

The Human Rights Clause in the European Union's External Trade and Development Agreements

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Abstract: *Since 1992, the European Union (EU) has included in all its agreements with third countries a clause defining respect for human rights and democracy as an 'essential element' of its external relationship. A Council decision of May 1995 spells out the basic modalities of this clause, with the aim of ensuring consistency in the text used and its application. The human rights clause is unique to the EU's bilateral agreements, and now applies to over 120 countries. It represents a new model for EU external relations as well as for international cooperation. The EU plays a leading role in the WTO and international economic relations. The human rights clause will have implications for the development of international rules concerning trade-related human rights policy.*

I Introduction

In the post Cold-War era, changes in the external environment, as well as internal reforms, require a re-focusing of human rights and democratic strategies, in particular to ensure that these issues permeate all EU policies. The EU seeks to uphold the universality and indivisibility of human rights as reaffirmed by the 1993 World Conference on Human Rights in Vienna. The protection of such rights, together with the promotion of pluralistic democracy and effective guarantees for the rule of law, are among the EU's essential objectives.

The EU is well placed to promote democracy and human rights. The EU's action in the field of external relations will be guided by compliance with the rights and principles contained in relating provisions of EU Treaties, in particular Articles 2, 3, 6, 11, 19, 29, 49 of the Treaty on European Union (TEU), Articles 11, 13, 177 of the Treaty Establishing the European Community (EC Treaty), and Articles 6, 7, and 49 of the

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Treaty of Amsterdam. This mechanism was further reinforced by the Treaty of Nice.¹ These Treaty provisions provide a constitutional basis for the EU to extend the objective of promoting the respect of human rights and fundamental freedoms, from trade and development cooperation to all forms of cooperations with third countries. The human rights clause in the context of EU's overall strategic approach will alter the shape and the content of EU's external trade and development relations for the coming years.

II The Concept of the Human Rights Clause

A The 'Essential Element' Nature

Since 1992, the EC has included a human rights clause in all its agreements with third countries. This clause defines respect for human rights and democracy as 'essential elements' in the EU's relationship with third countries. This approach has been further developed in all agreements concluded with the Conference on Security and Cooperation in Europe (CSCE) countries, including an innovative provision in addition to the essential element clause, the so-called 'additional clause'.

The human rights clause is unique in the EU's bilateral agreements. The essential element clause stipulates that respect for fundamental human rights and democratic principles as laid down in the Universal Declaration on Human Rights (UDHR)² underpin the internal and external policies of the parties and constitute an 'essential element' of the agreement. The essential element clause is enhanced by the additional clause dealing with non-execution of the agreement.

The additional clause provides a response for non-execution, diverging from the procedure of three-month notification laid down in Article 65(2) of the Vienna Convention on the Law of Treaties.³ It takes one of two forms:

- (a) an explicit suspension clause known as the 'Baltic clause' which authorises the suspension of the application of the essential provisions. This clause was used only in the first agreements with Estonia, Latvia, Lithuania, and Slovenia;⁴ or
- (b) a general non-execution clause known as the 'Bulgarian clause' which provides for appropriate measures should the parties fail to meet their obligations, following a consultation procedure except in cases of special urgency. This clause was used in the agreements with Romania, Bulgaria, the Russian Federation,

¹ European Union, *Consolidated Versions of The Treaty on European Union and The Treaty Establishing the European Community* (2002), OJ 2002 C325/1. European Communities, *The Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts* (1997). European Union, *The Treaty of Nice*, OJ 2001 C80/1.

² The text see Council of Europe, *Human Rights in International Law. Collected Texts*, 2nd edn (Council of Europe Publishing, 2000), at 81–86.

³ *Vienna Convention on the Law of Treaties*, United Nations, *Treaty Series*, Vol. 1155, at 331. Comments see I. Brownlie, *Principles of Public International Law*, 5th edn (Oxford University Press, 1998), at 622–627.

⁴ Estonia, Latvia, and Lithuania, OJ 1992 L403/2, 11, 20 respectively; Slovenia, OJ 1993 L189/2. Comments see P. Van Elsuwege, 'The Baltic States on the Road to EU Accession: Opportunities and Challenges', (2002) 7 EFAR, at 171–192.

Ukraine, Kyrgyzstan, Moldavia, the Czech Republic, Slovakia, Kazakhstan and Belarus.⁵

The difference between the two formulas depends on the degree of sensitivity allowed for. The 'Baltic clause' is more severe in that it provides only for extreme cases warranting immediate suspension without consultation of any kind. The 'Bulgarian clause' not only provides for a conciliation procedure but is also designed to keep the agreement operational wherever possible. The 'Bulgarian clause' is more easily accepted by third countries. It now can be seen as the standard formula for the additional clause following the approval of the human rights clause by the Council on 29 May 1995.⁶

Accordingly, in all new drafts negotiating directives for EC agreements with third countries, the following clauses and content should be included: (1) the Preamble, general references to human rights and democratic values; (2) an Article X defining the essential elements; (3) an Article Y on non-execution; and (4) an interpretation declaration on Article Y.

The human rights clause may cover some positive measures such as development cooperation, trade concessions, financial assistance or consultation procedures. However, the clause is essential for the accomplishment of the objective or purpose of the agreement. A violation of human rights may allow the EU to terminate the agreement or suspend its operation in whole or in part. Accordingly, the human rights clause must be regarded as an essential element rather than in terms of individual clauses of altogether subsidiary or ancillary nature. Treaty-based human rights clauses could offer in essence more accountability, the rights of initiative, the duty of cooperation, and legal certainty for contracting parties.⁷

B The Institutional and Political Dimension

In the human rights clause, the EU makes reference to both human rights and democracy and the rule of law and good governance. These human rights-related elements not only provide a concrete operational framework for dialogue between the EU and third countries and the programming and implementation of the associated funding; they also influence the implementation of European Development Fund (EDF) programmes by establishing a more efficient, transparent, and equitable institutional environment.

Article 5 of the revised fourth Lomé Convention⁸ states that 'respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of the Convention'.

⁵ For instance, Bulgaria, OJ 1994 L358/3; Czech, OJ 1994 L360/2; Romania, OJ 1994 L357/2. Comments see D. Napoli, 'The European Union's Foreign Policy and Human Rights', in N. A. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff, 1995), at 307, 308.

⁶ European Commission, 'Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreement Between the Community and Third Countries', COM (95) 216 of May 23, 1995; the Council Conclusions of May 29, 1995, Bull. EU5-1995, point 1.2.3.

⁷ Van Boven, 'General Courses on Human Rights', in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, Vol. IV, Book 2 (Martinus Nijhoff, 1995), at 65, 66.

⁸ Agreement amending the fourth Lomé Convention following the mid-term review, OJ 1998 L156/3.

In the Communication on 'Democratization, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States',⁹ the Commission explains to ACP partners how the EU interprets the revised fourth Lomé Convention, of which Articles 5, 224 (m) and 366a concern human rights, democracy, the rule of law, and good governance.

Human rights: human rights bind every government body and may not be restricted. Whether civil and political or economic, social, and cultural in nature, they must be respected and promoted in their entirety. They are the subject of a series of international agreements and legal acts constituting an international legal framework (the United Nations Charter, the Universal Declaration of Human Rights, etc.). The commitments made in these instruments were reaffirmed by the participating countries at the conclusion of the 1993 Vienna Conference on Human Rights.¹⁰ The EU applies a broad concept of human rights covering three generations of human rights. The first generation refers to civil and political rights. The second generation consists of economic, social, and cultural rights. The third generation extends to collective rights such as development and environmental rights, etc.¹¹

The rule of law: the primacy of law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural rights. This entails means of recourse enabling individual citizens to defend their rights. It includes a representative government drawing its authority from the sovereignty of people. The principle must shape the government of the state and the prerogatives of the various powers.

The rule of law thus implies: (a) a legislature respecting and giving full effect to human rights and fundamental freedoms; (b) an independent judiciary; (c) effective and accessible means of legal recourse; (d) a legal system guaranteeing equality before the law, etc.¹²

Democratic principles: Democratic principles can be defined in terms of two fundamental characteristics: (a) legitimacy and (b) legality. Legitimacy is the foundation of the authority of the state. It means that leaders at the local and national levels are freely appointed by systems recognised and accepted by the citizens. These systems should meet a number of criteria relating to non-discrimination and be employed regularly. Legality means the existence of clear-cut rules that are applied to all citizens without discrimination. Legality is reflected in an appropriate constitutional, legislative, and regulatory systems for the protection of human rights.¹³

By opting for the phrase 'democratic principles' rather than 'democracy', Article 5 of Lomé Convention sought to emphasise the universally recognised principles that must underpin the organisation of the state and guarantee the enjoyment of rights and fundamental freedoms, while leaving each country and society free to choose and develop its own model.

Article 5 also introduces good governance as an objective of cooperation for equitable and sustainable development. 'Good governance' implies managing public affairs

⁹ COM (98) 146, 12 March 1998.

¹⁰ For the text see Council of Europe, note 2 *supra*, at 199–226.

¹¹ P. R. Baehr, *Human Rights Universality in Practice* (Macmillan, 1999), at 6, 7.

¹² Van Boven, *op. cit.* note 7 *supra*, at 24–36.

¹³ Comments see S. Marks, 'Human Rights, Democracy and Ideology', in Academy of European Law (ed.), *Collected Courses of Academy of European Law*, Vol. VIII, Book 2 (Kluwer Law International, 2000), at 57–89.

in a transparent, accountable, participative, and equitable manner showing due regard for human rights and the rule of law. The concept extends the aims of democratisation into the sphere of resource management. Under this approach, good governance refers to the transparent and accountable management of all a country's resources for its equitable and sustainable economic and social development.

Good governance features alongside and complements the aims of respect for human rights, democratic principles, and the rule of law. Unlike those aims, however, it is not an essential element of the Lomé Convention.¹⁴

Within this overall approach, the human rights clause has two dimensions: the political dimension concerns the rule of law and democratic principles, and the institutional dimension concerns their effective application and good governance. In this respect, the human rights clause contains not only a set of principles but also substantial elements for practical operation.

The Cotonou Agreement, as signed on 8 June 2000 and entered fully into force on 1 April 2003, which will for twenty years link 78 ACP countries and the European Union.¹⁵ Article 9 reiterates human rights as essential elements and fundamental element of the Cotonou Agreement. Article 9(2) provides that 'Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement'. Article 9(3) states that 'Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the parties and constitute a fundamental element of this Agreement'. Breaches of any essential elements or fundamental element may ultimately lead to a country facing suspension as a measure of last resort provided in Article 96 and 97 of the Agreement respectively.

The EU-ACP cooperation is directed towards sustainable development centred on human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights. The Parties agree that respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development. However, political dialogues and consultation procedures are also pivotal to enacting the intent of the partnership as provided in Article 8, 96, and 97 of the Cotonou Agreement. With the full entry into force of the Cotonou Agreement, the €13.5 billion of the 9th EDF and the European Investment Bank (EIB) investment facility of €2.2 billion can be mobilised for the next five years.¹⁶ The combination of human rights conditionality with development and

¹⁴ Second subpara of Article 5(1) of the revised fourth Lomé Convention, states that: 'Development policy and cooperation shall be closely linked to respect for and enjoyment of fundamental human rights and to the recognition and application of democratic principles, the consolidation of the rule of law and good governance'.

¹⁵ European Commission, 'The Cotonou Agreement enters into force today (1 April 2003)', *Press Release*, IP/03/467, 1 April 2003, p 1. The text of the Cotonou Agreement see *Partnership agreement between the ACP states of the one part, and the European Community and its Member States, of the other part (Cotonou Agreement)*, OJ 2000 L317/3. East Timor was accepted as 78th ACP Member of the Cotonou Agreement by the ACP/EU Joint Council on 16 May 2003, see *Bulletin Quotidien Europe* No. 8464, 17 May 2003, p 11.

¹⁶ European Commission, '28th Meeting of the ACP-EU Council of Ministers Brussels, 15–16 May 2003', *Press Release C/03/144*, Brussels, 16 May 2003, at 1, 2; and P. Pooley, 'Europe and the Developing World', in D. Barton and M. Bond (eds), *Europe's Wider Loyalties: Global Responsibilities for the New Europe* (The Federal Trust for Education & Research, 2002), at 176–179.

trade cooperation policies will be more legitimate and potentially more effective. These human rights clauses will therefore contribute to promote and expedite the economic, cultural, and social development of the ACP States. The Cotonou Agreement represents an elaborative or evolutionary model of North-South cooperation.¹⁷

III Policy Development in the Human Rights Clause

A Policy Development

Key stages in the development of the human rights clause involved political consensus reached by the European Council and the EU institutions. On 21 July 1986, the declaration on human rights was made by the Community's Foreign Ministers. It stated that respecting, promoting, and guaranteeing human rights is a key factor in international relations and a cornerstone of European cooperation as well as of relations between the Community and its Member States and other countries.

On 13 March 1991, the Commission adopted a 'Communication' to the Council on human rights, democracy and development cooperation policy.¹⁸ The Commission has proposed general lines of conduct concerning the relationship between development cooperation policies, respect for and promotion of human rights, and support for democratic processes in developing countries. The Commission would like to see action by the EU and the Member States for the promotion of human rights approached on a more systematic basis by basing them on a more considered set of principles.

On 29 June 1991, the Luxembourg European Council adopted a declaration on human rights with reference to Commission Communication of 13 March 1991.¹⁹ The same Commission Communication was further adopted by the Council in a resolution of 28 November 1991 on human rights, democracy, and development.²⁰ The Council noted that respect for human rights, the rule of law, and the existence of effective, responsible political institutions enjoying democratic legitimacy are the foundation of equitable development; it also affirmed its attachment to the principles of representative democracy, the rule of law, social justice, and respect for human rights.

The same resolution introduced the concept of good governance. The Community stressed that equitable development can only effectively and sustainably be achieved if a number of general management principles are adhered to: sensible economic and social policies, democratic decision-making, adequate governmental transparency and financial accountability, creation of a market-friendly environment for development, measures to combat corruption, as well as respect for the rule of law, human rights, and freedom of the press and expression.

- The objective of the 1991 Council resolution is to formulate concrete guidelines, procedures and lines of action. The EU and its Member States will give active support for:

¹⁷ M. Holland, *The European Union and the Third World* (Palgrave, 2002), at 199–201; and R. Youngs, *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies* (Oxford University Press, 2001), at 192.

¹⁸ Bull EC 3-1991, point 1.3.41.

¹⁹ Bull EC 6-1991, I. 45.

²⁰ Bull EC 11-1991, point 2.3.1.

1. countries which are attempting to institute democracy and improve their human rights performance;
2. the holding of elections, the setting-up of new democratic institutions and the strengthening of the rule of law;
3. the strengthening of judiciary, the administration of justice, crime prevention and the treatment of offenders;
4. promoting the role of NGOs and other institutions which are necessary for a pluralist society;
5. the adoption of a decentralised approach to cooperation; and
6. ensuring equal opportunities for all.

In May 1995 the General Affairs Council took note of the Commission Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries and approved a clause to that effect for inclusion in all such agreements.²¹ This decision is aimed at giving the EU a more uniform and coherent approach to human rights and democratic principles. Under it, all cooperation, association, and free-trade agreements concluded by the EU with third countries now contain a clause on respect for human rights.

Decisions taken by EC institutions in 1991, characterised by major political change and a rapidly shifting world scene leading to the emergence of more governments committed to democracy and auguring well in some ways for the development of human rights, had also produced horrific excesses and abuses of human rights including, on the European continent, the dreadful example of the former Yugoslavia. Under these circumstances, the EU's human rights policy was in the process of significantly adapting and reshaping its external policies to reinforce its effectiveness in this sphere, both in development and other sectors.²²

On 7 December 2000, the Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council and the Commission of the EU in Nice.²³ Second recital of the Charter's preamble presents the EU as founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity. This Charter further broadens and deepens human rights protection in the EU. The Charter also has external connotations for EU enlargement as it states that new members should be fully in line with the Charter. The Charter may thus bring added value to EU external relations in line with the existing instruments and legal bases of the EU human rights framework.²⁴

On 10 November 2000, the Council and the Commission adopted an important Joint Statement on the EU's development policy.²⁵ Together with the reform of management of external assistance, it represents a new framework for the implementation of EU development policy. In order to reduce poverty, the EU will focus on areas such as the link between trade and development, support for macroeconomic policies, transport,

²¹ COM (95) 216 final, 23 May 1995.

²² European Parliament, 'Resolution on human rights in the world and Community human rights policy for the years 1991–1992', OJ 1993 C115, 26.04.1993. Bull EC 3-1993, point 1.3.74.

²³ OJ 2000 C364/1.

²⁴ J. Wouters, 'The EU Charter of Fundamental Rights—Some Reflections on its External Dimension', (2001) 8 *Maastricht Journal of European and Comparative Law*, at 5–7.

²⁵ Bull EU 11-2000, point 1.6.43.

and food security. This new development policy is also firmly grounded on the principles of sustainable, equitable, and participatory human and social development. The promotion of human rights, democracy, the rule of law, and good governance are an integral part of it.

This new development policy is aimed at enabling the EU to face new challenges such as sustainable development, globalisation, and the crises and conflicts that are giving ever more cause for concern in developing countries. The EU should take more account of the interests of developing countries. If it did so, the human rights clause would involve combining the political, trade, and development dimensions, ensuring the coherence and coordination of the human rights activities of the EU and the Member States, and improving their implementation.²⁶

B Policy Objectives

Since the latter part of the 1980s, as democratic transitions spread through various parts of the world, there has been a rapid and significant expansion in programmes of assistance financed by the EU. The overall purpose of these programmes is twofold:

- (a) to promote human rights and democracy for their own sake, as a political good that will improve the lives of citizens by bring more freedom, political representation and government accountability;
- (b) to support the idea that the promotion of human rights and democracy is an essential part of the process of furthering sustainable social and economic development.²⁷

At the Copenhagen European Council in June 1993 it was specified, as one of the conditions required of countries applying to join the EU, that these countries had to have achieved stability of institutions guaranteeing democracy, the rule of law, and respect for and protection of minorities.²⁸ The guidelines of October 1999 for the implementation of the Phare programme for the period 2000 to 2006²⁹ emphasise that these criteria are still relevant with regard to the granting of pre-accession aid.

The EU has also been at the forefront of declaring protection of human rights and democracy to be priorities for its development and cooperation programmes. It has operated on two fronts:

- (a) by applying political pressure on governments by establishing agreements which require governments that receive EU assistance to respect the principles of liberty, democracy, human rights, fundamental freedoms, the rule of law and good governance, freezing assistance when such principles are flouted;
- (b) by funding measures through public authorities and institutions, and through NGOs and voluntary bodies.

²⁶ The Laeken European Council, 'Annex I of the Presidency conclusions—Laeken Declaration on the future of the European Union', Bull EU 12-2001, point 1.27; and P. J. Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy', in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Martinus Nijhoff, 1993), at 405, 410.

²⁷ The link between human rights and development, see A. Przeworski and F. Limongi, 'Modernization: Theories and Facts', (1997) 49 *World Politics*, at 155–183; and A. Hadenius, *Democracy and Development* (Cambridge University Press, 1992).

²⁸ Bull EC 6-1993, point I.13.

²⁹ SEC (1999) 1596 final of 13 October 1999.

To further the overall policy objectives, most of the Council Regulations adopted in the area of external aid include human rights and democracy-related objectives. Council Regulations govern expenditures under the European initiative for democracy and the protection of human rights³⁰ with a wide range of objectives, *inter alia*, including:

- (a) measures aimed to promote and defend human rights and other fundamental freedoms; including civil and political rights, economic, social and cultural rights, etc;
- (b) supporting the process of democratisation; including the rule of law, constitutional and legislative reform, good governance, etc;
- (c) support for measures to promote respect for human rights and democratisation by preventing conflict and dealing with its consequences; including early warning systems, confidence-building measures, conflict prevention, humanitarian aid, a permanent international criminal court, etc.

The Commission has also identified three areas in which the EU can play a more effective role in the pursuit of human rights policy objectives: (a) through the promotion of coherence and consistency across EU and EC policies; (b) through placing a higher priority on, and 'mainstreaming', human rights and democratisation objectives in the EU's relations with third countries, in particular through political dialogue and strategic use of its external assistance programmes; and (c) through adopting a more focused and strategic approach to the European Initiative for Democracy and Human Rights (EIDHR).

The Commission's future approach to the EIDHR will be based on the identification of a limited number of priority themes and a number of countries on which the Commission will particularly focus. Four thematic priorities for the EIDHR programme for 2002 and in the medium-term are the following:

- (a) support to strengthen democratisation, good governance, and the rule of law;
- (b) activities in support of the abolition of the death penalty;
- (c) support for the fight against torture and impunity and for international tribunals and criminal courts; and
- (d) combating racism and xenophobia and discrimination against minorities and indigenous peoples.³¹

The more systematic inclusion of the human rights and democracy issues in political dialogue and the EU's external policy will give substance to the essential elements clause and permit contracting parties to identify the most effective measures needed to build political and economic stability. A long-term dialogue and policy on human rights and democratisation is also an element of the EU's conflict prevention strategy.³²

³⁰ Regulation (EC) 975/1999, OJ 1999 L120/1; and Regulation 976/1999 L120/8.

³¹ European Commission, 'The European Union's Role in Promoting Human Rights and Democratization in Third Countries', COM (2001) 252 final, 8 May 2001, at 16, 17, 20.

³² Communication on Conflict Prevention of 11 April 2001, COM (2001) 211.

The features of the human rights clause has been positive in many ways:

- (a) making human rights a core element in EU policies has profound implications on the common European future and the EU's activities;³³
- (b) enshrining promotion of human rights as an essential part of EU external relations and European cooperation;
- (c) adding institutional and political dimensions to the EU's trade and cooperation agreements, by reference to democratic principles, rule of law, and good governance in the human rights clause;
- (d) attaining a more uniform, consistent external policy by combining human rights with EU trade and development policy, and common foreign and security policies;³⁴
- (e) using the legal framework of the human rights clause implies that contracting parties accept their legal commitments; convincing more and more countries that upholding human rights is the legitimate and permanent duty of all states; and
- (f) permitting the EU to seize the initiative for human progress once again; external recognition of the EU as an economic and political block; and expansion of the EU's influence in international affairs.³⁵

IV Legal Basis of the Human Rights Clause

A Constitutional Foundations

References to human rights in agreements by the EU with third countries are based on Treaty provisions and case law of the European Court of Justice. The Single European Act (SEA) of 1986 makes reference to respect for human rights. It is clear from the judgment in *Case Defrenne v Sabena* that the objectives of EC may be made clear in the preamble of the Treaty.³⁶ Paragraph 5 of the SEA subscribes to universal and regional instruments and assuming responsibility for promoting the principles of democracy, the rule of law and respect for human rights. Paragraph 3 also states that the EU and the Member States should work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

Paragraph 1 of the SEA underpins the European Union in accordance with the Solemn Declaration of Stuttgart of 19 June 1983.³⁷ The European idea will be involved not only in economic integration, but also in political unification, with new developments in the field of human rights. It is logical for the EU to address the external dimension of EU human rights policy. The internal and external aspects of this policy cannot,

³³ A. Von Bogdandy, 'The European Union As a Human Rights Organization? Human Rights and the Core of the European Union', (2000) 37 CMLR, at 1308. See also *Laeken Declaration on the future of the European Union*, Bull EU 12-2001, point 1.27.

³⁴ Council of the European Union, *European Union Annual Report on Human Rights 2001*, 8 October 2001, at 201; and European Commission, *Annual Report 2001 on The EC Development Policy and Implementation of the External Assistance*, COM (2002) 490 final, Brussels, 12 September 2002, at 44–49.

³⁵ P. Alston and J. H. H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy', (1998) 9 EJIL, at 662.

³⁶ Case 43/75 [1976] ECR 455, para 63.

³⁷ Solemn Declaration on European Union, Bull. EC 6-1983, point 1.6.1; Single European Act, OJ 1987 L169/1.

however, be addressed separately. It is desirable to strengthen the EU's internal human rights policy with a view to consolidating the corresponding external policy, to speak ever increasingly with one voice and to act with consistency and solidarity in order to more effectively protect the EU's common interests and independence.

A major step in integrating human rights and democratic principles into the EU's policies was taken with the entry into force of the Treaty on European Union (TEU) on 1 November 1993. Human rights is encompassed within the Community's objectives. The embodiment in the Treaty of citizenship in the Union is a new legal factor supporting that argument. Article 2 TEU provides that one of the EU's objectives is 'to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union'.

Human rights is also one of the objectives of the EU's common foreign and security policy. Article 11 TEU provides that the EU's common foreign and security policy shall help 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'. Articles 3(2) also states that the EU shall ensure the consistency of its external activities as a whole in the context of its external relations, security, economic, and development policies. In this context, human rights forms a constant and stable feature of EU external relations.³⁸

The new title on development cooperation provided in the EC Treaty includes a second direct reference to human rights. Article 177(2) EC stress that EC policy in the area of development cooperation 'shall 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'. Article 179(1) further provides that the EC shall adopt the measures necessary to implement the objectives of development cooperation referred to in Article 177.

The Treaty of Amsterdam, which was signed on 2 October 1997 and came into force on 1 May 1999, marks another significant step forward in integrating human rights into the EU legal order.³⁹ The Treaty of Amsterdam reaffirms that the EU 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States'. Article 49 emphasises that the respect for these principles is required by that countries apply for EU membership. The Treaty also introduces, in Article 7, a mechanism to sanction serious and persistent breaches of human rights by EU Member States.⁴⁰

The mechanism provided in Amsterdam was further reinforced by the Treaty of Nice signed on 26 February 2001 and entered into force on 1 February 2003.⁴¹ The Treaty of Nice also extends the objective of promoting respect for human rights and fundamental freedoms, from development cooperation to all forms of cooperation with third countries. This new mechanism will be inserted into Article 181a EC. Article 181a(1) states that:

Without prejudice to the other provisions of this Treaty, and in particular those of Title XX, the Community shall carry out, within its spheres of competence, economic, financial and technical cooperation

³⁸ T. King, 'Human Rights in European Foreign Policy: Success or Failure for post-modern Diplomacy?' (1999) 10 EJIL, at 324, 325; and J. Show, *Law of the European Union*, 3rd edn (Palgrave, 2000), at 57–74.

³⁹ Bull EU 6-1997, point II.4. Comments see I. Pernice, 'Multilevel constitutionalism and The Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 CMLR, at 703, 704.

⁴⁰ L. Betten and N. Grief, *EU Law and Human Rights* (Longman, 1998), at 130–139.

⁴¹ Bull EU 1/2-2003, point 1.1.1.

measures with third countries. Such measures shall be complementary to those carried out by the Member States and consistent with the development policy of the Community.

Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.

The legal basis and political will for EU human rights policy is clear and determined. The EU seeks to uphold the universality and indivisibility of human rights. The protection of such rights, together with the promotion of pluralistic democracy and effective guarantees for the rule of law, are among the EU's essential objectives.⁴²

B Court of Justice Case Law

The legality of the human rights clause is confirmed by Court of Justice case law in Opinion 2/94⁴³ and *Portugal v Council*.⁴⁴

Opinion 2/94 relates to whether the accession of the EC to the Convention for the Protection Human Rights and Fundamental Freedom of 4 November 1950 (hereinafter 'the Convention') is compatible with the EC Treaty. The Commission refers to Article 308 (formerly 235) as the legal basis for accession. The conditions for the application of Article 308, namely the necessity for action by the Community, the attainment of one of the objectives of the EC, and the link with the operation of the common market, are fulfilled.

In its judgement, the Court of Justice ruled that 'as Community law stands, the Community has no competence to accede to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order'.⁴⁵ The Court of Justice further pointed out that:

such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 308 (ex Article 235). It could be brought about only by way of Treaty amendment.⁴⁶

However, the Court of Justice, in paragraph 27 of its Opinion, stated that 'No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field'. This ruling raised an important issue: whether the EC has the competence to include a human rights clause in its external agreements?

The principles of conferred power must be respected in both the internal actions and the international actions of the Community. The EU acts ordinarily on the basis of specific powers that are not necessarily the express consequence of specific provisions of the Treaty, but may also be implied from them. It is also settled in case-law that whenever EU law has created for the EC institutional powers within its internal system for the purpose of attaining a specific objective, the EU is empowered to enter into the

⁴² N. Winn and C. Lord, *EU Foreign Policy Beyond the Nation-State* (Palgrave, 2001), at 12–14, 160–162.

⁴³ Opinion 2/94, Opinion pursuant to Article 228(6) of the EU Treaty, [1996] ECR I-1759.

⁴⁴ Case C-268/94 *Portugal v Council* (India Agreement) [1996] ECR I-6177.

⁴⁵ Opinion 2/94, paras 34, 36.

⁴⁶ *Ibid.*, para 35.

international commitments necessary for attainment of that objective, even in the absence of an express provision to that effect.⁴⁷

Article 308 is designed to fill the gap where no specific provisions of the Treaty confer on the EC institutions express or implied power to act, if such powers appear nonetheless to be necessary to enable the EU to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. Actually, human rights as one of the EU's objectives is formally provided for in different provisions of the EU Treaties.

In Opinion 2/94, the Court of Justice recognised that 'Article 177(2) EC provides that Community policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms'.⁴⁸ Therefore, the EU has the power to include a human rights clause in its external agreements. This argument is further confirmed by the *Portugal v Council* case.⁴⁹

The *Portugal v Council* case concerns Portugal's application for annulment of Council Decision 94/578/EC⁵⁰ approving the conclusion of the Cooperation Agreement between the EC and India on Partnership and Development (hereinafter 'the Agreement').⁵¹ Portugal argued that the legal basis of the human rights clause, provided in Article 1 of the Agreement, should be Article 308 EC.

Article 1(1) of the Agreement provides: 'Respect for human rights and democratic principles is the basis for cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement'.

Portugal considered the fact that respect for fundamental rights ranks among the general principles of the EU legal order but does not justify the conclusion that the EU is competent to adopt measures in that field, whether internal or external. The references to human rights in the preamble to the Single European Act and in the preamble to and certain articles of the Treaty on European Union are 'programmatic'; they define a general objective but do not confer on the EU any specific powers of action.

Moreover, Article 177(2) EC merely defines a general objective. As a result, Article 181 forms a sufficient legal basis for the conclusion of a cooperation agreement only in so far as respect for human rights is prescribed merely as a general objective of the agreement. However, the Agreement goes further, as Article 1(1) states that 'Respect for human rights . . . constitutes an essential element' of the Agreement. Therefore, the human rights clause should be based solely on Article 308 EC. The Court of Justice pointed out that the mere fact that Article 1(1) of the Agreement provides that respect for human rights and democratic principles 'constitutes an essential element' of the Agreement does not justify the conclusion that provision goes beyond the objective stated in Article 177(2) EC.

By declaring that 'Community policy . . . shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedom', Article 177(2) requires the EU to take

⁴⁷ Opinion 2/91, [1993] ECR I-1061, para 7.

⁴⁸ Opinion 2/94, para 32.

⁴⁹ For comments see Peers 'Fragmentation or Evasion in the Community's Development Policy? The Impact of *Portugal v. Council*', in A. Dashood and C. Hillion (ed.), *The General Law of EC External Relations* (Sweet & Maxwell, 2000), at 103–106.

⁵⁰ OJ 1994 L223/23.

⁵¹ OJ 1994 L223/35.

account of the objective of respect for human rights when it adopts measures in the field of development cooperation.

The very wording of the Article 177(2) provision demonstrates the importance to be attached to respect for human rights and democratic principles, so that, among other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles. In other words, to adapt cooperation policy to respect for human rights necessarily entails establishing a certain connection between those matters, whereby one of them is made subordinate to the other.⁵²

Furthermore, Article 1 of the Agreement, headed 'Basic and objectives', and the wording of the first paragraph of that provision, provide confirmation that the question of respect for human rights and democratic principles is not a specific field of cooperation provided by the Agreement. According to Article 60 of the Vienna Convention on the Law of Treaties, the essential element of the human rights clause in a cooperation agreement enables the EU, where there is grave abuse of human rights by the other contracting party, to suspend the application of the agreement. In this context, the Court ruled that the human rights clause provided in Article 1(1) of the Agreement could be validly based on Article 181.⁵³

In fact, the use of Article 308 as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question. This point has been consistently held by the Court.⁵⁴ The EC Treaty has already provided an explicit provision in Article 177 for development cooperation. In addition, the choice of the legal basis for a measure must 'also be based on objective factors' including, in particular, the aim and content of the measure.⁵⁵

The preamble to the SEA, the preamble to the TEU and Articles 6(2), 11, 30 TEU, and Articles 11, 13, Part Two, Title XX of the EC Treaty enshrine respect for human rights as an objective of the EU. The whole of EU actions in external relations also illustrates the importance attached to respect for human rights in its development policy with third countries.⁵⁶ In theory, the human rights clause must indeed be deemed necessary if development cooperation policy is to be lawfully pursued. Advocate General La Pergola pointed out in its opinion that 'the failure to adopt a clause of that type that would compromise the legality of Community action, because compliance with the specific wording of Article 177 would no longer be guaranteed'.⁵⁷

Human rights has been clearly developed as an essential element in the EU legal order. It has been gaining increasingly steady footholds through constitutional Treaty provisions, secondary legislation, Court of Justice case law, and institutional practices. Human rights forms the new basis of the EU and inserts fresh impetus for European integration and the EU's external relations.

⁵² [1996] ECR I-6177, paras 23, 24, 26.

⁵³ *Ibid*, paras 28, 29.

⁵⁴ Case 45/86 *Commission v Council* [1987] ECR 1493, para. 13, and Case C-271/94 *Parliament v Council* [1996] ECR I-1689, para 13.

⁵⁵ Case C-300/89 *Commission v Council* [1991] ECR I-2867, para 10, and Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, para 25.

⁵⁶ E. Fierro, 'Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?' (2001) 7 *ELJ*, at 67.

⁵⁷ [1996] ECR I-6177, Opinion of Advocate General La Pergola, para 29.

V Human Rights Clause in Practice and Development

A Decision-making Process and Practical Operation

According to Articles 133, 177, and 181 EC, the legal basis for the EU to conclude a trade or development agreement with a human rights clause is Article 300. Article 300(1) provides that in the conclusion of agreements between the EU and one or more states, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees, for example the Article 133 Committee or the Generalized System of Preferences (GSP) Committee, appointed by the Council to assist it in this task and within the framework of such directives as the Council may see fit. In exercising the power conferred upon it by Article 300(1), the Council shall in principle act by a qualified majority.

In the qualified majority procedure, only one or two Member States cannot block Council decision. This is why Portugal in Case C-268/94 referred to Article 308, by which the Council shall act unanimously on a proposal from the Commission and after consulting the European Parliament to take the appropriate measures.

In order to provide a legal basis for all human rights and democratization activities of the EU under Chapter B7-70, the Council adopted Regulations 975/1999 and 976/1999 on 29 April 1999 on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms under Articles 179 and 308 of the EC Treaty. This Chapter B7-70, entitled 'European Initiative for Democracy and Human Rights (EIDHR)', was created by an initiative of the European Parliament in 1994, which brought together a series of budget headings specifically dealing with the promotion of human rights.⁵⁸

The management of human rights and democracy programmes is spread across several departments of the Commission. DG external relations is responsible for the programmes in central and eastern Europe and the new independent States, Latin America and the Mediterranean, and Asia. The DG Development has a unit responsible for these measures in the ACP States. DG external relations is also responsible for all B7-7 budget lines, by fusing the former Human Rights and ACP unit with the Human Rights and Democratization unit.⁵⁹

The EU draws on a wide-range of instruments for its human rights activities. Negative measures include consultation, dialogue, alteration of contents of cooperation programmes, or the channels used; reduction of cultural, scientific, and technical cooperation programmes; postponement of a Joint Committee meeting; suspension of high-level bilateral contacts; postponement of new projects; suspension, intervention, trade embargoes, and economic sanctions. Positive measures cover a wide range of instruments such as cooperation programmes, financial and technical aids, trade concessions; and the Generalized System of Preferences. The Commission, with the support of Member States, also chairs some cooperation instruments: EDF, EIDHR, Technical

⁵⁸ See C. Scappucci, 'EU-ACP Relations in the 1990s', in C. Cosgrove-Sacks (ed.), *The European Union and Developing Countries: The Challenge of Globalization* (Macmillan, 1999), at 111–113; and M. Van Reisen, *The North-South Policy of the European Union* (International Books, 1999), at 31–35.

⁵⁹ Court of Auditors, Special Report No 12/2000 on the management by the Commission of European Union support for the development of human rights and democracy in third countries, together with the Commission's replies, OJ 2000 C230/1, para 53.

Assistance to the Commonwealth of Independent States (Tacis), Asia and Latin American (ALA), Mediterranean (MEDA), etc.⁶⁰

The EU's external assistance programmes (Phar, Tacis, ALA, MEDA, CARDS) total some €5 billion per annum, in addition to EDA resources for Africa, Caribbean and Pacific countries (€13.5 billion under the 9th EDA between 2000 and 2007)—for example, €180 million of EDF programmes in direct support of human rights and democratization from 1997–2000. A further €115 million supported election assistance and observation between 1996 and 1999, of which €71 million was spent in Africa. The EU as a whole has become the largest donor of human rights assistance in the world.⁶¹ This also reflects the fact that the EU gives high priority to a positive approach, more carrots than sticks, in its human rights policy.⁶²

The EU has its own instrument in the labour rights incentive clause in the GSP, which provides for special incentive arrangements for the protection of labour rights. Article 14(2) of Regulation 2501/2001⁶³ states that the special incentive arrangements for the protection of labour rights may be granted to a country the national legislation of which incorporates the substance of the standards laid down in ILO Conventions No 29 and No 105 on forced labour, No 87 and No 98 on the freedom of association and the right to collective bargaining, No 100 and No 111 on non-discrimination in respect of employment and occupation, and No 138 and No 182 on child labour, and which effectively applies that legislation. Special incentive arrangements usually provide another five percentage points reduction on Common Customs Tariff duties in addition to the GSP scheme, as provided in Article 8(2).

The operation of the labour rights incentive clause is regulated in Articles 15–20. The requesting country shall submit its request to the Commission in writing and shall provide comprehensive information concerning: (a) the national legislation referred to in Article 14(2), the measures taken to implement it and to monitor its application; (b) any sectors in which that legislation is not applied. The full official text of the legislation referred to in Article 14(2) and of the implementing measures shall be attached to the request.⁶⁴

The Commission shall publish a notice in the *Official Journal of the European Communities* announcing that request. The notice shall state that any relevant information concerning that request may be sent to the Commission within a specified period.

The Commission then examines the request. It may ask the requesting country any relevant questions and may verify the information received with the requesting country or any natural or legal person. The Commission may also carry out assessments in the requesting country with assistance of the Member States.

⁶⁰ Council of the European Union, *European Union Annual Report on Human Rights 2002* (Office for Official Publications of the European Communities, 2002), at 50–57.

⁶¹ European Commission, *EU and Developing Countries: Facts and Figures*, Brussels, October 2001, at 2; and OECD, *Development Cooperation Report* (OECD, 2000), Table 3.1.

⁶² B. Brandtner and A. Rosas, 'Trade Preferences and Human Rights', in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999), at 718.

⁶³ Regulation 2501/2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ 2001 L346/1.

⁶⁴ On GSP, trade and labour rights, see J. A. McMahon, *The Development Cooperation Policy of the EC* (Kluwer Law International, 1998), at 244–247; and B. M. Hoekman and M. M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 2nd edn (Oxford University Press, 2001), at 448–452.

The Commission shall inform the requesting country of its assessments. The Commission shall submit its findings to the GSP Committee. The examination of a request shall be completed within a year of the date of publication of the notice in the *Official Journal of the European Communities*.

The Commission shall notify a requesting country of its decision. Where a country is granted the special incentive arrangements, it shall be informed of the date on which that decision enters into force. Where a requesting country is not granted the special incentive arrangements or where some sectors are excluded, the Commission shall explain the reasons if that country so requests.⁶⁵

Regulation 2501/2001 also contains a suspension clause for temporary withdrawal of the preferential arrangement and effective protection of human rights. Article 26 states that the preferential arrangements may be temporarily withdrawn, in respect to all or certain products, originating in a beneficiary country, for any of the following reasons:

- (a) practice of any form of slavery or forced labour;
- (b) serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour;
- (c) export of goods made by prison labour;
- (d) shortcomings in customs controls on export or transit of drugs, or failure to comply with international conventions on money laundering;
- (e) fraud, irregularities, or systematic failure to comply or to ensure compliance with the rule of origin of products;
- (f) unfair trading practices, including those which are prohibited or actionable under the WTO Agreements;
- (g) infringement of the objectives of international conventions concerning the conservation and management of fishery resources.

According to Article 26(3), the special incentive arrangements for the protection of labour rights may also be temporarily withdrawn, in respect of all or certain products included in that arrangement, originating in a beneficiary country, if the national legislation no longer incorporates the standards referred to in Article 14(2) or if that legislation is not effectively applied. The administration of the suspension clause, provided in Articles 27 to 34, is similar to the procedure of a special incentive arrangement. The suspension revealing that the clause has been applied to Myanmar, means that the clause is not just a paper tiger.⁶⁶

Myanmar was a beneficiary of EU GSP pursuant to Regulation 3281/94 and Regulation 1256/96.⁶⁷ Article 9 of each Regulation provided a suspension clause in circumstances including the practice of any form of forced labour.

On 7 June 1995 the International Confederation of Free Trade Union (ICFTU) and the European Trade Union Confederation (ETUC) made a joint complaint to the

⁶⁵ European Commission, 'User's Guide to the European Union's Scheme of Generalized Tariff Preferences', February 2003, <<http://europa.eu.int/comm/trade/gsp/gspguide.htm>> (visited 6 June 2003).

⁶⁶ B. Brandtner and A. Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice', (1998) 9 EJIL, at 489.

⁶⁷ OJ 1994 L348/1; OJ 1996 L160/1, respectively.

Commission under Article 9 of Regulation 3281/94 for suspension of EU GSP on manufactured products from Myanmar because of its use of forced labour. On 2 January 1997 the same Unions extended their request to cover the suspension of GSP on agricultural products from Myanmar.

The Commission examined the complaint in consultation with the GSP Committee and considered the evidence to be sufficient for the opening of an investigation. On 16 January 1996, the Commission decided by a Notice that an investigation should take place.⁶⁸ During the investigation, the Commission once tried to conduct a fact-finding mission but its request was rejected by Myanmar. The Commission's findings in its investigation were then based on the information available. In February 1997, the Commission submitted its proposals to the Council for suspension of GSP applicable to industrial and agricultural products originating in Myanmar,⁶⁹ which were adopted by the Council by a qualified majority vote on 24 March 1997.⁷⁰ According to Article 40(2) of Regulation 2501/2001 and Council Common Position 2001/757/CFSP,⁷¹ the EC decision on suspension of GSP on Myanmar is still valid.

B Outlook and Challenges

The EU's human rights clause refers to internationally agreed human rights standards and instruments, in particular those of the UN. The priority espoused by the Vienna Declaration and the Programme of Action on Human Rights of 1993 is a particular source of inspiration for the EU. Three principles stated in paragraph 5 of Part 1 of the Vienna Declaration form the keystone of the international system for the protection of human rights:⁷²

- (a) universality, which implies that no provision of a national, cultural, or religious nature can override the principles enshrined in the Universal Declaration on Human Rights;
- (b) indivisibility, which precludes discrimination between civil and political rights, and economic, social, and cultural rights;
- (c) interdependence, which means democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.

The principles are actually (directly or indirectly) influenced by the Luxembourg European Council's Declaration on human rights of June 1991, having the following corollaries:⁷³

⁶⁸ OJ 1996 C15/3.

⁶⁹ OJ 1997 C35/14; OJ 1997 C80/18.

⁷⁰ Regulation 552/97 temporarily withdrawing access to generalised tariff preferences from the Union of Myanmar, OJ 1997 L85/8.

⁷¹ Council Common Position 2001/757/CFSP concerning the extension of Common Position 96/635/CFSP on Myanmar, OJ 2001 L286/1.

⁷² T. Buergenthal, 'International Human Rights in an Historical Perspective', in J. Symonides (ed.), *Human Rights: Concepts and Standards* (UNESCO, 2000), at 17.

⁷³ Luxembourg European Council, 'Declaration on human rights', Bull EC 6-1991, point I. 45. See also European Commission, 'The External Dimension of the EU's Human Rights Policy: From Rome to Maastricht and Beyond', COM (95) 567, 22 November 1995, at 5, 6.

- (a) universality (paragraph 3): To promote human rights, is the legitimate and permanent duty of the world community and of all States acting individually or collectively. The different ways of expressing concern about violations of rights, as well as requests designed to secure those rights, cannot be considered as interference in internal affairs of a State, and constitute an important and legitimate part of the EU's dialogue with third countries.
- (b) indivisibility (paragraph 8): Human rights has an indivisible character. The promotion of economic, social, and cultural rights, as of civil and political rights, and of respect for religious freedom and freedom of worship, are of fundamental importance for the full realisation of human dignity and of the legitimate aspirations of every individual. Democracy, pluralism, respect for human rights, institutions working within a constitutional framework, and responsible governments appointed following periodic, fair elections, as well as the recognition of the legitimate importance of the individual in a society, are essential prerequisites of sustained social and economic development.
- (c) interdependence (paragraphs 7, 11): All lasting development should be centered on man as the bearer of human rights and beneficiary of the process of development. Violations of human rights and suppression of individual freedoms impede an individual from participating in and contributing to this process. Through their policy of cooperation and by including clauses on human rights in economic and cooperation agreements with third countries. Respect for human rights will favour political, social and economic development.

In this context, the EU has successfully extended its European idea of human rights to international rules. The EU has developed its external relations based on human rights over the years. As a result, its influence on world events has tended to become a good deal broader.⁷⁴ Most of its human rights clauses are provided in its trade or cooperation agreements. The EU can thus play a leading role in the development of human rights clauses in the WTO system.

The WTO and the international human rights conventions have many features in common. Both grew out of a desire to promote peace and better standards of living, ensuring full employment and a growing volume of real income. The Preamble of the WTO and Article 55 of the UN Charter both clearly express these as their goals. Both are maintained through the imposition of an international rule of law. Both also condemn discrimination on the basis of national origin. They are not and should not be presumed to be somehow contradictory.

Despite these similarities, there are also important differences to recognise. The WTO was not established with the intention of setting or enforcing human rights. The WTO also does not allow members to benefit from the WTO system to enforce rights and obligations other than those of WTO law. Human rights are primarily about legal relations between individuals and states. Trade relations under the WTO are about state to state relations. In other words, the individual is still not the subject of the WTO. These distinctions raise many difficult questions for the development of a human rights relating clause in the WTO.⁷⁵ How should the nature of the trade in products (goods and

⁷⁴ P. Leuprecht, 'General Course Human Rights in the new Europe', in *Academy of European Law* (ed.), *Collected Courses of the Academy of European Law*, Vol. V, Book 2 (Martinus Nijhoff, 1997), at 149–151, 188, 189.

⁷⁵ H. Lim, 'Trade and Human Rights: What's at Issue?' (2001) 35 *JWT*, at 278, 279.

services) and most-favoured-nation (MFN) and national treatment principles be reconciled with state to individual rights and obligations of human rights covenants? How should the non-discrimination principle be applied in the human rights clause at the practical level? How can we prevent the human rights clause from being applied as a trade protective tool?⁷⁶

With respect to the MFN principle, Article 1 of GATT 1994 requires that any WTO member granting any trade concession to any product originating in or destined for any other country 'shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'. If the MFN principle is also applied to human rights clauses then if any WTO member gives any privilege, such as free entry, or employment permits, to any foreign individual, it shall be extended to all WTO members. The MFN principle is commonly seen as the cornerstone of the international trading system. Unilateral or bilateral trade concessions, under the MFN clause arrangement, will lead multilateral level concessions. Should the MFN principle applied for trade in products also be extended to 'treatment of individual' for the universal protection and globalisation of human rights?⁷⁷

Similarly, GATT 1994 provides for national treatment of imported products. The principle of national treatment requires each member to accord to any other member treatment that is no less favourable than that of its own. Should this principle also be applied to foreign individuals receiving non-discriminatory treatment comparable to that of local residents, such as jobs, education, social and medical welfare, civil and political rights, economic and social rights, etc. If human rights is really universal, it should apply equally to nationals and foreigners.⁷⁸ Existing WTO provisions have not been designed for promoting core labour standards or fundamental human rights. These human rights issues would imply a reinterpretation of WTO rules and practices, or even to a greater or lesser extent renegotiation and amendment of WTO articles. The debate on this issue and on the associated conceptual and practical difficulties will continue.⁷⁹

If human rights considerations were formally brought into the WTO system, an important issue is how the situation could be avoided in which the human rights clause is abused, disguised as a trade measure. WTO members taking trade restrictive measures, based on human rights considerations, should inform the related WTO committee and provide for adequate consultations with the targeted country. Temporary measures should be limited to an emergency situation or with WTO permission.⁸⁰ The plaintiff should bear the burden of proof regarding the violation of human rights by the defense. WTO jurisprudence does not enforce a 'clean hand' doctrine for members to adopt antidumping or subsidy measures, even if these measures in fact are also taken by the complaint country. This can partially explain why antidumping and subsidy

⁷⁶ J. H. Jackson, *The Jurisprudence of GATT and the WTO. Insights on treaty law and economic relations* (Cambridge University Press, 2000), at 189, 413, 423.

⁷⁷ F. Weiss and P. de Waart, 'International Economic Law with a Human Face: An Introductory View', in F. Weiss, E. Denters and P. de Waart (eds), *International Economic Law with a Human Face* (Kluwer Law International, 1998), at 2, 10, 11.

⁷⁸ Leuprecht, *op. cit.* note 74 *supra*, at 182–184; and J. Donnelly, *Universal Human Rights In Theory & Practice*, 2nd edn (Cornell University Press, 2003), at 200–203.

⁷⁹ OECD, Report on Trade, *Employment and Labour* (OECD, 1996), at 16, 17; and J. H. Jackson, 'Perceptions about the WTO trade institutions', (2002) 1 *World Trade Review*, at 106–168.

⁸⁰ B. I. Hamm, 'A Human Rights Approach to Development', (2001) 23 *HRQ*, at 1017, 1018.

measures are increasingly applied in recent years. In addition, no country actually can guarantee that it has no infringement of human rights. The shift of the burden of proof from the defence to the plaintiff, therefore, will conform with the doctrine of 'equity'.⁸¹

Human rights-related trade restrictive measures should also be applied in accordance with the principle of non-discrimination. Non-discrimination is one of the basic principles of the WTO and has been well defined in Article 13 of the GATT 1994. There is the issue of the cost of maintaining a multilateral free-trade system: non-discriminatory treatment enables the WTO and its members to reduce the costs of monitoring whether a country is treated equally compared to other countries. It also contributes to judicial economy in WTO consultations and dispute settlement. In this context, non-discrimination treatment leads to all members being treated equally and, in turn, promotes a more liberal, fair, predictable, and democratic trading system.⁸²

The extension of MFN principles and national treatment to the human rights clause constitutes a challenge for the WTO and its Members.⁸³ The WTO agreements do not preclude actions by individual Member to ensure that international human rights principles are incorporated into its own activities. Therefore, the EU's human rights clause provides a model and alternative before the WTO in settling human rights-related issues.

During the WTO inserted negotiations, the EU proposed that 'non-trade concern' and 'animal rights' should be included in the agricultural negotiations. The EU's suggestions were regarded as constructive and positive, and supported by many WTO members.⁸⁴

The human rights clause enshrines that promotion of human rights as an essential part of EU external relations and European cooperation. It also enlightens more and more countries, convincing them that upholding and safeguarding human rights is the legitimate and permanent duty of all states. The human rights clause has permitted the EU to seize the initiative for human progress once again.

The EC is one of the rule makers in the new international order. It exerts a tremendous influence on global trends in human rights policy, for instance, towards relativism or universalism, towards self-interest or humanitarian objectives, towards dual standards or non-discrimination, towards sectoral approaches or interdependent and overall strategy, and towards rule or power-oriented cooperation relations. It is suggested that a leading role for the EU requires that it should continue to uphold and safeguard both the United Nations and the WTO systems.

⁸¹ C. Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies', (2002) 24 HRQ, at 49–50.

⁸² E-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13 EJIL, at 622–629.

⁸³ R. E. Hudec, 'Introduction to the Legal Studies', in J. Bhagwati and R. E. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (The MIT Press, 1996), at 7–9; and S. Tay, 'Trade and Labor: Text, Institutions, and Context', in B. Hoekman, A. Matto and P. English (eds), *Development, Trade, and the WTO: A Handbook* (World Bank, 2002), at 463–471.

⁸⁴ WTO, 'Preparations for the 1999 Ministerial Conference: EC Approach on Agriculture', WT/GC/W/273, 27 July 1999, at 1–3; 'Animal Welfare and Trade in Agriculture', G/AG/NG/W/19, 28 June 2000; and 'EU: Comprehensive negotiating proposal', G/AG/NG/W/90, 14 December 2000.

VI Conclusion

The promotion and protection of human rights is one of the main objectives of the EU in accordance with its purpose and principles, provided in the EC Treaty as well as the TEU, in particular for the purpose of external relations. Since the early 1990s, the human rights clause has been systematically included in EU external agreements of a general nature. This clause is implemented by a suspension clause that provides for appropriate measures to be taken by the party which invoked the violation. These clauses together support the EU's words with actions.

The effectiveness of the human rights clause is reinforced by the capacity and financial resources of the EU. The EU, in principle, gives high priority to a positive approach that stimulates respect for human rights and encourages democracy. The human rights clause, based on cooperation aid and consultation procedures, represents an important policy change in EU external relations. The EU is now conducting a more active strategy with a 'civilizing nature' in dealing with third countries.⁸⁵

Besides the human rights clause, most of the agreements concluded with third countries also arrange for regular political dialogue on all subjects of common interest, and aim for cooperation. This dialogue makes it possible for the EU to bring up human rights questions as well. Human rights considerations obviously give new context to the EU's external agreements and enrich the EU's foreign policy.

Given trading interests, historical linkage, and humanitarian concern, the EU is already the largest donor of economic aid and development assistance to developing countries. At the same time, the fact that the EU no longer seeks to exert hegemony confers it a great political and moral advantage in its external relations. There is much room for the EU to strengthen its economic and political partnerships with third countries with human rights concerns.⁸⁶

The human rights clause constitutes a new model for EU external relations and international cooperation. It confers prestige and 'soft' authority on the EU.⁸⁷ It also implies that EU external relations with third countries have achieved further progress. Under the human rights clause, an increase in dialogue and cooperation between the EU and third countries is not only in the fundamental interests of both sides, but is also conducive to world peace, stability and development.⁸⁸

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