup>39</sup> This seems to have been particularly relevant with regard to trade agreements founded on the EC Treaty’s Article 133 on the EC’s common commercial policy (now Article 207 of the TFEU). See, e.g., Proposal for a Council decision concluding the Interim Economic Partnership Agreement between the European Community and its Member States, on the one part, and the [Southern African Development Community] SADC EPA States, on the other part, COM(2008)565 final. It may be noted, however, that international agreements that are exclusively based on Article 133 of the EC Treaty are rather unusual.

<sup>35</sup> Fierro 2003: 286, 303-305.

<sup>36</sup> Fierro 2003: 75-78, 304.

of respect for democratic principles and human rights in agreements between the Community and third countries<sup>40</sup> requires human rights clauses to be included in all international agreements, whether or not the contracting third country is a developed or a developing one. From a political point of view it would appear to be rather problematic if the EU were to exempt developed countries from this requirement. Second, international agreements entered into within the framework of a number of international treaties – such as, for example, the World Trade Organization Agreement – do not necessarily allow the parties to impose clauses like the EU’s human rights clause. Third, on the one hand it may be arguable that agreements entered into prior to the entry into force of the Lisbon Treaty and based exclusively on Article 133 of the (then applicable) EC Treaty regarding the common commercial policy might not pursue the objective of furthering democracy as such. On the other hand, it is equally submitted that also before the entry into force of the Lisbon Treaty the EU could not actively undermine democracy – be it in the EU or outside. This means that also before the entry into force of the Lisbon Treaty the EU could not enter into international agreements that were liable to work against democracy.

As is clear from the above, whenever the European Union enters into an international agreement it commits itself to furthering, *inter alia*, democracy in the third country through the inclusion of a human rights clause. While it is arguable that the inclusion of such a clause does not conflict with the public international law principle of non-interference, it is also arguable that prior to the entry into force of the Lisbon Treaty in certain situations such an inclusion may

have been in conflict with the principle of attributed powers.

## 2.5 Tariff Preferences

An important aspect of the European Union’s assistance to developing countries is the provision of privileged access to the EU market. This is primarily done by allowing exports from developing countries to enter the EU at no or reduced customs duty under the general scheme of preferences (GSP).<sup>41</sup> Essentially, the European Union’s GSP scheme is composed of three categories. The first category provides a *general arrangement* that allows tariff-free access to the European Union market for manufactured products that the EU considers to be non-sensitive. The general arrangement provides only limited advantages to exporters of products that are classified as sensitive, thereby limiting its value to developing country exporters. The general arrangement is available to all beneficiary countries unless they are classified by the World Bank as a high-income country or where they are not sufficiently diversified in their exports.<sup>42</sup>

The second category provides a “special incentive arrangement for sustainable development and good governance”, normally referred to as the *GSP+ scheme*.<sup>43</sup> In addition to the tariff suspension provided under the general arrangement, the GSP+ also, to a large extent, suspends the customs tariffs on sensitive

<sup>41</sup> See Council Regulation 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences, [2005] OJ L169/1.

<sup>42</sup> Cf. Regulation 980/2005, Articles 2 and 4 and recital 6.

<sup>43</sup> The present GSP+ scheme was established following a WTO Appellate Body ruling holding the previous scheme to conflict with the European Union’s obligations under the WTO Agreement. The reason was that the previous scheme unduly discriminated between different developing countries. The replacement of the former GSP+ scheme, therefore, is a telling example of how the European Union is bound by international law. See Appellate Body Report, European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R (7 April 2004).

<sup>40</sup> Note 33 above.

products. To qualify for the GSP+ scheme the exporting country must be classified as vulnerable,<sup>44</sup> and it must ratify and effectively implement a number of international conventions concerning core human and labour rights as well as conventions related to the environment and to governance principles.<sup>45</sup> The European Commission monitors that the beneficiary countries comply with the latter condition. The list of conventions includes:<sup>46</sup>

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention concerning Minimum Age for Admission to Employment (No. 138)
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182)
- Convention concerning the Abolition of Forced Labour (No. 105)

<sup>44</sup> In order to qualify as vulnerable, a country must fulfil the conditions for being a beneficiary under the general GSP arrangement and in addition the country's GSP-covered imports to the EU must represent less than 1 percent in value of total GSP-covered imports to the EU, cf. Article 9(3) of Regulation 980/2005.

<sup>45</sup> Various time limits apply with regard to when ratification and implementation must have been completed. The ultimate limit was 31 December 2008, cf. Article 9(1)(c).

<sup>46</sup> Cf. Annex III to Regulation 980/2005.

- Convention concerning Forced or Compulsory Labour (No. 29)
- Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No. 100)
- Convention concerning Discrimination in Respect of Employment and Occupation (No. 111)
- Convention concerning Freedom of Association and Protection of the Right to Organise (No. 87)
- Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98)
- International Convention on the Suppression and Punishment of the Crime of Apartheid
- United Nations Convention against Corruption (Mexico).

The third and most favourable GSP category is reserved for the least developed countries.<sup>47</sup> In principle it allows these countries to export all their products, apart from arms and ammunition, to the European Union with no tariffs.<sup>48</sup> This category is therefore generally referred to as the *Everything But Arms* scheme or simply the EBA scheme.

The preferential treatment set out in the three GSP schemes may be temporarily withdrawn for a number of reasons. For the purposes of the present paper, it is particularly relevant that a developing country may see its preferential treatment temporarily withdrawn with regard to all or certain products if it is found to have seriously and systematically violated the principles laid down in the conven-

<sup>47</sup> The list of least developed countries is drawn up by the United Nations, which may also decide to remove countries from the list, cf. Article 12(7) of Regulation 980/2005.

<sup>48</sup> With regard to rice, bananas and sugar there was a gradual reduction in the tariffs, cf. Article 12(2)-(4) of Regulation 980/2005. Full suspension of the tariffs was reached in 2009.

tions listed under the GSP+ scheme.<sup>49</sup> Moreover, with particular regard to those countries that have qualified for the GSP+ scheme, the EU may temporarily withdraw the preferential treatment if national legislation no longer incorporates the relevant conventions or if the incorporating national legislation is not effectively implemented.<sup>50</sup>

### 3. ENFORCING DEMOCRACY IN THIRD COUNTRIES

The European Union to a large extent pursues its objective of furthering democracy in developing countries by offering economic advantages on condition that the beneficiary country complies with certain democracy conditions. If the beneficiary country fails to comply with the conditions, the European Union may sanction this – typically through the withdrawal of the economic advantages. To enforce compliance with the democracy conditions, three requirements must be met:

- the democracy conditions must be so precise that it is possible to determine whether the beneficiary country is in breach of its obligations;
- there must be a control system in place to verify whether the democracy conditions have been breached;
- there must be a sanctioning procedure that may be used against a beneficiary country in breach of its obligations.

<sup>49</sup> Cf. Article 16(1)(a) of Regulation 980/2005.

<sup>50</sup> Cf. Article 16(2) of Regulation 980/2005. Withdrawal has appeared in the case of Sri Lanka, cf. Regulation Implementing Council Regulation 143/2010 of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, [2010] OJ L45/1.

It is submitted that the European Union's present regime – as outlined in Section 2 above – gives rise to concern with respect to the first and the third point.

First, as explained in section 1.2 above, models of democracy can vary substantially and democracy is therefore not seen as presupposing a given set of institutions, but rather as a process involving political control and popular control as basic characteristics. This rather flexible definition is problematic from a legal point of view since it makes it difficult to establish a specific 'standard of behaviour' against which an obligated State may be held legally responsible. Hence, there is a risk that only gross violations of the democratic principle may be 'prosecuted' whereas more limited violations may pass more or less unnoticed.<sup>51</sup>

In this respect the GSP+ scheme seems to be the exception that proves the rule by laying down specific international conventions that the beneficiary country must comply with. Even though these conventions leave a certain margin of discretion to the beneficiary country, they clearly provide a much firmer standard to judge the country against.<sup>52</sup>

<sup>51</sup> The European Union has only taken steps to sanction non-compliance in cases of flagrant infringements of the democratic principle.

<sup>52</sup> Monitoring and evaluation of compliance with the GSP+ requirements are in particular based on the public reports and observations of the relevant international organisations. See Regulation Implementing Council Regulation 143/2010 of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, [2010] OJ L45/1 and 'Report on the status of ratification and recommendations by monitoring bodies concerning conventions of annex III of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences (the GSP regulation) in the countries that were granted the Special incentive arrangement for sustainable development and good governance (GSP+) by Commission Decision of 21 December 2005', COM(2008) 656 final, Brussels 21.10.2008. The margin for discretion left to the European Union is therefore rather limited.



Second, effective control on the obligated States to comply with their democratic obligations presupposes that a system of surveillance is put in place. For example, under article 8 of the Cotonou Agreement, the Parties undertake to regularly engage in a comprehensive, balanced and deep political dialogue where, *inter alia*, the question of failure to comply may be considered. Obviously, the information provided during these dialogues may be supplemented by reports of the European Union's representation in the State in question as well as information provided by EU Member States, NGOs and other relevant bodies.

Third, in order to encourage compliance with democratic obligations there must be some 'incentive system' in place. Non-compliance will normally first lead to political consultations between the parties during which the European Union will endeavour to persuade the beneficiary country to live up to its obligations. If these endeavours prove unsuccessful, the EU may resort to the use of sanctions. These sanctions will normally be in the form of the full or partial withdrawal of economic assistance, such as preferential status, that the EU has accorded to the beneficiary country.

The efficiency of this type of sanctions may be questioned. In particular, two factors together give cause to doubt its efficiency. First, the inherent reticence of the enforcement system means that sanctions are only likely to be a real possibility where a beneficiary country commits gross and persistent infringements. Second, withdrawing economic assistance to the beneficiary State is likely to negatively affect the population in general. It is thus those suffering from the beneficiary country's infringement who are likely to feel the consequences of the resulting sanctions most directly.<sup>53</sup>

<sup>53</sup> Economic sanctions are often dismissed as ineffective instruments to further democracy in a third country. This view has, however, been challenged by Marinov (2004).

It follows from the above that there are good reasons to amend the present incentive system in two respects: by ensuring a firm reaction at a much earlier stage than is presently the case, and by aiming any sanction much more directly at those responsible for the infringements.

#### 4. CONCLUSIONS AND A LOOK TO THE FUTURE

The above examination has shown that furthering democracy and the rule of law and consolidating respect of human rights and fundamental freedoms occupy an important position in the European Union's legislation in the field of development cooperation. The examination also shows, however, that enforcement of the democratic principle leaves room for improvement.

Section 3 above makes a proposal for improving the present incentive system. Nonetheless, the examination begs the question whether legal obligations – and enforcement – are a suitable way of advancing democracy. It is submitted that in general they are not. Admittedly, the examination presented in the present paper does not allow one to conclude that the various activities aimed at advancing democracy and human rights in developing countries which may be initiated on the basis of the so-called 'financing instrument'<sup>54</sup> provides a suitable means to achieve this objective. Nevertheless, this author finds that there are strong indications supporting using the latter approach rather than the one based on legal obligations and enforcement.

Following the entry into force of the Lisbon Treaty promotion of the European core values of human dignity, freedom, democra-

<sup>54</sup> Cf. note 20 above.

cy, equality, the rule of law and the respect for human rights has become a main objective of the European Union.<sup>55</sup> Moreover, the Lisbon Treaty has created a coherent policy framework for the European Union's external relations, in which development cooperation forms an important part. In this connection the EU Treaty in Article 21 now lays down that: "The Union's action on the international scene shall be guided by ...: democracy, the rule of law, ..."

The EU Treaty today further requires that in the development and implementation of the different areas of its external action the EU shall respect the above principles and pursue the above objectives. Moreover, the EU is required to ensure consistency between the different areas of its external action and between these and its other policies.

In short, the entry into force of the Lisbon Treaty has meant that democracy has been given an even more important position in the Treaties in general and in the external policy of the European Union in particular. Hence, the importance of the democratic principle in the EU's development cooperation has clearly been reinforced.

<sup>55</sup> At the same time the Charter of Fundamental Rights has become legally binding on the European Union and on (most of) the Member States. It seems clear, however, that the Charter is primarily aimed at the internal matters of the European Union, while external matters play only a subsidiary role. For example, the Charter includes the 'right of access to placement services' as a fundamental right, whereas the 'right to development' is not mentioned.

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