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The European Union as a global actor

A study of the external relations of the
European Union from a human rights
perspective

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Preface

I have now realised and understood why the European Union plays an important role not only on the inside of the walls of the Union but also on the outside. In today's world the external relations of the European Union is more important than ever. The voice of the European Union is very strong and it is an intergovernmental organisation of its own kind with effective tools to make change.

Writing this thesis has been challenging, interesting and fun. I have gained lots of new knowledge and I have enhanced and deepened my interest in the field of Community law even more. Collecting material in the United Nations head office in New York and in the Delegation of the European Commission to the United Nations, has contributed to a better understanding of the subject and to an extremely valuable experience to bring with me in the future. For that, I am very appreciative.

Moreover, a special thanks to my family for all the support during my law studies.

Kajsa Sandström
10 May 2006

Abbreviations

CFSP	Common Foreign and Security Policy
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEA	European Economic Association
EEC	European Economic Community
EIDHR	European Initiative on Human Rights
EU	European Union
EURATOM	European Atomic Energy Community
GATS	General Agreement on Trade in Services
GSP	Generalised System of Tariff Preferences
ILO	International Labour Organisation
JHA	Justice and Home Affairs
WTO	World Trade Organisation

1 Introduction

Purpose

The EU did not set out to become a world power. Its first concern was bringing together the nations and peoples of Europe after the World War II. But as the Union expanded and took on more responsibilities it had to define its relationship with the rest of the world.

Just as it has worked to remove trade barriers, develop poorer regions and promote peaceful cooperation and human rights within its frontiers, the EU works with the same issues with countries and international organisations outside the Union.

The purpose with this thesis on the external relations of the European Union is first to examine on what legal ground the Community has the power to act on the international arena. I will seek the answer to the question how the legal basis of the EU's external powers is structured and on what legal grounds the Community enters different commitments with third countries and international organisations. Related question will be the consequence of uncertainty regarding Community competence.

My purpose is also to study how the Community's external power is applied in practice. Human rights concerns are increasingly integrated into the many different dimensions of EU's external actions and a growing number of instruments are used to further human rights protection in third countries. For this reason and also due to my personal interest I will examine different ways of promoting human rights and combat child labour in third countries. Related legal authorization for the Community to act will be presented.

Delimitation

The external relations of the European Union is a wide subject, containing lots of interesting and debatable issues. I have decided to stay focused on the legal question concerning authority for the community to act internationally, in accordance with the Treaty, but also in situations where the Treaty does not expressly authorize the Community to act. After having clarified the history, development and the most relevant case law and opinions from the Court of Justice, two kinds of relations with the Community will be studied. The first one is bilateral agreements, association agreements, partnership agreements and trade agreements with third countries. The second one is international agreements which do not have human rights as objective but which are established on the condition of respect of human rights. I will not examine the content of the agreements as

such but instead focus on what legal grounds the Community can rely on. The external relations of the European Union also consist of the common foreign and security policy, which in this thesis will be left out. Regarding Human right actions, elimination of child labour and promotion of human rights by the Community in third countries I will mainly concentrate on different contemporary ways of taking action in practise by the Community by use of the most recently resolutions, publications and statements. My intention is not to study child labour in general but to focus on the European Union's role and ways of fighting child labour.

Method and material

I have used a traditional legal method when writing this thesis. EC legislation, including articles in the Single European Act, Treaty of Amsterdam, Treaty of Maastricht and Treaty of Nice together with case law have been analysed to examine and understand the legal framework of the external relations. The doctrine on the subject is extensive and sometimes complicated. Authors frequently mix information with their own distinguished analyses in a way that sometimes makes the subject imprecise. It has therefore been of major importance to study an extensive group of doctrine to receive the broadest knowledge possible and an understanding from different dimensions.

Regarding human rights action by the community in practise and the Community's fight against child labour, preparatory work, decisions and statements and information from different NGO's and international organisations have been examined. Since human right actions in third countries are developing rapidly, I have mainly focused on the work of today and the most up to date related publications.

In the United Nations head office in New York, fall 2005, I had the possibility to participate in consultations, debates and negotiations in the UNGA 6th Committee and in coordination meetings in the Delegation of the European Commission to the United Nations. This together with interesting discussions with talented diplomats on the subject from all over the world, and by this way collecting material, is a valuable contribution to this thesis.

2 The external powers of the Community

The European Community

Until 2002 there were three European Communities: The European Coal and Steel Community (ECSC), The European Community (EC), originally called the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). They are all distinct legal entities established by separate treaties. The ECSC ceased to exist in 23 July 2002 and its responsibilities and assets were then assumed by the EC. The European Union is established by The Treaty of the European Union (since 1993 called the Maastricht Treaty) and has no legal personality.¹

The European communities form part of the European Union. Since 1993, when the Treaty of Maastricht came into force, the European community is explained in terms of three pillars in which the three communities form one pillar. The other two pillars consist of the common security and foreign policy (CFSP) and justice and home affairs (JHA).²

The European Union is an “intergovernmental organisation” of its own kind. Its special significance is because member states have given up parts of their sovereignty to the Community. The work of the organisation is based on the Community itself, entrusted with a wide range of competences. By creating or acceding to the European Community, the Member states have limited their powers permanently by transferring them to the Community.³

According to the principle of subsidiarity in article 5 EC, the member states should adopt legislative measures unless a Community action is necessary for the fulfilment of the objective. The principle establishes “In areas which do not fall within the Community’s exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action be better achieved by the Community”.⁴ Thus, the Community does not always have to act even when it has the authority to do so.

¹ P. Craig and G. de Burca, EU law, text, cases and materials, The development of European Integration p 4 – 46.

² Supra.

³ Case 6/64 Costa v ENEL 1964 (ECR) 585, 593, 594

⁴ Article 5 EC part 2

As will be seen later on, the principle of subsidiarity is of great importance when studying the external relations of the European Union and its legal framework.

External powers

To understand the legal structure and the functioning of today's external powers of the Community, it is important to understand how the external competence was authorized from the beginning in the Treaty of Rome and how the amendments by different treaties later on has contributed to the development of the legal structure.

In the originally Treaty of Rome, the external powers conferred to the European Communities were limited. Article 3 (now 3.1.b) stated that one of the fundamental principles of the Community is to establish a common customs tariff and a common commercial policy towards third countries.

Regarding the common commercial policy article 113 EC (now 133) established that, "Where agreements with third countries need to be negotiated, 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 a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. In exercising the powers conferred upon it by this article, the Council shall act by a qualified majority."

The original Treaty of Rome also provided for the Community to establish association agreements. Association agreements are agreements entered by the Community with third countries and other organisations, particularly within the area of trade, and implies an association between the community and the state or the organisation in question, with reciprocal rights and obligations. The most advanced association agreement is the European Economic Association (EEA).⁵ Article 238 EC (now art 310 EC) states that "The Community may conclude with a third state, a union of states or an international organisation, agreements establishing an association involving reciprocal rights and obligations, common actions and special procedures."

After the Treaty of Rome the external competence of the Community has developed and been modified by the Single European Act, Treaty of Maastricht and the Treaty of Amsterdam.

The Treaty of Maastricht offered important amendments. Article 111 EC, gave the Community authority to enter international monetary agreements for the introduction of a single currency and article 177 established authority

⁵ P. Eeckhout, External Relations of the European Union, Association Agreements, p 103-106

to enter agreements in the field of development cooperation. Moreover, article 151.3 on culture, article 152.3 on public health, article 155.3 on trans-European network and article 174.4 on the environment concerned provisions conferring competencies for the Community to co-operate with third states and international organisations.

Article 111 and 177 and related articles will be discussed in the next chapter.

The amendments to the EC treaty after the Treaty of Amsterdam also contained development in the area of external competence. The most important change was the amendments made to the common commercial policy in the new article 133.5 EC. The article provides for the Council to enlarge the community's external competence within the common commercial policy to cover agreements on services and intellectual properties.

Expressed external competence

The Community shall act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein.⁶ In the famous case Costa v. ENEL, the court expressed the matter of attribution of powers in the following way,” By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity, and capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves”.⁷

Express powers are powers conferred expressly in a provision of the Treaty. It is always important to interpret the expressed external articles in the light of the practise of the Council and the case law from the Court of Justice.⁸

Today the EC Treaty contains of, besides art 133 and 310, four provisions explicitly conferring power to enter agreements for the purpose of organising international cooperation. The first two, article 170 on cooperation in community research, technological development and demonstration and article 174 (4) EC on cooperation in environmental matters, where both added to the Treaty by the Single European Act (SEA). The other two provisions, article 111 (3) EC on external aspects of monetary policy and article 181 on development cooperation where added by the Treaty of Maastricht.

Articles 111, 174, 170 and 181 make explicit what the authors of the original Treaty chose not to spell out, namely that the powers being conferred in a given field of activity may where appropriate be exercised through international cooperation.

Article 133 (5) EC and article 181 EC can be classified as dedicated external relations provisions.⁹ However, these articles do not reflect the range and the political and economic importance of the Community’s present activities. A perfect example of the need of an adjustment is the fact that there is no article in the Treaty authorising payments aid or technical assistance to countries other than developing countries. In this situation, the

⁶ Article 5 EC part 1

⁷ Case 6/64 Costa v. ENEL 1964 (ECR) 585, 593, 594

⁸ I.MacLeod, I.D.Hendry and S Hyett, The External relations of the European Communities, The powers of the Communities, p 45

⁹ Dashwood, A, The attribution of External Relations Competence, p 122-124

way to find a legal basis is normally by turning to article 308¹⁰. This article establishes that if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously, on a proposal from the commission and after consulting the European Parliament take the appropriate measures.

However, turning to article 308 in situations of payments aid or technical assistance to countries other than developing countries might not be a way out since the action might not be classed as being “in the course of the operation of the common market”. Thus, a lack of expressed external articles, covering the activities of the Community action today, is definitely found.¹¹

So far, it is easy to see that the treaty shows limits and vagueness when it comes to expressed external competence for the Community with regard to all the areas in which the Community takes action internationally. The challenge for the ECJ has been to establish, in an order based on the attribution of powers, competence for the Community to enter international agreements in circumstances where no such competence can be found in the Treaty provisions. It has been in the hands of the Court to develop the interesting and important doctrine of implied external powers.

Implied powers

The Treaty contains no general principle establishing the explicit international capacity of the Community. The only established competence is the ability to enter into international agreements with third countries or international organisations in specific policy areas. However, in the case of the policy areas central to the objectives of the Treaty, such as the internal market, fisheries, agriculture, and social policy, there is no explicit authorisation for the Community to take action internationally¹².

The Community has only the powers conferred on it¹³. In Opinion 2/94, discussed later on, the Court made clear that attribution of power is as necessary for international actions as it is for internal community actions because international agreements become part of Community legal order once the agreement enters into force.¹⁴

¹⁰ Article 308 EC

¹¹ A. Dashwood, External Relations provisions of the EC Treaty, The Attribution of External Relations Competence, p 123

¹² A. Dashwood, International Law aspects of the European Union, Implied External Competence of the EC, p 115

¹³ Opinion 2/94 of 28 March 1996 on the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1996 (ECR) I-1759, para 23

¹⁴ Opinion 2/94, para 24

The reasoning so far does not lead to the result that the Community is not at all able to enter into international agreements with third countries or with international organisations in policy areas where the Treaty is not providing an explicit right to take such action. The following chapters concentrate on the important case law that established and developed the principle of implied powers and made history in the field of external powers.

2.1.1 The ERTA case

The ERTA case¹⁵ is the first case in which the Court admitted that the Community enjoys implied external competencies. The ERTA case is important not only due to the theory of implied powers but also because of the theory of the community's exclusivity to act in areas where it is found to have implied external competence.

The case deals with the international agreement regulating the work of personnel engaged in international road transport and the question in the case was if the European Community or the European Member states were to conclude the agreement in question.

The Commission argued that the Community was able to conclude the agreement even though the Treaty did not contain any explicit provision that authorised the action. The agreement concerned regulations on transport, a subject of which the community enjoys the internal competence according to article 71 EC. The community is responsible for the aim of the common transport policy and enjoys internal competence on the matter. Therefore, the community cannot be excluded to act internationally.¹⁶

The Council opposed this argument and said that the power for the Community to conclude the agreement can only arise from an express power in the Treaty and referred to the important principle of attribution of powers in which the community only has the power that have been conferred upon it.¹⁷

The court concluded that in the absence of specific provisions of the Treaty relating to the negotiating and conclusion of international agreements in the sphere of transport policy, one must turn to the general system of the Community law in the sphere of relations with third countries. Article 281 provides that the Community shall have legal personality. In the field of external relations, it means that the community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in part one of the Treaty. Since art 281 belongs to chapter six of the Treaty, general and final provisions, and supplements chapter one,

¹⁵ Case 22/70 Commission v Council, ERTA 1971 (ECR) 263

¹⁶ Case 22/70, para 6-8

¹⁷ Case 22/70, para 9-11

the Court argues that the placement of article 281 means that the article must be read in conjunction with the general principles set out in the treaty. Since the regulation was a transport regulation, the Court made reference to chapter one article 3 of the Treaty in which transport is expressly mentioned as being one of the areas in which a common policy shall be adopted. Consequently, art 3 should be read in conjunction with article 281.¹⁸

To summarize the reasoning by the Court of Justice the result is that the community enjoys capacity to enter international agreements necessary to fulfil the obligations of the Treaty listed in part one of the Treaty. However, the court stressed that it is important that regard must be had to the whole scheme of the Treaty and no less than to its substantive provisions, when determining the particular case in which the community has authority. Authority may equally flow from other provision of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.

The Community's legal personality entails recognition of its international capacity. Article 281 therefore does not refer only to the cases in the Treaty where the Community expressly is authorised to act internationally but the external EC competence may also be impliedly conferred. However, it is a must to identify a specific legal basis for any external action, which means that it must be possible to point at a specific treaty provision or act of an institution by which the implied authorisation is given.¹⁹

Another interesting and important aspect of the ERTA case concerns the following statement from the Court:

"In particular each time the Community, with a view of implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever forms these might take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect these rules". By this statement, it seems that each time that the Community uses its implied powers, they turn exclusive. The court based its reasoning on the principle of loyalty in article 10 EC, which provides that the member states have a duty of loyalty towards the community. The principle is necessary to achieve the objectives of the Treaty and for the Member states not to jeopardize the attainment of these objectives.²⁰

As can be seen, the ERTA case did not only establish the principle of implied powers but also the theory of exclusivity in areas where the Community is found to have implied external power. The latter establishment by the ERTA case is worth studying a bit further since case law and opinions later on shows that the exclusivity by the Community is limited.

¹⁸ Case 22/70 para 12-17

¹⁹ A. Dashwood, International law aspects of the European Union, Implied External Competence of the EC, p 116

²⁰ Case 22/70 para 17

2.1.2 Kramer

The courts ruling in the Kramer²¹ case gave the Community's external exclusivity from the ERTA case a limited and narrower definition. It also answered one of the question that had been left out in the ERTA case, namely whether implied external competence might arise in circumstances other than where the corresponding internal competence had already been exercised?

Kramer concerned the North East Atlantic Fisheries Convention, an international agreement aimed at ensuring the conservation of fish stocks in the North East Atlantic Ocean. In accordance with decisions in this convention, The Netherlands took measures to restrict fishing for the purpose of conservation of the resources of the sea. Some fishermen failed to follow the restriction and was prosecuted. In their defence, they claimed that the Netherlands no longer had the power to participate in the operation of the Convention because the power belonged exclusively to the Commission.²²

The court started by examining the community's competence to act in the field of fishing conservation measures. By different regulations and articles from acts of accessions, the Court concluded that the Community had the power on the internal level to take any measures for the conservation of resources of the sea. The court also concluded that the only way to preserve the resources of the sea was through a system of rules binding on all states concerned, including non-EU member states. Thus, the community had authority to enter into international commitments for the conservation of the resources of the sea.²³

Nevertheless, the authority of the Community to enter into international commitments in this regard did not mean that The Netherlands no longer had the authority to adopt conservation measures. The Community had not yet fully exercised its functions in the matter on the internal level. Therefore, the member states were able to continue carry out its tasks, though, under a duty to use all political and legal means at their disposal in order to ensure the participation of the Community in the Convention.²⁴

Kramer shows that implied external competence might arise in circumstances where the Community had not yet fully exercised its rights on the internal level. The case can be comparable to the ERTA case in the way that the right for the Community to conclude international agreements was based not only on relevant treaty provisions but also on Community legislation in whole. The court analysed the relevant provisions of

²¹ Joined Cases 3, 4 and 6/76 Kramer 1976 (ECR) 1279

²² Joined Cases 3, 4 and 6/76 Kramer, para 1-11

²³ Joined Cases 3, 4 and 6/76 Kramer, para 30-33

²⁴ Joined Cases 3, 4 and 6/76 Kramer, para 44-45

community law and concluded that such power included fishing on the high seas and not only in the waters of the Member states. The only way to ensure a conservation of fishes is by means of an international system involving not only member states but also non-member states.

However, later cases on fish conservation are important to mention before leaving the Kramer case. In Commission v. United Kingdom in 1979, it was established that member states were no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. Article 102 of the act of accession and its expiry on 1 January 1979 meant, according to the courts examination, that measures relating to the conservation of the recourses of the sea belonged fully and definitely to the Community. Thus, the community's competence in this field had become exclusive.²⁵

2.1.3 Opinion 1/76 – The principle of parallelism

The ERTA case made history but left many questions concerning implied powers without answers. Some of the gaps were filled in by the case Kramer and another gap was to be filled in by Opinion 1/76.²⁶

In Opinion 1/76 the issue was the Community's participation in arrangements for the control of river traffic on the Rhine and Moselle. It was within the community's internal competence to regulate inland waterway traffic by means of its powers in the area of transport, but no such measures had been adopted. Accordingly, the case can be comparable to the Kramer case. In the circumstances of the case, it was necessary to ensure that Switzerland also participated in the scheme under consideration so the question was whether the community could conclude the agreement with Switzerland on basis of its internal powers without having first adopted internal measures.

The court pointed out in its decision that the objective of the agreement in question was to rationalize the economic situation of the inland waterway transport industry. This is doubtless an important factor in the common transport policy according to article 3 of the Treaty.²⁷

However, the power to conclude the agreement was not expressly laid down in the Treaty. The court started by referring to the ERTA principle; "authority to enter into international commitments may not only arise from an express attribution from the treaty, but equally may flow implicitly from its provisions."

The court argued that whenever community law has created for the institutions of the Community powers within its internal system for the

²⁵ Case 804/79 Commission v. United Kingdom, Air transport 1981 (ECR) 1045

²⁶ Opinion 1/76 Draft agreement for the laying up Fund for Inland Waterway vessels 1977 (ECR) 741

²⁷ Opinion 1/76, para 1

purpose of attaining a specific objective, the Community has authority to enter into international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection. This is particularly so in all cases in which internal power has already been used in order to adopt measures that come within the attainment of common policies. It is however not limited to that eventuality. Although the internal community measures are only adopted when the international agreement is concluded and made enforceable, the power to bind the Community against third countries nevertheless flows by implication from the provisions of the treaty creating the internal power and in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the community.²⁸

According to above, the court bases its conclusion on the fact that community participation in the agreement was “necessary for the attainment of one of the objectives of the community”. Even in absences of adopted internal measures, the power to enter and bind the community against the third country in question flows implicitly from the provisions in the treaty creating the internal power.²⁹

Opinion 1/76 has been referred to as the principle of “parallelism”. The principle, by definition, means that internal power goes parallel with the external. According to some authors, this is a misleading definition of the relationship between internal and external powers since parallelism can be recognised as things running alongside each other without meeting. It is of great importance that the internal and external competence are connected and that they both exist to serve the same objective³⁰

2.1.4 Opinion 2/91 – International Labour Organisation

Opinion 1/76 continued to be discussed in the courts Opinion 2/91³¹ concerning the convention on the international labour organisation (ILO). Some provisions in the convention regulate the safety when using chemicals at work. The question in the case was whether the community enjoyed competence to conclude the convention and whether such authority was exclusive. The Court started by stating that the community had external authority to enter international agreements necessary for the attainment of the internal objectives even in the absence of express provisions. This is so when community law has created for the institutions of the community powers within its internal system for the purpose of attaining specific

²⁸ Opinion 1/76, para 2-4

²⁹ Opinion 1/76, para 3

³⁰ A. Dashwood, International Law aspects of the European Union, Implied external competence of the EC, p 120

³¹ Opinion 2/91 ILO Convention No 170 concerning safety in the use of chemicals at work 1993 (ECR) 1061

objectives.³² The agreement in question belonged to the field of “social policy”. If, in accordance with Opinion 1/76, the external action, in this case concluding the convention, is necessary in order to attain the internal objective, social policy, then the community enjoys external competence.

The court also looked at the way in which the Community uses its competencies on the internal field and stated that the community exercise its internal competence in the field of social policy by using minimum measures. This is so also within other fields such as environmental protection and consumer protection. According to the principle of subsidiarity the Member states are allowed to regulate in the above three areas to the extent that is not below minimum standards set up by the Community. Accordingly, member states are allowed to legislate and conclude agreements in the area of social policy as long as the agreement and legislation is not below minimum standards. The conclusion is that the community is left with a limited number of exclusive external competences in the field of social policy.³³

Above reasoning shows a possibility to divide the implied external competence into two different questions. The first question to answer is if the community either explicitly or implicitly enjoys competence to enter the international agreement. If the community enjoys a right implicitly to conclude the agreement, the second question is what type of area it concerns. Depending on the answer, it is to be decided if the competence is exclusive or shared.

The participation by the Community in the ILO will be further discussed in chapter 4.

2.1.5 The Opinion 1/94 – General Agreement on Trade in Services

The principle of parallelism from Opinion 1/76 was modified in Opinion 1/94.³⁴ This case concerned the Community’s participation in General Agreement on Trade in Services (GATS). The dispute arose from provisions in the agreement concerning the right of establishment and the freedom to provide services.

The commission argued that participation in this agreement was necessary to ensure the coherence of the internal market and said that participation in international trade could not be left out. This as such could serve as an argument for an exclusive competence of the Community. According to

³² Opinion 1/76 Draft agreement for the laying up Fund for Inland Waterway vessels, 1977 (ECR) 741

³³ Opinion 2/91, para 4

³⁴ Opinion 1/94 WTO Agreement 1994 (ECR) I-5267

principle 1/76, competence on the external field in this matter flow implicitly from internal competence conferred on the institutions since the purpose was attaining one of the objectives of the Community even though no internal rules exist.³⁵

The court opposed the first statement from the commission and argued that the wish for a unit representation can be solved by other means.

The Court also rejected the second interpretation and explained that one of the objectives of the Community, attainment of freedom of establishment and freedom to provide services for nationals of the Member states was not necessarily linked to the treatment afforded in the Community to national of non-member countries. The court said that the objectives of the provisions in the agreement did not have any specific internal market objectives. The provisions in the agreement were aimed for nationals of member states to the agreement and not only member states of the Community. The power to conclude such an agreement cannot flow implicitly from the legal provisions in the Treaty. This is so even if there are provisions in community-directives regulating the treatment of nationals from third countries. In those directives, the external provisions have the purpose to facilitate the establishment and services within the internal market and the external provisions are designed to serve that purpose.³⁶

2.1.6 Summary

ERTA established the principle of implied powers. Where no provision in the Treaty offers authority for the Community to enter international agreements, the way of finding a legal basis is by turning to the general system of the Community law. Article 281, concerning legal personality, and its placement in the Treaty recognises that the Community can enter international agreements over the whole field of objectives defined in part one of the Treaty. Authority to enter international agreements might also flow from other provisions in the Treaty and authority may be impliedly conferred. The court stressed in this regard the importance of considering “the whole scheme of the Treaty”³⁷. The fact that implied external competence might arise in circumstances where the community had not yet exercised its rights on the internal level was established in the case Kramer.³⁸

External and internal powers must be connected and run next to each other. Even in the absence of adopted internal measures, power for the Community to enter international agreements flows implicitly from the provisions in the Treaty creating the internal power. The power for the Community is as far

³⁵ Opinion 1/94

³⁶ A. Dashwood, International law aspects of the European Union, Implied external competence of the EC, p 122

³⁷ Case 22/70 Commission v Council (ERTA), 1971 (ECR) 263

³⁸ Joined Cases 3, 4 and 6/76 Kramer 1976 (ECR) 1279

as the act is necessary to attain the objectives of the Treaty. It is important in every case to evaluate if the act by the Community is necessary to attain objectives in the Treaty. If the act is not necessary to attain the objectives of the Treaty, the authority for the Community cannot flow implicitly from the provisions in the Treaty.³⁹

Regarding exclusivity, the Community might not always enjoy exclusive external competence in areas where it enjoys implied powers to act as established in ERTA. In areas such as social policy, environmental matters and consumer protection, member states are allowed to legislate and conclude international agreements with third countries as long as it is not below standards set up by the Community.⁴⁰

Having clarified the legal background and development of the external competence for the Community, the following chapters will focus on acts by the Community on a more practical level. It is time to investigate how the case law from the court of justice applies in practise and human rights together with child labour will serve as major topics. Different ways of promoting human rights and take action in the fight against child labour will be examined. In this regard the relationship between the Community and the ECHR and ILO will also be discussed.

³⁹ Opinion 1/76, Draft agreement for the laying up Fund for Inland Waterway vessels, 1977 (ECR) 741

⁴⁰ Opinion 2/91 ILO Convention No 170 concerning safety in the use of chemicals at work 1993 (ECR) 1061

3 EU and Human Rights

“Respect for human rights is one of the most fundamental and universal values of our world. All of us, in our official capacity and in our private lives, have a responsibility to promote and protect the rights of our fellow members of the human family, be that at home or elsewhere in the world”

Benita Ferrero-Waldner, EU Commissioner for External relations.

Introduction

In Stauder from 1969⁴¹ the Court established that fundamental rights form an integral part of the general principles of Community Law. Also according to case 11/70 regarding the status of the European Convention on Human Rights (ECHR) in Community law the court made the following statement: “It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories. In that regard the Court has stated that the European Convention on Human Rights has special significance”.⁴²

On internal human rights policy article 6 EC Treaty establishes that the union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community Law. The same article also establishes that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. When turning to the external human rights policies, article 1 TEU establishes that one of the objectives of the Communities Foreign and Security Policy (second pillar) is to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms. Under the first pillar article 177 EC establishes that Community 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.

⁴¹ Case 29/69 Stauder 1969 (ECR) 419

⁴² Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel, 1970 (ECR) 1125

There is no provision in the EC Treaty expressly stating that human rights is one of the Community's general objectives listed in article 2 EC and that the Community has the power to enact rules on human rights or to conclude international conventions in this field. The question to be answered is therefore where the Community can find the legal basis to take action on human rights issues. In finding the legal basis, it is first important to separate two different external actions.

The first one is the conclusion of international agreements, which aims to legislate and laying down rules or standards of human rights protection for all the contracting parties. The second one is the international agreements, which do not have human rights as objective but which are established on the condition of respect of human rights or contain cooperation in this field. Example of the first agreement is the community's accession to the ECHR and its protocols. Another example is the ILO Conventions. The second type of agreement is the bilateral agreement, partnership agreement and association agreement between the Community and the third country.⁴³

The first category of agreements is more debated and disputable than the second one. Moreover, this category does not provide a clear picture on what legal grounds to rely on, and the competence has not yet been exercised. Difficulties in finding a legal basis for these agreements, is partly due to the constitutional balance between the Community and the member states.

Human rights protection is a core element in constitutionalism. However, the power to legislate within the area of human rights has never been transferred to the EU. If it would have been transferred, the European constitution in the area of human rights would have supremacy and dominate national constitutions.⁴⁴

Even though the court stressed that there is no general power, EC participation in the negotiation and conclusion of treaties and agreements of the first category is not ruled out according to Opinion 2/94. The decision by the court in Opinion 2/94 focused on constitutional and institutional consequences of EC participation in the ECHR system and the fact that the court concentrated on those specific consequences indicate that it did not wish to build a general barrier for EC involvement with human right treaties.⁴⁵

⁴³ P. Eeckhout, External relations of the European Union, Human Rights Policy, p 470

⁴⁴ P. Eeckhout p 471.

⁴⁵ Supra.

Opinion 2/94 – European Convention on Human Rights

All Member States of the community are members to the European Convention on Human Rights (ECHR). Opinion 2/94⁴⁶ is an important judgement in this regard and explains the relationship between the Community and the ECHR.

The case concerned the European Convention on Human Rights and the possible accession by the Community to the convention. In fact, the opinion faced two important questions, first if the Community had the authority to enter the convention and secondly whether the convention could be compatible with the EC Treaty. Regarding the second question, the Court immediately announced that it did not enjoy the competence to give its opinion on the question.

Regarding the first question, the reasoning by the court followed the principle of attribution of powers, article 5 EC in the Treaty and that the Community can only act within the limits of the powers that have been conferred upon it in the Treaty. In this case, nothing in the Treaty gives the Community the authority to enact rules on human rights and nothing in the Treaty gives the Community a right to act externally within this field.⁴⁷

Turning to the ERTA principle there are no express external provisions and there are no internal provisions either that can according to principle be read in conjunction with article 281 and create an external competence. The Court goes on to see if article 308 can serve as an answer⁴⁸. Article 308 EC can be seen as a resort for the Community when no other articles are applicable. The Court states that that article cannot serve to give the Community new areas in which it can act externally when it does not have the competence to do so.⁴⁹ Having established this, the conclusion is therefore that the Community does not have the authority to enter the European Convention on Human Rights without going beyond article 308 EC.

The court does not deny in the opinion the importance of human rights within the Community. However, the Opinion expressed that an accession to the ECHR would signify a substantial change for the institutions of the Community. In particular, since by signing the convention, the Community

⁴⁶ Opinion 2/94 on the Community's accession to the European Convention on Human Rights, 1998, (ECR) 1759

⁴⁷ Supra.

⁴⁸ Article 308 EC – For explanation see page 8.

⁴⁹ Opinion 2/94.

would accept and subordinate itself under a new international institutional system.⁵⁰

However, there is no doubt that the ECHR enjoys a status in the Community, although not having the Community as a member.

The debate about accession to the ECHR by the Community is still, 12 years later, on the table and has now a more political intensity. In Warsaw 2005, 46 heads of states and Government of the Council of Europe's member states expressed their wish for the Community to accede to the ECHR. The primary reason was consistency of human rights protection in Europe.⁵¹

According to Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg and his report on the subject, the ECJ treats the judgements from ECHR as forming part of EC-law. He also means that the membership of the European Union in the ECHR will not affect the relationship between the EU and its member states, as speculated. Nor will it lead to any subordination by the European Union to the Council of Europe. Accession will "subject the EU institutions to that external monitoring of compliance with fundamental rights which already applies to institutions in the Council's member states". As well, it will also "allow the EU to become a party in cases directly or indirectly concerned with community law before the European Court of Human Rights". Governments of the member states are by Jean-Claude Juncker urged to act under article 48 of the Treaty of the European Union⁵², and submit to their parliaments, in protocol form, a decision paving the way for EU accession to the ECHR.⁵³

⁵⁰ Supra.

⁵¹ Council of Europe – European Union, "A sole ambition for the European continent" Report by Jean-Claude Juncker, Prime minister of the Grand Duchy of Luxembourg

⁵² Article 48 EC

⁵³ Council of Europe – European Union, "A sole ambition for the European continent" Report by Jean-Claude Juncker, Prime minister of the Grand Duchy of Luxembourg.

4 EU and the International Labour Organisation

Introduction

There are no provisions in the Treaty that generally regulates the possible Community membership of an international organisation. Article 302 EC instructs the Commission “to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialized agencies as well as to maintain such relations as are appropriate with all international organisations” and Article 304 EC states, “the Community shall establish close cooperation with the Organization for Economic Cooperation and Development. Pure membership in international organisation is not mentioned in those provisions.

However, in Opinion 1/76 the court expressed that the Community may exercise its powers, in the external sphere, through accession to an organization, which deals with matters coming within those powers.⁵⁴

The International Labour Organisation is the UN specialized agency, which seeks the promotion of social justice and internationally recognized human and labour rights. It is an important organisation in the fight against child labour. The ILO does only allow states to become members and despite the Community's significant competences and legislative activity in the field of social policy, it is not a member to the organisation. Since the ILO deals with social policy matters, one of the objectives of the Community, the competence might be shared between the Community and the member states, but it may also be exclusive enjoyed by the Community. Social policy matters belong to the area where the Community can use minimum measures and some discretion is thereby left to the member states.⁵⁵

As stated above some ILO conventions might cover areas falling exclusively within the competence of the Community. This creates a problematic situation, which is regulated by Council decision of 22 December 1986. The council decision authorise the commission to negotiate. However, the Council decision does mean that the Community has the competence to ratify. Since the member states have transferred their powers to the Community, they do not have the power to act internationally in situations where the Community has exclusive competence. At the same time, the Community cannot make use of its exclusive competence since the

⁵⁴ Opinion 1/76, Draft agreement for the laying up Fund for Inland Waterway vessels, 1977 (ECR) 741, para 5

⁵⁵ P. Eeckhout, External relations of the European Union, Social Policy, p 125-126

accession to the ILO constitutive treaty is only for national states.⁵⁶ So what happens with the ratification when the ILO Conventions covers matters falling partly within the community's exclusive competence?

In Opinion 2/91 the court stated that the Community must conclude an ILO convention "through the medium of the member states" in situations where the Community is not in a position to exert its exclusive competence. Thus, member states must act as agents for the Community on basis of a competence, which they do no longer have. The general duty of cooperation in article 10 EC serve as justification.⁵⁷

The decision by the Council, authorising the Community to negotiate in this situation, has not yet been implemented since EC member states normally contests the existence of an exclusive competence of the Community.⁵⁸

Another situation might occur where the ILO convention covers matters falling partly within the exclusive competence of the Community and partly within the exclusive competence of the Community. This situation is less problematic since the obligation for the member states to ratify, as agents for the Community, cannot be derived from EC law. Here the competence partly belongs to the member states and the situation cannot be justified by the duty of cooperation in article 10. In these situations member states will have their own possibility to ratify or not.⁵⁹

Today the community enjoys observer status, as in the participation in the UN, and the Commission represents the Community and it participates in conferences without a vote. Normally the member state holding the presidency speaks on behalf of the European Union. Member states may express their own position on specific issues but of course, this is not as strong as standing united.⁶⁰

Incompatibility and difficulties

A critical aspect of the relationship between the ILO and the Community, and maybe a result of the different and sometimes difficult ways for the Community to take action in the ILO, is the risk of incompatible legislation. ILO Convention No 138 concerning child labour and the minimum age for workers might serve as an example. This convention might be inconsistent with community legislation. Council Directive 94/33/EC⁶¹ on the protection

⁵⁶ Council Decision of 22 December 1986 on the authorization of the Commission to negotiate in ILO matters covering areas exclusively enjoyed by the Community.

⁵⁷ L. Cavicchioli, The European Community as an actor in International Relations, The relations between the European Community and the International Labour Organisation, p 265-266

⁵⁸ L. Cavicchioli, p 265

⁵⁹ Supra.

⁶⁰ L. Cavicchioli, p 267

⁶¹ Council Directive 94/33/EC, on the protection of young people at work. (1994)

of young people at work also concerns child labour and refers to international labour standards. The directive contains a lower level of protection for young workers than Convention No 138. This as such is not a problem since the directive is based on article 137 of the EC Treaty and gives the Council power to adopt minimum requirements. Member states are thereby not prevented from adopting stricter standards. A more debatable and interesting fact is that Convention No 138 is included in the group of ILO conventions whose implementation is a precondition for developing countries to obtain favourable trade preferences. Thus, it means that developing countries are required to implement a higher standard for young workers than the minimum standard imposed on the EC member states.⁶²

The lack of clarity in many situations regarding the right for the community to take part and exercise an active role in ILO activities and the risk of incompatible legislation, might lead to negative consequences such as justification for EU member states not to ratify ILO conventions. This will be further discussed in the analysis.

Having established the relationship between the Community and the ILO, and the sometimes complicated cooperation, the next chapter will discuss different ways for the Community, by its own actions, to promote human rights in third countries. Related legal framework will be presented. Both ways of working has proven to be effective. However, as will be seen later on in the analysis, the underlying idea behind these actions might also be something else.

⁶² L. Cavicchioli, The European Union as an actor in International law, The relations between the European Community and the ILO, p 264

5 Promotion of Human Rights

In the Communication from the Commission to the Council and the European Parliament 8 May 2001 on the European Union's role in promoting human rights and democratisation in third countries, three areas were identified on where the Commission could act effectively.

The first was by promoting coherent and consistent policies in support of human rights and democratisation. The second was by placing a higher priority on human rights and democratisation in the European Union's relationship with third countries and taking a more pro-active approach, in particular by using the opportunities offered by political dialogue, trade and external assistance. The final and third way was by adopting a strategic approach to the European Initiative for Democracy and Human Rights (EIDHR), matching programmes and projects in the field with EU commitments on human rights and democracy.⁶³

In the following chapters, the discussion will focus on the first two areas, namely promotion of human rights in combination with trade and dialogues with third countries.

Human Rights Clauses as a way of promoting human rights in third countries

To be effective, respect for human rights and democracy should be an integral part or "mainstream" consideration in all EU external policies. This was expressed in the Communication from the Commission to the Council and the European Parliament, 8 May 2001 on the European Union's role in promoting human rights and democratisation in third countries. The meaning is that the Community should include human rights issues in planning, design, implementation and monitoring of policies and programmes, as well as the dialogue pursued with partners both by the Commission and by the Council.⁶⁴

Dialogue with third countries together with a positive partnership with governments, support and encouragement is extremely important to uphold human rights and fundamental freedoms. However, to reach success, the third country in question must be ready to cooperate and where the country

⁶³ Communication from the Commission to the Council and the European Parliament, 8 May 2001 on the European Union's role in promoting human rights and democratisation in third countries.

⁶⁴ Supra, Ch 3

may not have genuine commitment to pursue change through dialogue and consultations, the Community considers negative measures to be more appropriate.

Human rights clauses is one way by the Community to promote human rights. The clauses are inserted into trade and co-operation agreements (including association agreements) and concluded by the community with third states. Council decision of 23 May 1995 regulates the use and application of the clauses. The clause will constitute an essential element of the agreement, thereby the name “essential element agreements”, and serves to inspire contracting parties to respect human rights, democracy and the rule of law.⁶⁵

The clause normally contains a reference to the Universal Declaration of Human Rights. The provisions in the Universal Declaration are seen as customary law and reflect general principles of law recognised by civilised nations. This is so even if the declaration is based on a UN General Assembly Resolution and is therefore not legally binding.⁶⁶

According to the Court’s judgement in the case Portugal v. Council⁶⁷ the main objective of human rights clauses is not to create new requirements and obligations on third states, but to secure the right to suspend the agreement if the other party violates fundamental human rights. The agreement between third state and the Community does not necessarily concern matters related to human rights which means that the clause will not at all make any change of the basic nature of the agreement. The suspension of the agreement will follow international customary law established in the Vienna Convention on the Law of the Treaties but with the advantage of it not being forced to follow the procedural requirements laid down in the Convention.⁶⁸

The clause does not create new standards in international human rights law but is merely reaffirming general commitments of international law that is already binding upon the Community and the other contracting party. The human rights clause is based on mutual recognition, which means that the Community itself is also committed to respect democratic principles and fundamental human rights as recognised in the Universal declaration of Human Rights.⁶⁹

⁶⁵ Commission Communication COM (95) 216 of 23 May 1995. The inclusion of respect for democratic principles and human rights in agreements between the Community and third countries.

⁶⁶ Supra.

⁶⁷ Case C-268/94 Portugal v. Council 1996 (ECR) 6177

⁶⁸ B. Brandtner and A. Rosas, Human Rights and the External Relations of the Community, An analysis of doctrine and practise, p 474

⁶⁹ B. Brandtner and A. Rosas, p 475

Legal basis for bilateral cooperation, association agreements and trade agreements

In Opinion 2/94, the Court of Justice held that there was no general EC competence to assume obligations in the field of human rights protection.⁷⁰ No Treaty provision confers on the Community institution any general power to enact rules on human rights or to conclude international conventions in this field. Since the human rights clause, as seen from above, nowadays have a primary role in the system of external relations it is time to examine on what legal ground cooperation agreements and trade agreements with human rights clauses can be concluded.

Article 181(a) EC was introduced by the Treaty of Nice and establishes that all cooperation agreements with third countries, including association agreements, should contribute to the general objective in article 181, that is to develop and consolidate democracy and the rule of law. This covers most of the Community's bilateral contractual relations with third countries.

Article 133 EC regulate the common trade policy. However, this article does not mention anything about human rights clauses.

To find out on what legal ground the Community has authority to conclude a trade agreement with third state including a human right clause it is necessary to study article 177 (2) EC regarding development cooperation in developing countries and 181a (1) regarding other third countries. Both articles speak of a “general objective” of respect of human rights, to which the respective policies (trade and development policy) must contribute. No other provision in the Treaty mentions this general objectives and the Treaty does not mention the scope of the general objective. The terms “general objective of respect of human rights” can be interpreted as if the objective goes beyond the specific policies in the articles.⁷¹

To find more guidance, it is necessary to turn to article 11(1) in the treaty of the European Union. This article establishes that “the Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be...to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”. The final part of article 11(1) uses the same

⁷⁰ Opinion 2/94 on the Community's accession to the European Convention on Human Rights, 1998, (ECR) 1759

⁷¹ P. Eeckhout, The external relations of the European Union, Human rights Policy, p 470 - 473

language as in article 177 and 181 EC. Reading this together with article 3 TEU, providing for the EU to ensure consistency of its external activities as a whole in the context of its external relations, security, economic and development policies, the conclusion to draw can be that the general objective discussed above is a general objective also in the external actions by the Community.⁷²

Based on the language in article 177(2) and 181(a) EC treaty and articles 11(1) and 3 TEU, the answer to the question if the Community has authorised power to conclude trade agreements with human rights clauses is positive.

Regarding the scope of the objective of respect of human rights and thereby the scope of the Community's power in this field is not established in the Treaty. The human rights clause has been accepted by the court in the Case Portugal v. Council, in terms of an essential element clause. Accordingly, there must be some discretion left for the institutions to further define what respect of human rights may be in a particular relationship as long as the institutions do not exercise any legislative function regarding human rights. Exercise of a legislative function brings the agreement to the first category of agreements and it would then be necessary to show that such legislative exercise is necessary to reach a specific, substantive objective of the Community as seen from above ERTA case and the Opinions that followed.⁷³

Unilateral Trade Preferences – stick or carrot?

Community actions cannot be viewed in isolation from other EU actions and the European Council has strongly encouraged the coordination and cooperation between the Commission and the Member states to impose the most uniformity actions possible. In the trade and investments sector, initiatives to promote human rights in third countries have increased and the European parliament, business partners, trade unions, and civil society organisations are key players. Trade unions are sometimes seen as “watchdogs” for international labour standards.

1968 the United Nations Conference on Trade and Development (UNCTAD) recommended the creation of a generalised system of tariff preferences (GSP) under which industrialised countries would grant trade

⁷² Supra.

⁷³ Supra.

preferences to all developing countries. The European Commission was the first to implement a GSP scheme in 1971.⁷⁴

The Community's GSP system consist of tariff reduction and includes both incentive and withdrawal measures. The Community's GSP is implemented to follow cycles of ten years and guidelines are drawn up for each ten-year period. The guideline for the period 2006-2015 was adopted in 2004. In practise, the GSP is implemented by means of Council regulations. According to the guideline 2004 a new GSP scheme was adopted on 27 june 2005 through Council Regulation 980/2005 and this regulation applies for the period 2006 until 2015.⁷⁵

The GSP system includes not only incentive measures but also withdrawal measures. Article 16 in Regulation 980/2005 for the GSP system implies that benefits granted to the third country in question can be withdrawn if the country is found to:

1. Serious and systematic violate principles laid down in core human and labour rights in certain UN and ILO Conventions.
2. Serious misuse customs controls on export or transit of drugs, or failure to comply with international conventions on money laundering.
3. Export goods made by prison labour.
4. Serious and systematic infringe the objectives of the regional fishery organizations or arrangements to which the Community is a member concerning the conservation and management of fishery resources.

The GSP system also implies "special incentive arrangements" for sustainable development and good governance. This means additional preferences granted to third countries who implements certain international standards in human rights and labour rights. These preferences are available for countries complying with the core labour standards laid down in the ILO Conventions concerning forced labour, freedom of association, elimination of child labour. The new form of special incentive arrangements, "GSP Plus", requires that the countries have signed and ratified the conventions. It is no longer sufficient that the substance of the conventions is incorporated in national legislation.⁷⁶

Environmental protection, fight against drugs and good governance are also areas in which special incentive arrangements can be granted. The special

⁷⁴ <http://europa.eu.int/comm/trade/issues/global/gsp/gspguide.htm> Trade Issues, Generalised System of Preferences, Users guide, 15 April, 2006, 10:59

⁷⁵ Council Regulation No 980/2005 of 27 June 2005 applying a scheme of Generalised Tariff Preferences.

⁷⁶ B Brandtner and A Rosas, Human Rights and the external relations of the European Community, An analysis of doctrine and practise, p 478

incentive arrangement doubles the general GSP benefit and may be granted to certain sectors and not only to entire countries.⁷⁷

One of the reasons for the GSP being very effective is the fact that the access to the EU's internal market is of great economic importance for many countries. Refusing such access, as some authors call "stick" or granting preferential terms of trade "carrot" has proven to be an effective way of exercising pressure for change.⁷⁸

Promoting human rights through import restrictions or preferences are in many cases limited by international commitments established in the World Trade Organisation. Provisions and principles in WTO prohibit different treatment of trading partners that are members of the WTO. The latest guideline from 2004 concerning the GSP period 2006-2015 establishes that the GSP scheme is an exemption to the most favoured nation principle under the GATT and it must comply with the "enabling clause" as interpreted by the WTO appellate body in the case India v. Community.⁷⁹

The most favoured nation principle in the WTO establishes that countries cannot normally discriminate between their trading partners. Grant someone a special favour and you have to do the same for all other WTO members.⁸⁰ The "enabling clause" provides that a GSP scheme must be "autonomous, non-reciprocal and non-discriminatory." It needs to be designed to facilitate and promote trade of developing countries, and to respond positively to the development, financial and trade needs of developing countries.⁸¹

The appellate body found, in a complaint from India against the Community, that WTO members are in principle allowed to grant different tariffs to products originating in different GSP beneficiaries under the condition that identical treatment is available to all similarly situated GSP beneficiaries. A WTO member which intends to grant additional tariff preferences under its GSP scheme would have to identify on an objective basis the special "development needs" of developing countries which can be effectively addressed through tariff preferences.⁸²

⁷⁷ <http://europa.eu.int/comm/trade/issues/global/gsp/gspguide.htm> Trade Issues, Generalised System of Preferences, Users guide, 2006-04-15, 10:59

⁷⁸ P. Eeckhout, External Relations of the European Union, Human Rights Policy, p 481

⁷⁹ Council Regulation No 980/2005 of 27 June 2005 applying a scheme of Generalised Tariff Preferences.

⁸⁰ www.wto.org, Understanding the WTO, Principles of the trading system

⁸¹ GATT Contracting parties; Decision of 28 November 1979 L/4903 on the most favoured nation treatment in favour of developing countries.

⁸² WT/DS246/5 of 6 March 2003 European Communities, Conditions for the Granting of Tariff Preferences to Developing Countries.

Corporate Social Responsibility

At the World Economic Forum, 31 January 1999, UN Secretary-General Kofi A. Annan challenged world business leaders to “embrace and enact” the Global Compact⁸³ both in their individual corporate practises and by supporting appropriate public policies. Today many companies from all over the world, international labour and civil society organisations are engaged in the Global Compact, working to advance ten universal principles in the areas of human rights, labour, environment and anti corruption.⁸⁴

The first and second principles of the United Nations Global Compact states that “business should support and respect the protection of internationally proclaimed human rights within their sphere of influence and they should make sure they are not complicit in human rights abuses”. Principle five of the Global Compact establishes the abolition of child labour.

Council Resolution 2004/2151 on the annual report on human rights in the world and the EU’s policy on the matter stresses the responsibility of companies according to their “Corporate Social Responsibility”. They are encouraged in the resolution to adopt minimum standards of human rights. Enterprises working on the international market are in a strong position of influencing governments in the global market and are in a very good position of promoting, protecting and secure the rights of workers and people employed by their suppliers.⁸⁵

Companies are also encouraged and urged by the Council not to operate in a state where unilateral and regional sanctions or trade embargoes have been imposed on account of human rights concerns.⁸⁶

⁸³ UN Global Compact, 31 January 1999

⁸⁴ www.globalcompact.org United Nations Global Compact, 2006-05-10, 17:36

⁸⁵ European Parliament Resolution 2004/2151On the annual report on human rights in the world and the EU’s policy on the matter.

⁸⁶ Supra.

6 Child labour

Introduction

In the most recently adopted European Parliament Resolution on child labour, the definition of child labour is spelled out as being any forms of work carried out by children under the age of 18 that interferes with the child's education or is harmful to the child's health or physical, mental, spiritual moral or social development. However, there is no universally accepted definition of "child labour". Varying definitions of the term are used by international organisations, non-governmental organisations, trade unions and other interest groups, and writers and speakers do not often specify what definition they are using.⁸⁷

About 352 million children are today victims of child labour and most of them work in the agricultural sector. 61% of the world's child labour is found in Asia.⁸⁸

The Resolution, stresses the European Union's commitments to the "Millennium Development Goals", which for instance provide for the elimination of poverty before year 2015.⁸⁹ Poverty hinders the right to education and normally child labour and poverty goes hand in hand. It also calls for countries to keep on ratifying the UN Convention on the rights of the child and its optional protocol as soon as possible and urges the EU member states that have not yet ratified the ILO Convention No 138 and 182 to do so.⁹⁰

Moreover, the resolution implies new initiatives and incentive measures in the fight against child labour. The Commission should take into account the core labour standards as a permanent element in bilateral consultations with third countries. Fighting child labour in third countries is said to be a political priority for the European Union and the parliament recommends that the Commission include in all bilateral trade agreements and strategic partnerships, a clause on the implementation of core labour standards, including the banning of child labour, with a special reference to respect for the minimum age for admission to employment.⁹¹

It stresses the importance that EU's trade policy is in conformance with promotion of the rights of the child. A new proposal is put forward which

⁸⁷ European Parliament Resolution 2005/2004 on the exploitation of children in developing countries with a special focus on child labour. (INI)

⁸⁸ www.childlaborphotoproject.org/childlabor.html, Child labour Global Village, 1 March 2006, 11:06

⁸⁹ European Parliament Resolution 2005/2004, para 22

⁹⁰ ILO Convention No 138 concerning minimum age for admission to employment, ILO Convention No 182 on the worst forms of child labour.

⁹¹ European Parliament Resolution 2005/2004, para 8

establishes a scheme for labelling of goods imported into the EU. To ensure that products are produced without the use of child labour at any point in the production and supply chain they should be labelled “child labour free”. It is nevertheless important that the labelling complies with the rules set out in the World Trade Organisation and that it does not constitute any form of discrimination of goods.⁹²

A new proposal from the parliament is for the Commission to establish a group of Commissioners for fundamental rights. The protection and promotion of children’s rights and the elimination of child labour should be one of their top priorities.⁹³

The finalisation of the Strategic Partnership for Development Cooperation with the ILO is important to conclude. In the cooperation the elimination of child labour, particularly among the youngest age-groups, is the topmost priority for joint activities.⁹⁴

Finally, the Commission is by the parliament also encouraged to investigate the creation of appropriate EU-level legal safeguards and mechanisms, which identify and prosecute EU-based importers who import products, which allow the violation of the core ILO conventions, including the use of child labour, in any part of the supply chain. The Commission is therefore encouraged to explore the possibility of creating incentives for EU importers who carry out regular and independent monitoring of the manufacture of their products in all third countries forming part of the production chain. Companies that continuously and persistently use child labour in any part of the production and supply chain must be identified and the parliament suggest a list available for EU importers.⁹⁵

Parliament Resolution on child labour in the production of sports equipment

FIFA, Federation of International Football Association, and many large sporting goods companies signed in 1998 a contract prohibiting the use of child labour in licensed products. Despite this many young children, under the minimum age, in for example India and Pakistan produces footballs, some even labelled “no child labour used”.⁹⁶

⁹² European Parliament Resolution 2005/2004, para 7

⁹³ European Parliament Resolution 2005/2004, para 12

⁹⁴ European Parliament Resolution 2005/2004, para 15

⁹⁵ European Parliament Resolution 2005/2004 para 43

⁹⁶ http://www.fifa.com/en/fairplay/index/0_1255_113478.00.html?articleid=113478 FIFA’s fight against child labour 18 April 2006, 17:22

The European Parliament Resolution on child labour in the production of sports equipment aims at calling on the Commission and the Member states to take action in the field of child labour and to make sure that all children are given the opportunity to education, health care and food. The resolution condemns all forms of child labour and calls for elimination especially in the football industry.⁹⁷

The resolution also calls on FIFA to make sure that no child is employed in the production of FIFA licensed sportswear and footballs and to agree on transparent, credible and independent system for the monitoring of and verification of the production in the football industry. FIFA is encouraged to make the World Cup in Germany 2006 the first international event free from child labour and in accordance with fair labour standards.⁹⁸

The resolution also urges the ILO to develop a credible and independent system in order to monitor the ILO standards in the sporting goods industry worldwide.⁹⁹

Child labour, China and the European Union

China is after the US the second biggest trading partner for the EU and also the second largest beneficiary of the EU's GSP scheme. Moreover, China is one of the countries in the world using child labour to a great extent.

On 10 June 2005 China and the European Commission concluded an agreement which will allow the European Commission to monitor and limit certain Chinese textile products until the end of 2008. The reason for concluding this agreement was mainly to cure the enormous increase of import of Chinese textile products since the beginning of 2005. The increase is a result of the quotas on textile products between 1974 and 2005 but also because of Chinas accession to the WTO in the year 2001. Sweden and Holland were the only countries in Europe opposing insertion of quotas again.¹⁰⁰

During the time without quotas on textile products, China was definitely the winner. Its export to the EU increased with 50 percent. While China was a winner, Rumania lost half of its textile export. The reason for China being a winner was the use of cheap labour costs partly due to the large amount of

⁹⁷ European Parliament Resolution on Child Labour in the production of sports equipment, 13 June 2002, para A-E

⁹⁸ Supra, para 4

⁹⁹ Supra, para 7

¹⁰⁰ http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/pr100605_en.htm Textile Sector, EU and China agree negotiated limits for textile imports, 15 April 2006, 11:26

child workers in the textile sector. However, the Chinese market offers hard competition not only because of cheap labour costs, but also due to that the market is not always a free market. Textile companies are in many cases state-run and benefit from aid.¹⁰¹

According to EU policy, Chinese companies who wish to export to Europe should respect human rights and international standards on the environment and employment. Products according to the European Parliament that are manufactured by children should be prohibited.

Not only GSP schemes serve as examples of Community action on products from China but in the fight against child labour the recently adopted European Parliament resolution plays significant importance. It is a resolution based on prospects for trade relations between the EU and China. The resolution expresses the concerns of the lack of worker's rights in China especially inadequate health and safety rules. The resolution calls on China to establish independent trade unions and to "swift action" against the use of child labour and forced labour. The resolution also aims at calling for the EU to carry on an even more intensive political dialogue with China especially on human rights matters.¹⁰²

In 1996 a human rights dialogue was initiated between the EU and China. The dialogue was interrupted in 1997 when 10 EU member states tabled a resolution on the human rights situation in China. The dialogue then continued in the end of 1997 and has since then been held twice a year. The dialogue allows the EU to channel all issues of concern (such as the death penalty, re-education through labour, ethnic minorities' rights, civil and political freedoms, individual cases, human rights and child labour etc.) in a forum where China is committed to responding. The dialogue, together with pressure from other international partners, has contributed to yield some concrete results. Visits to China by the UN Commissioner for Human Rights, signing of the UN Covenants on Civil and Political Rights, signing and ratification of the UN Covenant on Social, Economic and Cultural Rights, release of prisoners, setting up of Commission co-operation projects etc serve as examples of result. Despite success through dialogue the EU has made it clear on several occasions that it wants the dialogue to achieve more improvements in the Human rights situation on the ground.¹⁰³

The European Commission, which also takes part in the Human rights dialogue as a member of the EU Troika, is committed to use its cooperation programme to support Human Rights in China. The EU-China Legal and judicial cooperation Programme, by far the most important foreign assistance project of its kind in China, aims to supporting the strengthening of the rule of law in China. Projects aimed at empowering citizens with civil rights at the basic level, such as the EU-China Village governance

¹⁰¹ Supra.

¹⁰² Prospects for trade relations between the European Union and China, 2005/2015, (INI)

¹⁰³ <http://www.delchn.cec.eu.int/> European Commission, The European Union in the world, How do the EU and China communicate? 2006-05-10, 11:50

Programme, and projects aimed at promoting social and economic rights, are examples of ongoing and planned initiatives.¹⁰⁴

¹⁰⁴ Supra.

7 Analysis

My purpose with this thesis on the external relations of the European Union was to examine and understand the legal basis behind the different ways of acting on the international field. How the legal framework for action was structured and how the international action with regard to human rights applied in practice. During the journey I have realised that human rights is one of the external areas where the Community is active the most and it is an area where the Community holds a great deal of potential and tools for changing the world of today.

The starting idea behind the purpose was from the beginning the simple question why the Community is engaged in promoting human rights in third countries at all? The original purpose of the European Union was not to be engaged in third countries politics concerning human rights. The Community was from the beginning an entity with specifically enumerated aims, mainly of economic and commercial character.

I have now realised the strong relationship between internal actions (expressly conferred) and external actions (derived by implication). I definitely dare to say that today it is more rule than exception that the Community has become an entity endowed with the power to seek compliance with universal values in the international arena.

The legislation, for which the external relations of the community is based today, is a result of case law and sometimes complicated interpretations by the European Court of Justice. The striking breakthrough for the external relations was established by the principle of implied powers in the case ERTA. Authority to enter international agreements may be impliedly conferred from other provisions in the treaty and not only from the principle established in part one of the Treaty. The whole scheme of the Treaty should be considered in the finding of a legal basis. However, even if the ERTA case made history and the following principles and opinions contributed to the development of the legal structure for the Community, and thereby filled many of the gaps left out in the ERTA case, the explicit understanding and forms of today's legal framework for acting internationally by the Community is vague and unclear. It is wrong to deny that there is a lack of precise delimitation of community competence. No general rule regarding international action is applicable in all areas where the Union is active can be found.

Even though the Community acts in a time where the external relations are of great importance and where the external actions consist of a great part of the Community's action in total, the explicit authorisation has not developed in the same way. From what I have understood, much is due to the principle of conferred powers, one of the major basic principles of Community law.

The European Union is not yet an organisation with the structure and ruling as in a federal state.

However, when studying the problem from a greater point of view, it seems like if the imprecise nature of the external competence for the Community can be found in the difficult balance between member states leaving some of their sovereignty in the hands of the European Union and what competences exactly that has been left? It is hard to draw a precise line when it comes to external relations. The result might be an expanding competence and expanding area of work in areas where the community not always have any competence at all but where the competence to act is justified by complicated judgements by the Court of Justice impliedly conferring the powers.

However, expanding the competence for EU action might actually be what is necessary to follow the development and challenges in the world of today. But the question is doubtful whether member states are ready to give up even more. My question from the beginning undoubtedly raises further questions only for the future to answer.

The International Labour Organisation is an extensive international organisation and an important player in the fight against child labour in the world. After having examined the relationship between the European Union and the ILO it is evident that the relationship has proven to be difficult which of course leads to problematic consequences. Membership in the ILO is open for member states and the European Community only enjoys observer status. The difficulties mainly consist of a lack of cooperation between the institutions of the Union and its member states, unclear rules when the Community can act in the ILO and as a result incompatible and overlapping legislation.

The structure of the two organisations might be one explanation to the complicated way for the Community to take action. ILO with three institutions offers its member states full participation in all situations while the European Union and its participation in social policy matters sometimes only offer the member states a consultative role in the legislation process.

The search of a coherent development of EC legislation on labour matters in the ILO normative activity might be disturbed by the fact that there are still no clear rules and established practise of how to act when an ILO convention covers areas within the exclusive competence of the community.

Difficulties in cooperation might be a result of uncertainty regarding the division of competences but it might also be a result of pure lack of interest in ILO matters by European member states. This might be due to that member states assume superiority by the EU. All in all the result of today's complicated participation in one of the world's most important organisation must undoubtedly lead to a lack of dynamism of the ILO.

Regarding human rights action by the Community in third countries the Community holds great means of exerting pressure. The Community works with a global marketing on the subject human rights. By using human rights clauses and GSP schemes the Community put pressure on developing countries and third countries, that disregards human rights, to swift action. The valuable access to the European economic market is of great importance for countries outside the Union and what is called “stick or carrot” has shown to be an effective method in the fight against human rights challenges.

Human right actions by the Community can also be seen as a perfect example of an area where the Community alters the scope of EC foreign power. Since the Community by human rights clauses and GSP schemes protect human rights in the international arena, it also assumes human rights as one of the aims of the external policies. In general it thereby endorses the role of a global political actor, even in situations where the competence to act sometimes does not even exist.

The question that reaches my mind at this stage of writing is also if the Community’s trade policy and its different ways of promoting human rights in third countries actually contribute to benefit third countries in the end. Living conditions for many people in third countries and developing countries are of bad standard and there is no other way out than to send children to work and make them contribute to the family’s economy. From the democratic point of view, I question myself if the continued development in third countries actually benefits from EU holding the pointer. Today there is an intensive debate going on concerning global development and globalization. That the US and the EU are key players in this development is a fact. However, there is no doubt that governments in many poor countries do not care about working conditions and child labour, or does not have the economic stability to do so. Is the best way to change their policy to respond by granting preferences or by restricting trade? The consequence for the country that does not live up to the requirements on human rights standards is that they might consider the EU policy as just another way of discriminating their export.

In this regard, I believe it important is to further enhance and strengthen the already existing dialogue between the Community and the EU. Strong dialogues leads to better understanding and respect of the situation in third countries today and might lead to a more effective way of helping third countries to establish a society based on respect for human rights and the rule of law by themselves.

Requirements for third countries, “forcing” them not to deliver products produced by the use of child labour, meaning cheap labour costs, is an effective way of protecting its own market. The EU is definitely facing the competition from cheap labour costs outside the Union, especially from China, and has to protect its own values. In the US an American federation of trade union, AFL-CIO, published an investigation in 2001 which

established that” we welcome a closer economic cooperation with the rest of the world as long as it does not damage our members. Products produced in countries with bad labour conditions must be subject to trade restrictions such as customs or import restriction”. Maybe the same approach is applicable on the EU.

If poor countries deliver products produced by the use of child labour and are thereby hindered to export to the EU, the poor country become even more emaciated and in the end, there is no benefit from exporting at all. Moreover, I cannot be silent about the fact that when EU uses human rights clauses and GSP schemes, it might be a way of forcing third countries to apply a certain kind of policy. Restrictions against child labour sometimes meet strong objections in many families that do not have any other choice than to send their children to work. This is so despite the fact that these people are to be protected by the clauses.

Finally, from the democratic point of view the result might actually be a distorted democratic situation where poor countries allow the rich world to dictate what policies they should apply. I am doubtful whether third countries will benefit from this in the future.

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