



The EU's Conditionality Policy: A New Strategy to Achieve Compliance

Fabienne Zwagemakers

Abstract

Through the inclusion of human rights and democracy clauses in the trade and association agreements of its common external trade policy, the European Union seeks to promote and transmit the values of human rights, democracy, and the rule of law globally. However, trade partners from the developing world often feel that these clauses offend their national sovereignty, and sometimes resort to alternative agreements offered by countries notorious for cutting corners. This working paper offers an assessment of the motives for non-compliance and sketches out how the EU could engender compliance. The paper concludes that there is a pivotal role to be played by education, civil society, business, and political parties in the nexus between economic growth, democracy, and the respect for human rights. The EU must target these factors directly, as they largely determine the domestic enforcement of HR clauses. In addition, the EU should develop a human rights strategy coordinated with global, regional, and local actors.

Keywords: *European Union (EU) / External relations / External trade policy / Sri Lanka / Nicaragua / India / Human rights / Democracy / Political conditionality*

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by Fabienne Zwagemakers*

Introduction

The European Union (EU) is the world's largest importer and exporter of goods. Through the inclusion of human rights and democracy clauses in the trade and association agreements of its common external trade policy, the EU seeks to promote and transmit globally the values of human rights, democracy, and the rule of law.¹ However, what happens when trade partners from the developing world feel that these clauses offend their national sovereignty? And what happens when these partners consequently refuse to comply with the EU's clauses and instead resort to alternative agreements offered by countries notorious for cutting corners? Conflicting policy priorities may then lead to poor relations and the EU could end up empty-handed or worse, isolated in a world guided by new international values. Aware of this risk, how can the EU generate compliance with the human rights and democracy clauses in trade and association agreements?

By examining why the application of human rights conditionality has been unsuccessful, and on the basis of the lessons learned from this, a clear picture can be drawn of how the EU could engender compliance with trade and association agreements. Three cases of EU failure to apply human rights conditionality in the framework of its trade policy will be examined: Sri Lanka, Nicaragua, and India. The analysis of these experiences will help survey how the EU can reaffirm the credibility of its conditionality policy, as well as the significance of its soft power, while remaining a global diplomatic player. This paper assumes that two factors are of decisive importance for compliance. The first factor concerns the possibility of domestic enforcement of human rights and democracy clauses, and the second factor concerns the extent to which governments take the anticipated reactions to non-compliance of citizens, states, and international organisations into account.² As a result, these factors - domestic enforcement and anticipated reactions - are at the heart of the analysis.³

Paper prepared for the Istituto Affari Internazionali (IAI), January 2012.

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¹ The EU's common trade policy is part of the EU's Common Commercial Policy. The European Commission (EC) has the exclusive competence to broker trade agreements with third countries, but it coordinates intensively with the EU member states and with the European Parliament.

² This approach is indebted to Oona Hathaway. See Oona A. Hathaway, "Why do countries commit to human rights treaties?", in *The Journal of Conflict Resolution*, Vol. 51, No. 4 (August 2007), p. 590, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009613.

³ *Ibidem*, p. 592.

1. Human Rights Conditionality in the EU's External Trade Policy

1.1. Human rights clauses and political dialogue

Through bilateral trade agreements and association and cooperation agreements, the EU aims to advance the development of third world countries and to support regional organisations.⁴ The EU asserts that a democratic structure, in which respect for human rights and the rule of law is fostered, is a facilitating condition for accomplishing development through trade. Therefore, EU agreements on trade and cooperation with 'third countries', encompassing all non-EU countries and EU applicant-countries, comprise "essential element clauses": human rights and democracy clauses (hereinafter HR clauses).

The EU seeks to confer economic benefits on third countries as a reward for respecting the principles of human rights and democracy, and is simultaneously wary of contributing to violations of these principles through its own economic engagement.⁵ Therefore, in all its trade agreements the EU includes a section pertaining to the implications of non-compliance with these clauses.⁶ The scope of the agreement is mutually agreed upon by the EU and the third country. Various kinds of conditionality clauses have been developed, providing the EU with mechanisms to encourage compliance on a legal basis.⁷ Reinforcement by reward, as opposed to reinforcement by punishment, is the usual EU strategy to induce states to comply.⁸ This means that the EU provides positive incentives to countries that do comply, whereas non-compliance and human rights violations are met with "appropriate measures" such as the withdrawal of privileged status, aid or assistance, rather than with coercive measures such as the imposition of additional costs.⁹

Concurrently, the EU engages in political or human rights dialogue with thirty foreign governments and civil societies.¹⁰ Cutting across the conditionality process, dialogue is instrumental to the application of HR clauses, meaning that dialogue may lead to the implementation of HR clauses, may be the result of the implementation of HR clauses, or may even function as conditionality as such.¹¹ Political dialogues are organised annually or bi-annually on a confidential basis at the level of senior officials or at the

⁴ European Parliament, "Defending Human Rights and Democracy", in *Fact Sheets on the European Union*, http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.1.2.pdf.

⁵ Lorand Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*, Brussels, European Parliament, November 2008 (Policy Department External Policies Study), p. 1, <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=23557>.

⁶ European Council, EU Annual Report on Human Rights, 10 October 2003, p. 41, <http://www.consilium.europa.eu/uedocs/cmsUpload/HR2003EN.pdf>.

⁷ Lorand Bartels, *The Application of Human Rights Conditionality ...*, *cit.*, p. 1.

⁸ Frank Schimmelfennig, Stefan Engert, and Heiko Knobel, "Costs, commitment and compliance: the impact of EU democratic conditionality on Latvia, Slovakia and Turkey", in *Journal of Common Market Studies*, Vol. 41, No. 3 (June 2003), p. 498, http://www.eup.ethz.ch/people/schimmelfennig/publications/03_JCMS_CostsCommitment.pdf.

⁹ Lorand Bartels, *The Application of Human Rights Conditionality ...*, *cit.*, p. 1.

¹⁰ European Union External Action Service, *The EU's human rights dialogues*, http://eeas.europa.eu/human_rights/dialogues/index_en.htm.

¹¹ Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, The Hague, Nijhoff, 2003, p. 102.

level of the heads of the EU's diplomatic missions. Political dialogue may concern a range of different issues: the global economy, peace and security, migration, but also climate change, science, transport, or other issues of mutual interest. Human rights and democracy appear high on the agenda of these political meetings.¹²

As growing prosperity is considered a factor facilitating the development of democratic state structures, the EU first strives to bring about economic convergence. This may ultimately pave the way for an intensification of political relations. The EU also seeks to accomplish a confluence of standpoints regarding certain issues on the agenda.¹³ This entails efforts to persuade foreign governments to comply with and implement international treaties, norms, and standards. In this regard, political dialogue plays a decisive role in the EU's relations with most of the so-called BRICS countries (Brazil, Russia, India, China and South Africa), the rapidly emerging powers that are viewed in several regions of the world as economic development models alternative to those put forward by the West.¹⁴ The BRICS are highly sensitive to criticism of their human rights record, to the extent that the EU has abandoned any pretence of including human rights-related conditionality in its relations with them, preferring instead to deal with human rights issues in the broader context of political dialogue.¹⁵ The EU engages in high-level political dialogue with Brazil, Russia, and China, whereas political dialogue with India and South Africa takes place at the level of the EU's diplomatic mission. The EU additionally attempts to encourage cooperation on democracy, the rule of law, and human rights on a 'neutral' level through participation in multilateral forums, such as the United Nations (UN) and the World Trade Organisation (WTO).

1.2. Assessing the impact of HR clauses

The EU's conditionality policy is the object of much controversy and criticism, in particular regarding the legality, consistency, and effectiveness of the HR clauses. The added value of political dialogue is also frequently questioned. This is not to say that the conditionality policy has been a complete failure. The EU's insistence on it confirms its commitment to the principles of human rights, democracy, and the rule of law. Moreover, through reinforcement by reward the EU has adopted a positive approach to human rights promotion worldwide. Nonetheless, a series of shortcomings still characterise the EU's conditionality policy.

One important drawback of the conditionality policy concerns the legality of HR clauses. According to the European Court of Justice, the European Commission does not have the general authority to internationally enact HR rules or to conclude international HR conventions.¹⁶ However, HR clauses do enact HR rules on third

¹² European Union External Action Service, *The EU's human rights dialogues*, cit.

¹³ Vaughne Miller, *The Human Rights Clause in the EU's External Agreements*, London, House of Commons Library, April 2004 (House of Commons Library Research Paper No. 04/33), p. 22, <http://www.parliament.uk/briefing-papers/RP04-33>.

¹⁴ In 2010 South Africa was officially included on the list of emerging regional players on the global level, adding the 'S' to the 'BRIC'- acronym.

¹⁵ Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, cit., p. 200.

¹⁶ European Court of Justice, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/94), 28 March 1996, par. 27, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994CV0002:EN:PDF>.

countries, and, moreover, impose positive HR obligations on the European Commission.¹⁷ Positive obligations imply that the EC has the responsibility to actively protect human rights worldwide, whereas, internationally, the EC merely has negative HR responsibilities, meaning the sole obligation of not violating human rights. Additionally, HR clauses refer primarily to the Universal Declaration of Human Rights, a legally non-binding tool. In this respect, it should be noted that HR clauses generally have little or no bearing on the specifics of the trade agreements. Rather, the clauses usually reaffirm states' commitment to certain principles to which they have already committed themselves.¹⁸ Thus, while the EU does not demand anything new of its partners, it implicitly positions itself as an 'arbiter' (albeit without any real legal authority to do so), potentially questioning the compliance of its partners with their broader international obligations. Understandably, third parties frown upon this attitude, which is generally perceived as condescending.

The lack of consistency in the implementation of the HR clauses is another significant drawback of the conditionality policy. The inclusion of HR clauses in the EU's commercial policy became compulsory in 1995. Since the inclusion of HR clauses in the EU's commercial policy became compulsory in 1995, the EU has been stricter in imposing HR clauses with developing countries than with affluent countries. This led to accusations that the EU was using double standards, posing as a strong defender of human rights in relations with poor countries but backtracking when dealing with major powers. In addition, HR clauses are still not applied consistently to trade agreements in all sectors. HR clauses are absent in agreements on fisheries, steel, and textiles, even though these agreements are negotiated with countries that are known for their poor human rights record.¹⁹ This lack of consistency has led to a credibility deficit of the EU's conditionality policy.

Lastly, the EU's conditionality policy has been criticised for being ineffective. This critique primarily touches upon the insufficient availability of operational mechanisms to implement, monitor and evaluate the HR conditionality policy. Implementation, monitoring, and evaluation usually takes place through the EU's diplomatic missions, or through other existing EU structures which have other tasks and are not specifically tailored to the conditionality policy. This means that human rights compete with other interests and policy priorities on the EU's agenda in third countries. In addition, the effectiveness of the conditionality policy suffers from the legality and consistency deficit, mentioned above. An effective HR conditionality policy necessitates legality and consistency, because through legality and consistency the EU confirms the indivisibility and importance of human rights. This, in turn, leads to greater credibility, which encourages trade partners to comply more. Once countries comply, they are likely to improve their human rights record, as trade benefits are only conferred on third countries that do comply with human rights standards. Greater consistency and legality hence lead to a more effective policy to advocate the respect for human rights.

¹⁷ Lorand Bartels, *The Application of Human Rights Conditionality ...*, cit., p. 14.

¹⁸ Barbara Brandtner and Allan Rosas, "Human rights and the external relations of the European Community: an analysis of doctrine and practice", in *European Journal of International Law*, Vol. 9, No. 3 (1998), p. 475, <http://ejil.oxfordjournals.org/content/9/3/468.full.pdf>.

¹⁹ Lorand Bartels, *The Application of Human Rights Conditionality ...*, cit., p. 4.

1.3. Assessing the impact of political dialogue

The EU's political dialogues have been subject to scepticism. Although monitoring the dialogues' impact and effectiveness is a difficult exercise, these dialogues do not seem to have been particularly productive so far.²⁰ Nevertheless, the EU's effort to generate compliance with human rights and democracy principles among sceptical trade partners is not entirely useless as dialogue may ultimately pave the way for inclusion of HR clauses. By engaging in an alternative course of action with trade partners unsusceptible to conditionality, the EU nonetheless exerts a degree of influence on the governments of these countries. Therefore, political dialogues offer a positive alternative to HR clauses when countries are unwilling to accept the latter.

Political dialogue also ensures ongoing engagement with these countries. In particular, political dialogue provides a mechanism for interacting with the BRICS countries. Especially China and Russia seem to present different discourses of economic development (which they de-link from democracy), thereby weakening the EU's argument that development and respect for human rights and democracy are two faces of the same coin.

1.4. Reconstructing the global HR discourse

The importance of protecting human rights is often "trumped" by the importance of safeguarding national and cultural sovereignty. This discourse in which sovereignty is used to justify non-compliance with HR clauses is increasingly employed by affluent and less affluent countries alike. These countries perceive external pressure to comply with HR clauses as inappropriate. This discourse must be reconstructed. Discourse reflects social reality, but it may also shape social reality. In this regard, the international community can play a constructive role in raising moral awareness of HR practices, emphasising the indivisibility of HR, and shaming non-compliant countries into compliance. The EU, as a lead member of the international community, could and should play a role here.

The EU is often viewed as an ineffective actor for promoting human rights globally due to the drawbacks of its conditionality policy which we have seen above. In order for conditionality to be effective, the EU must seek not only to generate compliance, but also to modify HR perceptions and convey clear and consistent signals about the moral obligations of states, and about the nexus between prosperity and human rights. On the basis of new perceptions, compliance may become the rule, where it is now the exception. The EU should co-operate with global powers to reconstruct the HR discourse towards one based on this nexus and on global HR responsibility. Reconstructing the discourse may have effects on the climate for domestic enforcement of HR clauses, as well as on the significance attributed to anticipated reactions to non-compliance by both domestic and international actors. Countries may ultimately start to institutionalise HR practices, and the impact of anticipated reactions may increase. Moreover, as one author stressed, the attitude of one country greatly

²⁰ Jonathan Holslag, *The normative disconnect between Europe and the emerging powers*, Brussels, Brussels Institute of Contemporary China Studies, 2010 (BICCS Asia Paper, Vol. 5, No. 4), p. 1-2, <http://www.vub.ac.be/biccs/site/assets/files/apapers/2010301%20-%20Normative%20disconnect.pdf>.

affects the attitude of neighbouring countries. When a country is inclined, even enthusiastic, to comply with HR clauses, neighbouring countries are more likely to follow.²¹

The EU is gradually regaining leverage on HR issues on the international scene. A report by the European Council on Foreign Relations (ECFR) has indicated that the EU has been playing a pioneering role on HR issues at the UN.²² Political dialogue plays a decisive role in this regard. With competitors like China and Russia in the field, the EU must pursue a strong and consistent policy with regard to human rights and democracy in order to maintain credibility and remain a global player. The EU should adopt a stricter approach, including HR clauses in all trade agreements. As the compliance of one country can have positive implications for the attitude of neighbouring countries, the BRICS countries are likely to play a decisive role by setting an example in their regions. It is not inconceivable that major powers like China or Russia, known for systematic breaches of human rights, may ultimately promote values of HR and the rule of law. In this regard, the ECFR mentions the attitude of Russia and China during the 2010-2011 Ivory Coast crisis, purporting that they may be open to accepting HR principles.²³ The ECFR bases this consideration on the fact that Russia and China, who frequently veto UN resolutions intended to sanction other countries, supported a UN Security Council resolution to impose sanctions against Laurent Gbagbo, the incumbent who resorted to violence after refusing to take his loss in the elections. Indeed, the political dialogue between the EU and China was in fact an initiative of the Chinese government in 1995. The EU could build on this, emphasising the relation between wealth and respect for human rights.

2. Practices

This section elaborates on three rather unsuccessful episodes related to the EU's human rights conditionality policy: the EU's trade negotiations with Sri Lanka, Nicaragua, and India. Assessing these practices will make it possible to identify the reasons for and trends of non-compliance. This will, consequently, allow us to work out new EU strategies to stimulate compliance. The following analysis will focus on the key factors of compliance: the possibility of domestic enforcement of the HR clauses in the respective countries and the importance of the anticipated reactions to non-compliance of domestic and international actors (hereafter "anticipated reactions").

2.1. Sri Lanka

The EU is Sri Lanka's first trading partner. The contractual links between the two parties are spelled out in a Co-operation and Partnership Agreement. Sri Lanka became a beneficiary of the Generalised System of Preferences, "GSP+", an EU programme set up to respond to the crisis brought about by the catastrophic December

²¹ Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, cit., p. 285.

²² Richard Gowan and Franziska Brantner, *The EU and human rights at the UN: 2011 Review*, London, European Council on Foreign Relations, September 2011 (Policy Memo - ECFR No. 39), p. 1, http://www.ecfr.eu/page/-/ECFR39_UN_UPDATE_2011_MEMO_AW.pdf.

²³ *Ibidem*, p. 2.

2004 tsunami in the Indian Ocean. The GSP+ provides economically dependent countries with duty free access to EU markets. The EU requests GSP+ beneficiaries to ratify sixteen core international human rights conventions. The EU additionally engages in local political dialogue with Sri Lanka through its diplomatic mission.

While August 2010 marked the end of Sri Lanka's participation in the GSP+ scheme, the EU had already announced in February 2010 that it planned to suspend the GSP+ trade deal with Sri Lanka temporarily, in response to severe human rights violations in the country. Earlier, in October 2009, the conclusions of the investigation of Sri Lanka's offensive against the separatist movement of the Tamil Tigers had prompted the EU to call upon Sri Lanka to improve its human rights record. At the time, the EU expressed concerns about the protection of human rights in Sri Lanka, condemning the unlawful killings, torture, abuse of child labour laws, and police violence that occurred in the wake of the Sri Lankan government's offensive.²⁴

In response, Sri Lanka's government declared that the EU's investigation was discriminatory and stressed that Sri Lanka shared long standing trade relations with the EU, which had now come to be dominated by the EU's interest in political issues, thus shifting the economic targets of the trade agreement towards political targets.²⁵ During subsequent re-negotiations on GSP trade extensions in June 2010, the EU proposed fifteen additional human rights and democracy requirements. These requirements²⁶, comprising among others the need to make impartial and independent appointments to key public positions, and the freedom of journalists to exercise their profession, led the government of Sri Lanka to terminate further talks.²⁷ The government asserted that the proposed conditions were not relevant, infringed on Sri Lanka's sovereignty with regard to international law, and were an insult to the country's citizens.²⁸ Instead, Sri Lanka has pursued a partnership with China, one of the regional powers attempting to attenuate the EU's economic role in South Asia.²⁹

a) Domestic enforcement

Sri Lanka's constitution acknowledges the principles of democracy, human rights, and the rule of law. As a matter of fact, between 1947 and 1988 Sri Lanka was one of the most successful democracies in Asia, with a legal system inherited from British colonial

²⁴ "Abuses may hit EU Sri Lanka ties", in *BBC News*, 19 October 2009, http://news.bbc.co.uk/2/hi/south_asia/8315422.stm.

²⁵ *Ibidem* and "The 15 EU conditions: 'Erode authority of the Govt. of Sri Lanka' - Ministry of External Affairs", in *Muslim Guardian*, 30 June 2010, http://ver2.muslimguardian.net/index.php?option=com_content&view=article&id=839.

²⁶ The fifteen reforms that were demanded by the EU and the response of the Sri Lankan Ministry of External Relations to the letter of the European Commission issuing these reforms can be found on the website of the Government of Sri Lanka ("Govt rejects EC conditions on GSP+", 24 June 2010, http://www.priu.gov.lk/news_update/Current_Affairs/ca201006/20100624govt_rejects_ec_conditions.htm) as well as on the website of the *Muslim Guardian* (see note 25) and the *Tamil Guardian* ("GSP+ conditions", 30 June 2010, <http://www.tamilguardian.com/article.asp?articleid=2778>).

²⁷ "Sri Lanka says no to EU conditions on GSP+, ends further talks with EU", in *ColomboPage*, 24 June 2010, http://www.colombopage.com/archive_10A/Jun24_1277387855KA.php.

²⁸ *Ibidem* and Sri Lanka Government, "Govt rejects EC conditions on GSP+", *cit.*

²⁹ Clare Castillejo, *Sri Lanka: the failure of EU human rights sanctions*, Madrid, FRIDE, January 2011 (FRIDE Policy Brief No. 63), p. 1, <http://www.fride.org/publication/881/policy-brief>.

rule and a well-functioning public service.³⁰ Moreover, the successful production of tea, rubber, and coconut goods enabled the development of a flourishing welfare state, characterised by free medical care and education, in turn resulting in a high literacy rate. However, in 1988 President Ranasinghe Premadasa of the United National Party won the democratic elections and gradually took over all powers. Since then, ethnic tensions have tormented the country and the protection of human rights has fallen to an all-time low. The Sri Lankan government is said to have caused the escalation of tensions.³¹ Domestic enforcement of human rights has become ever less rigorous due to the concentration of power in the hands of one political party. However, with its traditionally democratic state structure, it is not unthinkable that a new government could restore democratic traditions. In order for that to happen, the significance of anticipated reactions, and the degree to which the government values the reactions of its citizens, neighbours, and international organisations ought to be factored in.

Business in Sri Lanka, and in particular the tourist sector, could play a pivotal role in conveying clear signals to the government about the protection of human rights. This is because tourism is one of the main economic forces in Sri Lanka, with nearly half of the tourists coming from the EU. Many tourists, however, are not aware of the human rights situation in Sri Lanka, which is actually worsening due to the construction of lucrative new tourist attractions. The profits, gained at the expense of the local population, end up in the hands of the government. The EU could choose to target the Sri Lankan citizens directly by funding European or Sri Lankan projects in Sri Lanka to create a responsible tourist market. In this way, the local population would become acquainted with the important nexus between the protection of human rights and economic development. In addition, the EU could reward responsible initiatives and provide positive incentives for enterprises that include human rights clauses in their contracts. The EU could also offer incentives to European tour operators to boycott tourist attractions where human rights have been or are systematically violated. Through these endeavours, the Sri Lankan government would be directly confronted with the consequences of its approach to human rights, while the EU would create the ground for domestic enforcement of the HR clauses from within society.

b) Anticipated reactions of domestic and international actors

At this point, anticipated negative reactions to non-compliance with HR clauses do not appear to play a role, as Sri Lanka has found a new trade partner in China. Moreover, with one political party dominating government, political representation of citizens and democratic responsiveness appear to be low on the agenda. One way forward is to foster a more active relationship between Sri Lankan political parties and the members of the European Parliament. Relations between Sri Lankan parties and European parties have already been established but meetings should be held more frequently and should refocus on the nexus between wealth, democracy, and human rights. This could help to restore Sri Lanka's democratic capacity. The EU has supported Sri Lanka's re-transition to democracy by allocating funding via the European Initiative for

³⁰ Peter Kloos, "Democracy, civil war, and the demise of the Trias Politica in Sri Lanka", in Hans Antlöv and Tak-Wing Ngo (eds), *The Cultural Construction of Politics in Asia*, New York, St. Martin's Press, 2000, p. 19.

³¹ *Ibidem*.

Democracy and Human Rights (EIDHR), which also offers support to students, scholars, and universities.

The EU could play a role in encouraging the effects of anticipated reactions by investing even more in education in Sri Lanka. This would be part of a bottom-up approach, through which civil society and Sri Lankan citizens are directly targeted. The EU could choose to fund small-scale civil society projects on the ground, acquainting citizens with democratic practices and informing them of the possibility of freely voicing their opinions. This could ultimately pave the way for domestic enforcement and an increased role of anticipated reactions.³² In this regard, the EU could opt for the strategy of emphasising Sri Lanka's democratic past during dialogue with the government and civil society. In doing so, the EU should stress the economic benefits and regional status Sri Lanka enjoyed during its democratic past.

Anticipated reactions may start to play a greater role in the future and the EU could play a pivotal role in this regard. Sri Lanka is gradually alienating other trade partners as well, and the EU could strengthen its strategy by cooperating with these trade partners. In October 2011, Canada expressed deep concern about the accountability of human rights violations in Sri Lanka.³³ As a matter of fact, Canada had raised similar concerns in 2009, as had the EU, but Sri Lanka's human rights record is now higher on Canada's foreign policy agenda.³⁴ The EU must seek to move respect for human rights up on the global agenda, and by developing a coordinated strategy with affluent countries like Canada, the EU may be able to modify global perceptions of human rights.

2.2. Nicaragua

Relations between the EU and Nicaragua are based on the EU-Central America Framework Cooperation Agreement and the Political Dialogue and Cooperation Agreement. In April 2009 Nicaragua withdrew from negotiations for an Association Agreement with the prospect of GSP+ benefits for Central America. This was partially due to the imposition of what the Nicaraguan side deemed 'unacceptable political conditions' by the EU,³⁵ which comprised the "essential element clauses", as well as a political dialogue section. The government of Nicaragua stressed that the deal ought to be confined to trade matters and that human rights were not relevant within this framework.³⁶ Equally decisive during the negotiations was that Nicaragua failed to secure the EU's support for its proposal to launch a Common Economic and Financial Credit Fund for Central America worth sixty billion euros (a sum EU negotiators defined as 'not viable').³⁷ The Fund was intended to reduce economic inequalities between the EU and Central America.

³² *Ibidem*.

³³ Fawzia Sheikh, "Sri Lankan rights abuses obstruct trade efforts with Canada", in *Inter Press Service*, 29 October 2011, <http://ipsnews.net/news.asp?idnews=105651>.

³⁴ *Ibidem*.

³⁵ Helena Martell, "Nicaragua withdraws from EU-CA negotiations", in *InfoSurHoy*, April 2009, http://www.infosurhoy.com/cocoon/saii/xhtml/en_GB/features/saii/features/2009/04/06/feature-04.

³⁶ *Ibidem*.

³⁷ *Ibidem*.

a) Domestic enforcement

The influence of donors is significant in Nicaragua, as external financing is key to the country's macro-economic stability, social cohesion, and development.³⁸ The push for domestic enforcement of HR clauses has to come from these external actors. US diplomats, for instance, have played a prominent role in the development of Nicaragua's local governments, media, civil society, and law schools, and have seen the great interest of local citizens in demanding reform of their government.³⁹ The EU could cooperate with the US and other external actors to create a common ground with regard to respect for human rights, which could be instrumental in driving Nicaragua into compliance with HR clauses.

Commercial associations on the ground have been shown to have a positive impact on compliance with HR clauses. Shortly after Nicaragua withdrew from the negotiations with the EU, the country's Higher Council of Private Enterprises (COSEP) urged the Nicaraguan government to resume talks, recalling the importance of European trade and investment. In turn, COSEP requested the EU to take a more flexible attitude.⁴⁰ The involvement of these external and internal actors may pave the way for the gradual emergence of domestic enforcement of HR clauses, if the EU engages in dialogue with these actors and develops a coordinated strategy. Therefore, in order to encourage the domestic enforcement of HR clauses, the EU should target associations on the ground and Nicaraguan civil society more directly. Civil society in Nicaragua consists primarily of non-governmental organisations, and, due to some extent to the lack of accountability and representation resulting from this, Nicaraguan civil society is rather fragmented and polarised.⁴¹ There is nevertheless quite a favourable environment for the flourishing of civil society and there is increasing consultation between civil society and state institutions.

Another measure that could lead to the domestic enforcement of HR clauses is EU dialogue at the parliamentary level. Members of the European Parliament (MEPs) are known for brokering partnerships with their political counterparts in third countries. Through capacity building by means of intensified and frequent dialogue with European colleagues and the exchange of good practices, Nicaraguan political parties could gradually acknowledge the importance of human rights, especially when they recognise the nexus between wealth, trade, democracy, and human rights. This may ultimately inspire political parties to encourage the government to comply with HR clauses. However, Nicaragua is one of the poorest countries in Central America, which complicates the development of a strong democratic culture. Consequently, the EU

³⁸ European Union External Action Service, *Nicaragua Country Strategy Paper 2007-2013*, April 2007, p. 5, http://eeas.europa.eu/nicaragua/csp/07_13_en.pdf.

³⁹ Steven E. Hendrix, *The New Nicaragua: Lessons in Development, Democracy, and Nation-Building*, Santa Barbara, Greenwood, 2009, p. ix.

⁴⁰ "Nicaragua: entrepreneurs want to resume negotiations with the EU", in *CentralAmericaData*, 7 April 2009, http://www.centralamericadata.biz/en/article/home/Nicaragua_Entrepreneurs_Want_to_Resume_Negotiations_with_EU.

⁴¹ Axel Borchgrevink, *A Study of Civil Society in Nicaragua*. A Report Commissioned by NORAD, Oslo, Norwegian Institute of International Affairs, 2006 (NUI Working Papers No. 699), p. 63, <http://english.nupi.no/Publications/Working-Papers/2006/A-Study-of-Civil-Society-in-Nicaragua>.

could also choose to invest directly in Nicaragua's educational system, as a well-educated work force can significantly stimulate economic growth.

b) Anticipated reactions of domestic and international actors

On the global level, Nicaragua is indeed concerned with human rights despite the fact that the country has not ratified all relevant international conventions.⁴² Nicaragua, as a member state of the Central American Integration System (SICA), has played a pioneering role with regard to conflict resolution and demilitarisation in Central America. In addition, Nicaragua is a member of the Central American Common Market and is aspiring to become a member of the free trade zone of Southern American countries, MERCOSUR. Taking this into account, and especially given that the US is Nicaragua's largest trade partner, anticipated reactions may be important to Nicaragua, even though this does not seem to be the case with regard to Nicaragua's relations with the EU. The EU should, therefore, tailor its strategy to Nicaragua's attitude by developing a strategy coordinated with the US, but also with the UN, and even with MERCOSUR. If the EU manages to enforce its own position in international forums, the 'anticipated reactions' factor could ultimately bear fruit. Moreover, by developing a coordinated strategy with these international actors, the EU could reinvigorate its role as an international human rights promoter in order to modify the gradual change of the human rights discourse underway.

2.3. India

India and the EU share a Cooperation Agreement and engage in political dialogue through the heads of the EU's diplomatic mission, regular ministerial meetings, and expert meetings. In December 2010 India blocked negotiations on a free trade agreement with the EU, India's most significant trading partner, claiming that it could not accept a number of social and political clauses proposed by the EU. These clauses touched upon the protection of labour rights and the guarantee of environmental sustainability as if they were human rights.⁴³ India protested, stressing that it wanted to be treated as an equal partner.⁴⁴ Moreover, Indian negotiators complained that extraneous clauses of this kind were irrelevant to the agreement.⁴⁵ India indicated that it would not accept trade talks to be dominated by human rights, minority rights, and animal welfare rights.⁴⁶ The insistence on conditionality on the part of the EU has thus once again created a stalemate.

Already in 2007 India refused to sign a Partnership and Cooperation Agreement with the EU due to the inclusion of human rights and non-proliferation clauses. This latter clause comprised a declaratory commitment to non-proliferation, as well as the request to take steps to ratify all relevant international instruments, and to establish an effective

⁴² European Union External Action Service, *Nicaragua Country Strategy Paper 2007-2013*, cit., p. 5.

⁴³ Juliane von Reppert-Bismarck, "Indian trade minister rejects EU social, environmental clauses", in *Reuters*, 10 December 2010, <http://uk.reuters.com/article/2010/12/10/greenbiz-us-eu-india-trade-idUKTRE6B933I20101210>.

⁴⁴ *Ibidem*.

⁴⁵ *Ibidem*.

⁴⁶ Shalini Arun, "India rejects EU demand on social clauses in trade pact", in *The Hindu Business Line*, 12 March 2010), <http://www.thehindubusinessline.com/todays-paper/article986254.ece>.

system of national export controls.⁴⁷ The situation was worsened by incoherence on the part of the EU.⁴⁸ During negotiations on the matter between India and individual EU member states, some of the latter proved more flexible in imposing the EU's normative pre-conditions than others, thereby damaging the EU's negotiating position.

a) Domestic enforcement

Domestic enforcement of the HR clauses is indeed possible because India is the world's largest parliamentary democracy. India's constitution, moreover, guarantees the protection of human rights. Additionally, India's economy is said to thrive mainly as a result of the improved and advanced educational system. However, next to a low level of government responsiveness, there is weak law enforcement, a shortage of trained police, and an overburdened judiciary, leading to gaps in accountability structures and impunity.⁴⁹

The main problem with enforcement of the HR clauses is that India considers itself an equal partner to the EU, and thus feels insulted by the EU's assumption that India's human rights record is not satisfactory. But India's human rights record is, in fact, unsatisfactory. There are records of government involvement in unlawful and extrajudicial killings, particularly in conflict regions.⁵⁰ The EU could stress that India should resolve its internal conflicts as a precondition for an equal and mature EU-India partnership, putting citizens at the heart of their trade relations. Intensified political dialogue could play a crucial role in this regard; more frequent and higher level dialogue, and dialogue at the level of political parties, could help to persuade India into adopting a more liberal approach towards human rights. This would also increase the EU's visibility in India. The EU's representation in India suffers from scarce visibility not only among Indian citizens, but also among Indian officials.⁵¹

Dialogue should also be pursued with entrepreneurs of both Indian and European companies, in coordination with government representatives. The nexus between business and the protection of human rights, and the corporate responsibility flowing from this nexus, is widely acknowledged and ought to be pursued as such.⁵² Businesses profit from the bilateral relations between India and the EU, and also contribute themselves to these relations. Businesses are crucial forces of socialisation on a daily basis and are key to ensuring open market access and to protecting human rights within their own sphere of influence. HR clauses could therefore be taken to the

⁴⁷ Gerrard Quille, *The EU's approach to tackling the proliferation of Materials and Weapons of Mass. Destruction and prospects for cooperation on the eve of a new US administration*, Brussels, European Parliament, November 2008 (Policy Department External Policies Working Paper), p. 11, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede070909briefingpapernt_/sede070909briefingpapernt_en.pdf.

⁴⁸ Gauri Khandekar, *The EU and India: A Loveless Arranged Marriage Analysis*, Madrid, FRIDE, August 2011 (FRIDE Policy Brief No. 90), p. 2, <http://www.fride.org/publication/939/the-eu-and-india:-a-loveless-arranged-marriage>.

⁴⁹ US Department of State, 2010 Human Rights Reports: India, April 2011, p. 1, <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154480.htm>.

⁵⁰ *Ibidem*, p. 2.

⁵¹ Gauri Khandekar, *The EU and India: A Loveless Arranged Marriage Analysis*, *cit.*, p. 5.

⁵² John G. Ruggie (UN Human Rights Council), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31)*, March 2011, p. 1, http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

business level, and the EU could reward corporate responsibility with (financial) support. In addition, the EU could fund human rights training within the business sector to increase awareness about international business ethics and emphasise the productivity profits for enterprises with good human rights practices.

Civil society in India is thriving, and many organisations have engaged in partnerships and exchanges with European equivalents.⁵³ The EU already makes an effort to encourage cooperation between Indian civil society and political parties, universities, trade unions, and business associations. So far, a strong Indian civil society has not been able to pressure the government into compliance. This is primarily due to the poor responsiveness of the political system. Domestic enforcement through civil society will only be possible if this unresponsiveness of Indian politics is reversed. The EU could play a role in this regard by stimulating dialogue between European parliamentarians and Indian political parties. Dialogue on this level could increase the EU's visibility in India and be used to stress once again the relation between the protection of human rights and economic growth.

b) Anticipated reactions of domestic and international actors

Unlike Nicaragua and Sri Lanka, India is one of the BRICS. It is the ninth economy in the world and takes part in G20 meetings. As such, India considers itself a new power holding worldviews not only distinct from, but as or more significant than, the West's. As an emerging world power and already a regional power, India can afford not to comply with HR clauses because the costs of non-compliance do not outweigh the potential benefits.

However, precisely because India sets the tone in the region, it could inspire neighbouring countries to comply. Aware of this, the EU should stress India's democratic aspirations and emphasise the responsibilities that democratic states have towards their citizens. The EU thus needs to change India's perception of human rights to its own benefit.

3. Lessons Learned from Unsuccessful Practices

The nexus between the protection of human rights, democracy, and economic growth is widely acknowledged. Nonetheless, the perceived irrelevance of HR clauses in trade agreements with the EU is a recurrent motive for non-compliance by third countries. Sri Lanka, Nicaragua, and India maintain that the EU's HR requirements undermine the economic objectives of the trade agreement. Moreover, these countries refuse to comply with the HR clauses because they feel that the clauses infringe upon their national sovereignty and integrity. In addition, inconsistent performance by the EU has undermined any sense of obligation to comply.

One lesson learned is that there is a pivotal role for education, civil society, business, and political parties in the nexus between economic growth, democracy, and respect for human rights. These factors, largely determining the possibilities for domestic enforcement of HR clauses, may thus play a role in encouraging governments to

⁵³ European Union External Action Service, *India Country Strategy Paper 2007-2013*, April 2007, p. 13, http://www.eeas.europa.eu/india/csp/07_13_en.pdf.

comply. Another important lesson is that, as the EU is often regarded as an inappropriate actor to deal with human rights and democracy internationally, it needs to start co-operating closely with global, regional, and local actors to ensure the indivisibility of human rights.

3.1. Towards a new strategy

The EU should strengthen its strategy for generating compliance by improving its own policy, while bringing about a change in perceptions. The objectives of this new strategy should therefore focus on two long-term developments: democratisation in third countries and a change in the global HR discourse, encouraging acknowledgement of the nexus between human rights and economic growth. The EU could focus on domestic enforcement and anticipated reactions, two closely intertwined - signifiers of democratisation.

a) Domestic enforcement

A democratic state system allows for increased opportunities for domestic enforcement of HR clauses. The EU should therefore invest in the democratisation of third countries. This long-term objective of democratisation requires several short-term investments.

First, the EU should insist on consistent application of conditionality, as consistency and coherence are prerequisites for an effective policy. Consistency entails that the EU should include HR clauses in all trade agreements, including with affluent countries, and in the contacts between EU member states and third countries to convey a clear message about the indivisibility of human rights. This is necessary to make the policy credible.

Second, the EU should invest directly in the educational systems of third countries, acknowledging education as a precondition for economic growth, which in turn is a key factor behind the emergence of a strong democratic state system and the protection of human rights.

Third, the EU should target civil society in third countries to engender a bottom-up change in perceptions. Civil society contributes strongly to local knowledge and expertise and this is particularly relevant if the EU seeks to contribute to democratisation. In a similar vein, the EU should stimulate businesses in third countries and relations among business enterprises in the EU and third countries to promote corporate responsibility regarding human rights and democracy. Finally, the EU should not merely intensify political dialogues; the use of political dialogue should be extended to the level of the European Parliament and political parties in third countries. MEPs are known for brokering partnerships with foreign counterparts and by increasing capacity building on this level, political parties in third countries could learn how to play a crucial role in the domestic enforcement of HR clauses.

b) Anticipated reactions of domestic actors and international actors

The significance of anticipated reactions has to be reinforced to modify global perceptions of human rights and reverse the changing global human rights discourse in which sovereignty is used to justify non-compliance. Modifying global perceptions

should be the second long-term objective of a new EU strategy towards compliance. This objective also requires several short-term investments.

First, the extension of political dialogue to the level of parliaments could, besides supporting democratisation processes, also help to increase the EU's visibility among officials and parliamentarians in third countries. This could have a fruitful impact on increasing the significance of anticipated reactions, as it leads to interaction on a more frequent basis.

Second, the objective of modifying HR perceptions requires more EU leverage at the global level. However, the EU is often perceived as an inappropriate actor for transmitting the values of democracy and human rights. In this regard, it is crucial for the EU to enhance cooperation with the UN, the US and other affluent countries like Canada, within and outside multilateral forums. A coordination strategy among global, regional, and local actors, initiated by the EU, could pave the way for more recognition of the important nexus between wealth, democracy, and human rights.

Countries ought to be shamed into accepting HR clauses, but there are too many alternatives to compliance today. By drawing a line regarding the nexus between human rights and economic growth, global actors could bring about a less lenient attitude towards governments that violate human rights and could make human rights a global priority. In this regard, the EU should intensify political dialogue with the BRICS countries, as well as with regional organisations such as MERCOSUR. These actors make a difference in their regions and their attitudes towards compliance have an effect on the attitudes of the countries surrounding them. Co-opting the BRICS countries into a HR policy centered on the nexus between wealth and human rights is thus necessary to reverse the global change of perceptions on human rights.

Conclusion

Analyses of the three cases of Sri Lanka, Nicaragua and India have made it possible to identify several trends of non-compliance with the EU's HR clauses. First, Sri Lanka, Nicaragua, and India all stress the irrelevance of dealing with human rights issues during trade negotiations. Second, these countries individually maintain that the HR clauses infringe upon their national sovereignty. India, in addition, emphasises that its relations with the EU are equal and that it therefore wants to be treated as an equal partner. Finally, the incoherence of the EU and the inconsistency of its conditionality policy often undermine its effectiveness.

What lessons can the EU learn from the analyses? The first lesson learned is that there is a pivotal role for education, civil society, business, and political parties in the nexus between economic growth, democracy, and respect for human rights. These factors, which largely determine the possibilities for domestic enforcement of HR clauses, can play a role in encouraging governments to comply. A second lesson is that the EU needs to start co-operating with the international community to ensure the indivisibility of human rights so as to alter the perception of the Union as an inappropriate global HR promoter.

How can the EU generate compliance with HR clauses? The EU can generate compliance, first, by working on the consistency of its conditionality policy. Greater consistency leads to a more credible policy, in turn encouraging compliance. Moreover, the EU can generate compliance by stimulating the democratisation of third countries, and by focusing on reversing the controversy surrounding conditionality. The latter two are long-term goals that warrant short-term investments.

A bottom-up approach is needed to enhance the democratisation process that may ultimately allow for the domestic enforcement of HR clauses. This means that the EU should directly target citizens by investing in educational systems and engaging directly with civil society and business. Through this bottom-up approach, citizens become acquainted with democratic practices, become aware of their rights within the nexus between wealth, democracy, and human rights, and learn about the possibility of voicing their opinions. In a similar vein, the EU should intensify relations between European parliamentarians and political parties in third countries to ensure socialisation on a frequent basis. In this way, democratisation from within society also stimulates the responsiveness of governments and, therefore, stimulates the significance governments attach to the anticipated reactions of domestic and international actors. By working together with these domestic and international actors, the EU would increase its leverage on the global stage, which is necessary to reverse the controversy surrounding conditionality and to alter global HR discourse. By developing a coordination strategy with global, regional, and local players, aimed at conveying a clear message about the indivisibility of human rights, the EU may be able to engender international recognition of the nexus between wealth, democracy and human rights. This recognition may ultimately pave the way for a reconstructed global HR discourse in which the importance of protecting human rights is no longer trumped by the importance of safeguarding national sovereignty.

Updated: 15 December 2011

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