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

Abstract

This paper justifies both the jurisprudence and operation of EU’s human rights clause in North—South relations. It argues that the human rights clause in the EU’s external trade and development agreements have became a new model for international cooperation. The EU plays a leading role in international economic relations. The human rights clause will have a significant impact on the development of international rules concerning trade-related human rights policy.

Policy Development and Essential Elements

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 Treaty on European Union (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 which provides for appropriate measures to be taken by the party which invoked the violation of human rights.
The human rights clause is unique in the EU’s bilateral agreements. The essential clause stipulates that respect for fundamental human rights and democratic principles as laid down in the Universal Declaration on Human Rights (UDHR) underpin the internal and external policies of the signatory parties and constitute an ‘essential element’ of the agreement. The essential clause is enhanced by the additional clause that deals with non-execution of the agreement.

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

**The Human Rights Clause in Practice**

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 an individual clause of altogether subsidiary or ancillary nature. The human rights clause, based on formal treaty, could offer in essence more accountability, rights of initiative, duty of cooperation, and legal certainty for contracting parties.

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 human rights and encourages democracy. The human rights clause, based on cooperative aid and consultation, represents an important policy change in EU external relations. Since 1992, the EU has been conducting a more active strategy with a ‘civilizing
nature’ in dealing with non-EU countries.

The EU’s external assistance programmes (Phar, Tasics, ALA, MEDA, CARDS) total some five billion euros p.a., in addition to EDA resources for Africa, Caribbean and Pacific countries (13.5 billion euros under the 9th EDA between 2000-2007.) As an example, 180 million euros from EDF programmes directly supported human rights and democratization programmes from 1997-2000. A further 115 million euros supported electoral assistance and observation between 1996 and 1999, of which 71 million euros was spent in Africa. The EU as a whole has become the largest donor of human rights assistance in the world.

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 a new context to the EU’s external agreements and enrich the EU’s foreign policy.

The Human Rights Clause and the WTO

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.

If human rights considerations were formally brought into the WTO system, an important issue would be how the situation could be avoided in which the human rights clause was abused, disguised as a trade measure. I would propose that 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. The plaintiff should bear the burden of proof regarding the violation of human rights by the defense.

WTO jurisprudence does not currently enforce a ‘clean hand’ doctrine for members to adopt anti-dumping or subsidy measures, even if these measures in fact are also taken by the complaining country. This can partially explain why anti-dumping and subsidy measures are increasingly applied in recent years. In addition, no country can actually guarantee that it has no infringement of human rights. The shift of the burden of proof from the defense to the plaintiff, therefore, would conform to the doctrine of ‘equity’. Human rights related trade restrictive measures should also be applied in accordance with the principle of non-discrimination.

Under the human rights clause, 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. Most of its human rights clause is provided in its trade or cooperation agreements. The EU can thus play a leading role in the development of human right clauses in the WTO system. In this context, the EU’s human rights clause provides a model and alternative for WTO in settling human rights related trade issues.

Conclusion: Impacts and Significance

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 political hegemony confers on 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 non-EU member countries with human rights concerns. The human rights clause confers prestige and ‘soft’ power on the EU. It constitutes a new model for EU external relations and international cooperation. Under the human rights clause, an increase in dialogue and cooperation between the EU and non-EU countries is not only in the fundamental interests of both sides, but is also conducive to world peace, stability and development.

Der-Chin Horng
Institute of European and American Studies, Academia Sinica