Chapter 15
Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages

Tobias Dolle

> [. . .] The aim of our commercial policy is also to project our values with respect to human rights [. . .] with respect to the rights of workers, and they are, and they will be, an integral part of my approach with respect to trade policy.[1]

15.1 Introduction

Human Rights and Trade Agreements lie at the core of European policies. The policies are based on a long history of economic cooperation and integration in order to protect Human Rights and to establish and maintain a high level of Human Rights protection. Although recent developments have emphasized a more streamlined approach to the integration of Human Rights issues into other areas of action, the issue of Human Rights has already influenced European external policies for several decades. Thus, while certain aspects of this policy may be deemed "new," the general approach has been established for a long time. Starting point for the discussion on integrating Human Rights clauses into EU external policy was a 1977 massacre in Uganda at a time the EU had committed development assistance to Uganda but did not wish to contribute to Human Rights abuses in Uganda. More recent developments have actually shown the EU moving somewhat away from a strict approach of including Human Rights clauses in its agreements and thereby contradicting its own policy guidelines and rhetoric.

[1] Karel de Gucht, EU Trade Commissioner, 10 January 2010.

T. Dolle (✉)
Law clerk, Berlin, Germany
e-mail: tobiasdolle@web.de

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This chapter will briefly highlight the development of the integration of Human Rights clauses into European Trade Agreements, explain the *status quo*, and focus on the existing advantages and disadvantages.

15.2 Human Rights Clauses in EU Trade Agreements

The European Union has been a particularly strong proponent of Human Rights. This is reflected by a long history of political and philosophical debate on the issue across the European nations. The foundation of the European Communities and its evolution towards the European Union was in several ways a direct reaction to the horrific events of World War II, and according to Article 2 of the Treaty on European Union, the EU is founded on the core values "of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights." Founded on these values, the EU aims at aligning its actions with them and at acting accordingly. Article 3 of the Treaty on European Union states that the EU "[. . .] shall uphold and promote its values and interests [. . .]" and "[. . .] shall contribute to [. . .] the protection of human rights [. . .]." According to Article 21 of the Treaty on European Union, the external actions of the EU "[. . .] shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." Consequently, the EU has to take account of the issue of Human Rights when dealing with other countries and negotiating and concluding international agreements.

One way to advance this policy objective of advancing Human Rights and democracy in the wider world has been the inclusion of Human Rights clauses in agreements negotiated and concluded with third parties. The EU is one of the rare examples around the world to include general Human Rights clauses in its agreements. Another prominent example is the inclusion of clauses concerning worker's rights in free trade agreements, a practice often applied by the United States.

Still, the EU remains the strongest proponent of the inclusion of Human Rights clauses or references to Human Rights in its agreements. This has been affirmed by EU Trade Commissioner Karel de Gucht when he stated that "the aim of our commercial policy is also to project our values with respect to human rights, with respect to the protection of the environment, with respect to climate change, with respect to the rights of workers, and they are, and they will be, an integral part of my approach with respect to trade policy."[2] The EU has been pursuing this approach for quite some time now and has always encountered difficulties. A look back at the

[2] Minutes of the hearing of Karel de Gucht, then Commissioner-designate for Trade at the International Trade Committee of the European Parliament, 10 January 2010, p. 20.

evolution of the EU approach to include Human Rights clauses in Trade Agreements will lead the way to an analysis and evaluation of this strategy.

15.2.1 The EU and Free Trade Agreements

The European Communities were relatively reluctant to conclude free trade agreements with third countries, especially after the founding of the WTO and prioritizing its efforts on the multilateral level. Agreements were concluded, though, with neighboring countries and especially with countries expected to join the Communities at some point. This fundamentally changed with the slowdown and potential impasse of the WTO negotiations. The EU and nearly every other state or regional bloc began to negotiate and conclude free trade agreements with partner countries around the world. By now it is hard to estimate an exact number of free trade agreements as negotiations are ongoing and agreements are nearly concluded on a daily basis. By January 2013, more than 540 agreements were notified to the WTO (counting goods and services separately).[3] The EU officially observed a moratorium from negotiating bilateral agreements from 1999 to 2006 after the 1995 founding of the WTO and devoted all its efforts into the multilateral level.[4]

While negotiations do continue at the WTO, many countries are mostly devoting their efforts into negotiating bilateral free trade agreements and thereby circumventing the WTO and also the impasse in WTO negotiations.

15.2.2 Background of EU Human Rights Clauses

Human Rights clauses in EU Free Trade Agreements do have a considerably long history and have evolved over time. A closer look at their development will help the later analysis and evaluation of this approach.

15.2.2.1 Reason

While the EU has probably never been involved in as many parallel negotiations of bilateral free trade agreements as right now, the debate about including Human Rights clauses goes back to the 1970s. In 1977, a massacre took place in Uganda.[5] The EU relations with Uganda were governed by the Lomé I Convention, a treaty

[3] WTO Website, Trade Topic, Regional trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm. Accessed 28 July 2014. Not all agreements concluded are notified though.

[4] Ahearn (2011), p. 2.

[5] Hoffmeister (1998), p. 11 (with further references).

concluded by the EU with the so-called African, Caribbean and Pacific (ACP) states. The EU had committed funds and payments of development aid and withdrew those funds as a reaction to the massacre in order to avoid contributing (financially) to the Human Rights violations.[6] The withdrawal of the payment naturally had a second objective, coercing Uganda to end the Human Rights violations. A direct consequence of the events in Uganda were the so-called Uganda Guidelines stating that "any assistance given by the Community to Uganda does not in any way have as its effect a reinforcement or prolongation of the denial of basic human rights to its people."[7]

Thus, the debate about the inclusion of Human Rights clauses in bilateral trade agreements did not constitute a decision by the European Communities to proactively advance its Human Rights values but a defensive reaction to concrete Human Rights violations in order to avoid contributing to the Human Rights violations. The debate that followed focused on this approach of avoiding EU involvement in Human Rights violations in third countries. There did exist certain legal problems, as there was no legal basis for the withdrawal of such payments or the suspension of the treaty or parts of the treaty. Consequently, the EU wanted to include a legal basis in the Lomé Agreement for suspending the agreement in case of such cases of Human Rights violations.[8] The debate remained mostly theoretical during the 1980s though the Lomé IV Convention, signed in 1989, did contain a reference to Human Rights, although without any potential legal consequences in case of Human Rights violations.[9] It was not until a 1990 cooperation agreement between the EC and Argentina that a more meaningful Human Rights clause was included.[10] Despite the discussion after the Uganda massacre, the Human Rights clause was included at the request of the Argentinian side.

Since the early 1990s, EU bodies have affirmed the EC's commitment to Human Rights and emphasized a "positive approach" favoring dialogue and declaring sanctions the last resort. Human Rights clauses became standard in agreements concluded by the European Communities; in May 1992, the EC established this approach by declaring that respect for democratic principles shall be "an essential part of agreements between the EC and the Conference on Security and Cooperation in Europe (CSCE) countries."[11] The first agreements concluded with regard to

[6] Bartels (2008), p. 2.

[7] "Uganda Guidelines" cited in Bartels (2008), p. 2; Hoffmeister (1998), p. 11.

[8] Bartels (2008), p. 6; Hoffmeister (1998), pp. 13 f. and 21 ff.

[9] Miller (2004), pp. 11 and 12; "Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries," 23 May 1995 COM(95) 216, p. 2; Hoffmeister (1998), pp. 38 ff.

[10] Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, Official Journal of the European Communities, 26 October 1990, L 295: Article 1 (1): "Cooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina." Hoffmeister (1998), pp. 100 f.

[11] Miller (2004), p. 13; Hoffmeister (1998), pp. 117 ff.

this approach included a similar provision. An Agreement between the European Economic Community and the Republic of Albania on trade and commercial and economic cooperation affirms in its Article 1: "Respect for the democratic principles and human rights established by the Helsinki Final Act and Charter of Paris for a new Europe inspires the domestic and external policies of the Community and Albania and constitutes an essential element of the present agreement."[12] This provision needs to be read with regard to Article 21 (3), which states that "The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present Agreement."

This constitutes an important and innovative development, especially considering the possible legal consequences. The wording makes reference to Article 60 (3) lit. b) of the Vienna Convention on the Law of Treaties (VCLT).[13] It states that "A material breach of a treaty, for the purposes of this article, consists in: [...] (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty." By designating the Human Rights clause an "essential element" of the treaty, the contracting parties are enabled to terminate "the treaty or suspending its operation in whole or in part" according to Article 60 (1) of the VCLT. Without any further explanation in the treaties themselves, the EC has created a strong legal basis for reaction to Human Rights violations. As this provision was also used in agreements with the Baltic States, it came to be known as the "Baltic clause."[14] This clause evolved into the "Bulgarian clause,"[15] which allowed for greater flexibility and enabled the parties to "take appropriate measures" but only after having had recourse to the Association Council and a political dialogue. This clause was integrated into agreements with Vietnam, South Korea, and Israel, as well as Association Agreements with Tunisia and Morocco and the revised Lomé IV Convention (all concluded in 1995).

It took the EC nearly 20 years to achieve an adequate solution for the question of reacting to Human Rights violations, but the EC did arrive at a firm clause enabling reactions.

15.2.2.2 Formalization of the Approach

After including strong and enforceable Human Rights clauses in its treaties, the EC began to consolidate and to formalize the approach.

[12] Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation, Official Journal of the European Communities, 25 November 1992, L 343/2, 3; Cf. Hoffmeister (1998), pp. 124 f.

[13] Cf. Hoffmeister (1998), pp. 248 ff.

[14] Miller (2004), p. 13; Bartels (2008), p. 5.

[15] The term was coined due to its first use in the 1993 Europe Agreements with Bulgaria and Romania; cf. Hoffmeister (1998), p. 126.

Considering the different approaches, the Commission published guidelines on the integration of Human Rights clauses into EC agreements.[16] The decision established guidelines for the preamble of agreements (general references to Human Rights and Human Rights instruments) and for the body of the agreements (respect for democratic principles and human rights constitute essential elements of the agreement).

A "Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries"[17] again described the Commission's position on the issue, evaluated the implementation of the 1993 decisions, and proposed draft clauses to be used in future negotiation directives and upcoming agreements. After criticism and concern voiced by the European Parliament and the Council, the Commission aimed at improving "the consistency, transparency and visibility of the Community approach and to make greater allowance for the sensitivity of third countries and the principle of non-discrimination."[18]

The Commission revised the guidelines and proposed more elaborate standard clauses for the draft negotiating directives. There were no changes related to the references in the preamble of future agreements. The proposed articles for the body of the agreement included a clause defining Human Rights and democratic principles and a second clause on nonexecution of an obligation of the agreement. The Commission also proposed the insertion of an interpretative declaration regarding the nonexecution clause and the question of cases of special urgency that allow the taking of appropriate measures without having prior recourse to the Association Council. According to the proposed interpretative declaration, the violation of an essential element does constitute a "special urgency." The Communication was directed at the Council and the Parliament and was taken up only a few days later by the Council in the Council Conclusions. The Council concluded that "a suspension mechanism . . . should be included in Community agreements with third countries to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights."[19]

By 2001, the "essential elements clause" had been included in a plethora of agreements and applied to more than 120 countries. Since then, the EU continues to pay attention to the issue. A 2001 Communication from the Commission on the EU's role in promoting Human Rights and Democratisation in Third Countries sets forth the Commission's position on the issue and especially underlines the Commission's intent to reinforce Human Rights dialogues with partner countries.[20]

More recently, several documents have taken up the issue of Human Rights and the EU's external policies. The Commission published a Communication regarding

[16] COM Decision, 26 January 1993, MIN(93) 1137, point XIV.

[17] COM(95) 216 published on 23 May 1995.

[18] COM(95) 216, p. 5.

[19] Council Conclusions, 29 May 1995 cited in Bartels (2008), p. 3; Hoffmeister (1998), pp. 173 ff.

[20] COM(2001) 252 final, 8 May 2001.

the trade policy aspects of the strategy "Europe 2020: A strategy for smart, sustainable and inclusive growth" and underlined that the EU's trade and political relations are supposed to "encourage our partners to promote the respect of human rights, labour standards, the environment, and good governance [...]."[21] In late 2011, the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy issued a Joint Communication to the European Parliament and the Council entitled "Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach"[22] and again highlighted the Human Rights clauses in EU agreements with third countries and the relevance of Human Rights for EU trade policy.[23] Finally, in 2012 the Council of the European Union agreed on a "Strategic Framework and Action Plan on Human Rights and Democracy."[24] The framework emphasized again that the EU will integrate the promotion of Human Rights into—among other policies—trade and investment policies. The Action Plan also referred to certain specific measures to further strengthen the role of Human Rights in EU trade policy, including the reinforcement of Human Rights dialogues with FTA partners.[25]

It seems obvious that the EU remains committed to promoting Human Rights through its external actions, including cooperation agreements and free trade agreements, and the guidelines call for Human Rights clauses to be included in all EU agreements. However, recent bilateral trade agreements do not always contain elaborate Human Rights clauses anymore as they have often been strongly opposed by the respective negotiating partners.

15.2.2.3 Further Examples After Formalization

After the formalization, Human Rights clauses have continued to be included in most agreements concluded by the EU. More recently though, especially with regard to agreements solely focused on trade, less elaborate clauses have been included—if present at all.[26]

The Association Agreements between the EU and the Mediterranean countries as well as the bilateral free trade agreements concluded with South Africa, Mexico, and Chile all include Human Rights clauses establishing respect for Human Rights and democratic principles as an essential element of the agreement. The most elaborate mechanism can be found in the 2000 Cotonou Agreement between the EU and the Group of ACP countries. The Cotonou Agreement, successor to the

[21] COM(2010) 612 final, 9 November 2010.

[22] COM(2011) 886 final, 12 December 2011.

[23] COM(2011) 886 final, 12 December 2011, p. 11.

[24] Council of the European Union, Press statement, 25 June 2012, document number 11855/12.

[25] EU Action Plan on Human Rights and Democracy, No. 11 (b).

[26] Paasch (2011), p. 14.

Lomé Conventions, contains a Human Rights clause in its Article 9,[27] and Article 96 and Annex VII establish a highly elaborate mechanism in case of violations of the principles set out in Article 9 (so-called Article 96 Consultations).

More recent agreements, however, often do not include Human Rights clauses. While the agreement between the EU and the Andean Community states of Colombia and Peru (concluded in 2010, signed in 2012) does include a Human Rights clause in its Article 1, the bilateral free trade agreement concluded between the EU and the Republic of Korea (signed 2009, in force since 2011) does not include such a clause at all. The agreement does, however, include a chapter concerning Trade and Sustainable Development, which makes reference to environmental and labor protection. The provisions on labor protection are very detailed and constitute probably the highest number of specifically defined Human Rights in an EU trade agreement so far.[28] It remains to be seen, though, how effectively these provisions will be implemented over time.

Many agreements do include Human Rights clauses, though there are some notable exceptions. So far, no agreement concluded by the EU with a developed country includes a Human Rights clause. In fact, agreements between the EU and Australia as well as New Zealand did not materialize due to Australia's and New Zealand's opposition to the EU's intent of including Human Rights clauses.

Another notable exception is sectoral trade agreements. Agreements on specific goods, such as fisheries, steel, or textiles, do not include Human Rights clauses even though they do sometimes cover areas prone to Human Rights violations (i.e., labor conditions of textile workers). A new development is mentioned in the 2012 EU Human Rights Report[29]: the Commission indicated in a 2011 Communication that it wished to insert a Human Rights clause into the existing bilateral fisheries agreements. In 2011, protocols inserting the clause into the respective agreements had already been initialed with Cape Verde, Comoros, Greenland, Guinea-Bissau, Mauritius, Mozambique, São Tomé and Príncipe, and the Seychelles.[30]

Finally, current negotiations between the EU and the Gulf Cooperation Council and with India have been difficult due, to a large extent, to the reluctance of the Gulf states and of India to accept the EU's proposal for Human Rights clauses. It remains to be seen if the EU will succeed in including such clauses into the agreements.

[27] Article 9 (2) ACP-EC Partnership Agreement ("Cotonou Agreement"): "[...] Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement."

[28] Sen and Nair (2011), p. 430.

[29] Since 1999, the EU has annually published a "Human Rights Report" detailing the EU's actions in this policy area and containing a section on the Human Rights clauses in EU agreements. The latest report was published in June 2012 for the year 2011, entitled "Human Rights and Democracy in the world – Report on EU action in 2011," available on the website of the EU External Action Service, http://eeas.europa.eu/human_rights/docs/index_en.htm. Accessed 28 July 2014.

[30] Human Rights and Democracy in the world – Report on EU action in 2011, p. 21.

Reasons for this strong opposition will be examined after a closer look at the actual implementation of Human Rights clauses.

15.2.3 Application of Human Rights Clauses in EU Agreements

Before looking at their advantages and disadvantages, their potential problems and opportunities, it is essential to examine the actual use and implementation of the Human Rights clauses in EU trade agreements. In general, there exist two possible means to enforce the Human Rights clauses. The first option consists of a resolution of the issue through consultations. The second option refers to an approach based on coercion (the agreement or parts of the agreement may be suspended, trade preferences granted or withdrawn). Depending on the case at hand, a combination of the two options may be the solution of choice.

The 2012[31] EU Human Rights Report covering the year 2011 explains that no new agreements containing a Human Rights clause were signed or came into force in 2011,[32] though consultations were held concerning a case of Guinea Bissau and making use of the Article 96 Consultations of the ACP–EU Cotonou Agreement. The Article 96 Consultations under the Cotonou Agreement are in fact the clauses that are most regularly put into action. Article 96 Consultations were held with Togo, Niger, Guinea-Bissau, Comoros, Côte d'Ivoire, Haiti, Fiji, Liberia, Zimbabwe, the Central African Republic, and Mauritania.[33] The consultations did often lead to an improved situation and a better protection of Human Rights.[34] Apart from the Article 96 Consultations, there have been several cases in which development aid was withheld; this concerns cases of Belarus, Russia, and the Palestinian Authority.[35] There have, however, also been cases in which other EU institutions, particularly the EU Parliament, as well as nongovernmental organizations have called for EU action and the EU Commission did not act.[36] This has lead to accusations of the existence of a lack of coherence and of the Commission applying a double standard.[37]

[31] An overview of the previous application can be found in Hoffmeister (1998), Chapters 11–13.

[32] Human Rights and Democracy in the world – Report on EU action in 2011, p. 20.

[33] Paasch (2011), p. 13; Website of the Council of the European Union, http://www.consilium.europa.eu/policies/eu-development-policy-(ec-wbesite)/main-themes/cotonou-partnership-agreement/consultations-under-articles-96-and-97-of-cotonou-agreement/policy-archive?lang=en. Accessed 28 July 2014.

[34] Hafner-Burton (2005), pp. 610 and 611.

[35] Paasch (2011), p. 14.

[36] This concerns cases of Algeria, Israel, and Vietnam (Bartels 2008, p. 2; Paasch 2011, p. 14).

[37] Bartels (2008), pp. 11–13.

But other factors may need to be taken into account, especially the potential effectiveness of the clauses' implementation.[38] In a study for the European Parliament,[39] the cases and their outcomes were examined, and the study concludes that a distinction can be made between cases in which a general political crisis exists (due to mutiny, coup d'état, flawed elections, etc.) and individual cases of sudden and grave human rights violations (so far, the EU has not acted in cases of "mere Human Rights abuses"[40]). In cases of a general political crisis, measures taken by the EU can be deemed more successful, while in cases of Human Rights abuses, EU reactions have not been as successful. The success in countries with new or illegitimate regimes is attributed to the fact that the countries in question (Central African Republic, Ivory Coast, Fiji, Haiti, and Togo) have aimed at achieving closer relations with the EU and the potential (financial) benefits that go along with it.[41] The lack of action in some cases may therefore also be attributed to a negative forecast concerning the potential outcome. Then why does the EU act in certain cases of grave human rights abuses even though success may be limited? A change of perspective may be necessary. In the case of the EU financially supporting a government accused of grave human rights violations, the reason for action may be the very reason the Human Rights clauses were included in the first place—to prevent EU financial aid to contribute to the Human Rights violations.

The EU's actions may therefore be more coordinated than they might appear even though this may be unsatisfactory from a Human Rights point of view.

15.3 Advantages and Disadvantages: Problems and Opportunities

Since its introduction into EU policies in 1977, the issue of Human Rights in EU agreements has developed into a formal policy and has been applied in several cases. There does, however, still exist a debate concerning the mere existence of this approach, as well as a debate concerning the actual application of the policy.

15.3.1 Advantages and Opportunities

As has already been shown, there exist very legitimate reasons for the EU approach.

[38] Bartels (2008), p. 12.

[39] Bartels, The Application of Human Rights Conditionality in the EU's bilateral Trade Agreements and other Trade Arrangements with Third Countries, November 2008.

[40] Bartels (2008), p. 12.

[41] Bartels (2008), p. 12.

The EU does not wish to contribute—financially or politically—to Human Rights violations in its partner countries. If a treaty binds the EU and another country, there needs to be a legal option for the EU to react in case of grave Human Rights violations. This will be particularly relevant in cases with a development focus as these are the countries often requiring financial assistance and some of them are prone to political crisis. A reaction by the EU may as well be necessary due to general EU foreign policy considerations. The success of this approach in cases of new or illegitimate regimes further confirms the legitimacy of the EU approach.

There has also been a more general support for the inclusion of Human Rights clauses in EU agreements, particularly in trade agreements beneficial for partner countries. The idea behind this support is the linkage of the EU's Human Rights objectives with its trade policy and thus creating an incentive to ensure the observance of the Human Rights clause in order to keep benefitting from the agreement.

Why may this be necessary? The idea of tying trade policy benefits to the compliance with Human Rights clauses may make trade agreements more effective to achieve Human Rights objectives than general Human Rights treaties that do not include any sanctions in cases of noncompliance.[42] Human Rights agreements are an important means of establishing Human Rights standards and thereby triggering domestic policy changes in the countries signing the respective agreement.[43] These agreements do not, however, usually include any provisions on implementation and enforcement; they are based on the idea that states are persuaded by the Human Rights agreements to act accordingly. Despite having signed Human Rights treaties, many countries purposefully violate the protected Human Rights without any direct consequences. While some trade agreements in regions outside of Europe also contain Human Rights clauses, they are usually considered "soft" since they only establish an obligation of the contracting parties to adhere to the Human Rights principles but do not contain any mechanisms to enforce the Human Rights clause. Agreements with "hard" Human Rights clauses tie the benefits of the agreements to the compliance with the Human Rights clause and put an emphasis on coercion rather than on persuasion. The change of behavior in order to comply with the Human Rights clause may thus constitute a minor side payment for benefitting—in case of preferential trade agreements—from better market access.[44] Several cases have shown the success of the Article 96 Consultations with ACP countries under the Cotonou Agreement.[45]

Trade agreements may be a very good choice as an incentive for compliance with Human Rights principles. Most countries have a strong interest in concluding preferential trade agreements and in keeping the benefits of the agreements.

[42] Hafner-Burton (2005), p. 593.

[43] Hafner-Burton (2005), p. 594.

[44] Hafner-Burton (2005), p. 606.

[45] Cf. the remarks concerning Article 96 Consultations in Sect. 15.2.3.

This constitutes a rather strong incentive to adhere to the clauses in the agreement, including the Human Rights clauses. Necessary for said adherence is of course a consistent application of the Human Rights clause and the consequences provided in case of noncompliance.

The inclusion of Human Rights clauses also highlights the EU's commitment to the protection of Human Rights, which is stipulated in the EU treaties.

Human Rights clauses therefore do attain two major objectives: they ensure that EU policies are enacted it a way that is consistent with EU principles, on one hand, and international law, on the other. Finally, they have proven successful in a certain number of cases—a fact that should not be underestimated.

15.3.2 Disadvantages, Problems, and Criticism

Despite the success of the Human Rights clauses, they have also been strongly criticized. Criticism mostly stems from two separate perspectives. On one hand, there is the Human Rights perspective, particularly criticizing the way it is used and highlighting the deficiencies of the EU approach. On the other hand, there is the trade perspective, assessing the Human Rights clauses on the basis of EU trade policy.

Some of the criticism has already been mentioned. The EU approach is being depicted as lacking coherence and creating double standards. The prospects for success may be the very pragmatic reason for the EU when deciding on the reaction to noncompliance with Human Rights clauses. However, this allegedly inconsequential approach may lead to less compliance by partner countries and thereby highly weaken the effectiveness of the Human Rights clauses. And even if the EU does act in cases of noncompliance, the success also heavily depends on the other party.[46] It does not seem to be the case, however, that countries with a repressive regime avoid being party to an agreement with a Human Rights clause.[47]

A lack of coherence can also be observed with regard to the types of EU agreements containing Human Rights clauses. Until 2011, EU sectoral agreements did not contain any Human Rights clauses and thereby making the EU lose some of its credibility. This situation seems to be changing, though, since the EU has begun negotiating protocols inserting Human Rights clauses into its fisheries agreements. The same lack of Human Rights clauses may be observed concerning recently concluded agreements. The EU approach needs to be consistent in order to produce the results the EU is aiming at. Although some of the more recent agreements do contain a Human Rights clause, some of them lack a clause concerning its implementation or enforcement. Without the ability to put pressure on the other party, any Human Rights clause will lose its effectiveness. In order to improve the

[46] Hafner-Burton (2005), p. 607.

[47] Hafner-Burton (2005), p. 608.

effectiveness of the Human Rights clauses, the Commission introduced the idea of creating working groups as part of the cooperation agreements to discuss Human Rights issues.[48]

The scope of the Human Rights clauses has also drawn some criticism. The clauses are mostly used only with regard to so-called first generation Human Rights (i.e., Human Rights protecting civil and political liberties). Other countries, like the United States, put a stronger emphasis on protecting workers' rights.[49] However, the scope also depends on the way the Human Rights clause is interpreted, and EU Human Rights clauses may thus be open to a broader interpretation than currently used.

A more forceful opposition originates in the trade policy area. Some see Human Rights clauses as having nothing to do with the trade provisions covered in the agreement and regard the Human Rights clause as an extraneous element of trade agreements. The clauses are seen as being inappropriate in a trade agreement, and they have actually prevented some agreements from being concluded. Major examples include trade agreements between the EU and Australia, as well as New Zealand. In 1997, the EU was in the process of negotiating framework agreements with Australia and New Zealand and insisted on the inclusion of Human Rights clauses as this has been practiced since 1995.[50] While Australia was not opposed to references to Human Rights in general, Australia did not accept an "operational" Human Rights clause and the inclusion of a clause concerning actions in case of noncompliance.[51]

A more recent example concerns the negotiations between the EU and India regarding a comprehensive bilateral free trade agreement, as well as the negotiations between the EU and the Gulf Cooperation Council (GCC) regarding a bilateral free trade agreement. The negotiations with the GCC have stalled, one of the reasons used to be the insistence of the EU regarding a Human Rights clause. The negotiations with India are still ongoing, but they are only slowly progressing, which was for some time primarily attributed to the EU's insistence regarding the inclusion of a Human Rights clause.[52] Even if the debate concerning the Human Rights clause may not always impede the conclusion of the agreement, it often substantially prolongs the negotiations.

Another major point of criticism concerns the intention of including Human Rights clauses into trade agreements. It is asserted that the inclusion of a Human Rights clause linking the benefits of the agreement to the issue of Human Rights compliance is actually a method of adding a layer of conditionality to the agreement and being a sign of protectionism. The assertion, therefore, is that the issue of Human Rights protection is only an excuse for protectionism.

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[48] Miller (2004), p. 35.

[49] Hafner-Burton (2005), p. 614.

[50] Miller (2004), pp. 58 and 59; Bartels (2008), p. 3.

[51] Miller (2004), pp. 59 and 60; Bartels (2008), p. 3.

[52] Sen and Nair (2011), p. 433.

The issue has especially been raised in the case of labor rights provisions in free trade agreements negotiated and concluded by the United States. One may argue that the area of worker's rights has a closer connection to a trade agreement than a general Human Rights clause, and in fact the inclusion of such clauses has been advocated by United States labor unions wanting to assure a similar level of competitiveness. However, new labor standards and regulations may weaken the developing countries' competitiveness in the time after the conclusion of the agreement.[53] Labor unions often feared the conclusion of free trade agreements because of potential job losses in the United States. Including labor right's provisions in the agreements might weaken the other party's competitiveness, and this is one the reasons the clauses have been criticized of constituting an element of protectionism.[54] One of the first major free trade agreements to make reference to labor rights is the North American Free Trade Agreement (NAFTA) in which the labor rights provisions are included in a side agreement (North American Agreement on Labour Cooperation). A more positive interpretation of this approach is the assertion that the provisions for labor and environmental rights may contribute to further leveling the playing field.[55]

The fact that the Human Rights provisions are not always enforced adds to the impression that there exists another motivation than assuring a higher level of Human Rights protection.

A second layer of criticism in this area concerns the general situation of developed countries and developing countries. Human Rights clauses are often proposed by developed countries in agreements with developing countries. This often leads to the assumption that developing countries impose their values and Human Rights standards upon the developing countries. Considering the colonial history, this is often a cause of irritation and perceived as condescending.[56] Many developing countries see this as a violation of their sovereign rights.[57]

The question remains if it is in fact desirable to make something as sensitive as Human Rights protection a sort of trade policy instrument and thereby a subject of negotiations. Negotiating partners also fear the use of the Human Rights clause as a veritable "trade weapon" that would discredit the approach if it were used to achieve trade policy objectives and not to ensure the protection of basic Human Rights.[58] There is also a risk that Human Rights and Human Rights clauses may be sacrificed in cases in which a strong negotiating party is opposed to the inclusion and the other party has a strong desire to conclude the agreement.

If states intend to use the area of trade policy to advance Human Rights, the WTO may be the more appropriate forum to pursue this goal. In fact, it has been

[53] Sen and Nair (2011), p. 424.
[54] Sen and Nair (2011), p. 425.
[55] Sen and Nair (2011), p. 423.
[56] Zwagemakers (2012), p. 5.
[57] Miller (2004), p. 40.
[58] Sen and Nair (2011), pp. 433 and 434.

tried to adopt certain provisions on workers' rights at the WTO, though these attempts have never succeeded.[59]

Nongovernmental organizations (NGOs) especially criticize the fact that the Human Rights clauses do not explicitly apply to Human Rights violations caused by the trade agreement itself. This includes the fact that the agreements tie tariffs and market access to compliance with the Human Rights clause when the agreements themselves may have negative effects on the situation in developing countries and may even be the cause for an aggravation of the Human Rights situation in the respective country. This has been taken up by the recently published *EU Action Plan on Human Rights and Democracy*, which calls for the development of a methodology "to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements."[60] NGOs also call for an assessment of the positive and/or negative impacts the agreements may have on the Human Rights conditions in the respective country.[61] The ACP–EU Cotonou Agreement does contain a provision that can be interpreted in a way to include Human Rights violations caused by the agreement. Article 9 (4) of the Cotonou Agreement stipulates that "The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance." Article 9 enumerates the "essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance" and may thus be construed in a way that negative impacts caused by the agreement constitute a reason for consultations or the suspension of the agreement.[62]

15.4 Conclusion

The issue of Human Rights clauses is rather complex. Many aspects have to be taken into consideration. Negotiations may be prolonged, some agreements are not concluded at all, and the effectiveness of the clauses is put into question. A major trading power as the European Union is kept from concluding important agreements due to the insistence of the inclusion of Human Rights clauses, extraneous provisions to the trade subject at the heart of the agreements. But still the issue of the protection of Human Rights constitutes one of the core values of the European Union. Even if the costs are high and success is not guaranteed, it does seem plausible for the EU to continue with its strategy to include Human Rights clauses in the agreement the EU negotiates. It enhances the credibility of the EU, and in the

[59] Hafner-Burton (2005), p. 624.

[60] Council of the European Union, Press statement, 25 June 2012, document number 11855/12, EU Action Plan on Human Rights and Democracy, No. 11 (a).

[61] Paasch (2011), p. 16.

[62] Paasch (2011), p. 15.

matter of Human Rights, even some success should be regarded a positive result. And while generally there should not be a need for an incentive to maintain a high level of Human Rights protection, if the incentive does improve the situation, it seems to be worth the effort. The approach may also take up the criticism of some NGOs concerning the Human Rights situation in the partner countries with whom the EU is engaged in negotiations. The legitimate criticism discussed should not be disregarded though. The EU approach needs to be further evaluated and adjusted in order to improve it. It remains to be seen if the recently adopted *Action Plan* can lead to improvements.

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