ROMANIAN
JOURNAL OF INTERNATIONAL LAW

ISSN 2559 – 3846

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Mihai BĂDESCU

RJIL No. 24/2020

Pages 132-147

Contribuţia doctorandului şi masterandului / PhD and Master Candidate's Contribution

The Legal and Practical Inefficiency of Systematically Introducing Human Rights Clauses in the European Union's Agreements

Mihai BĂDESCU [*]

Abstract: *This paper's goal is to provide a pertinent critique of the legal and practical deficiencies of the human rights conditionality model systematically implemented by the European Union in its foreign policy. This practice has been subject to academic examination since its introduction in 1995, yet very few analysed the issue from a public international law or practical perspective. This paper uses a qualitative method of research based on an investigation of the historical evolution of the human rights clause between multiple agreements concluded by the EU with third States. Starting from this collected information, it is revealed that the clause has developed heterogeneously and has a variable legal value. This has been determined in two ways: first, by comparing clauses with the Abbot-Snidal theory of distinguishing between soft law and hard law and, second, by analysing these clauses in light of the material breach of treaties doctrine. As for the practical point of view, it is found that no methodology has yet developed in order to properly assess the effects of human rights conditionality. Thus, the findings imply that this practice has, with a few exceptions, become outdated as the EU already is in possession of better instruments of human rights promotion which do not hinder its treaty-negotiation ability. This is a unique conclusion which, unlike previous works, does not suggest a mere reform of the system, but its entire removal.*

Key-words: *human rights conditionality; material breach doctrine; soft law and hard law instruments; European Union foreign policy*

[*] *LL.M. candidate in Public International Law at the University of Bucharest's Faculty of Law, Bucharest, Romania - badescu.mihai.97@gmail.com.* The opinions expressed in this paper are solely the author's and do not engage the institution he belongs to.

1. Introduction

The practice of conditioning (at least in appearance) trade liberalisation and other such treaties to the parties respecting certain individual rights or democratic principles has recently become normalised and is currently being implemented by States such as Canada, Australia or the United States of America.[1] However, since 1995, it is the European Union which has been systematically introducing the so-called "human rights clause" (HRC) in all of its trade, cooperation and association agreements with third States.[2] Typically, the clause also introduces obligations regarding other non-trade objectives such as maintaining the rule of law or other democratic principles. Furthermore, the Union classifies the HRC as essential clauses in these agreements in order to allow either party to suspend their obligations or even unilaterally denounce the entire agreement if the other party partakes in grave breaches of human rights.

In fact, during the past 25 years, the EU has never made use of this clause in order to meaningfully sanction human rights violations committed by various partners. A recent analysis shows that out of the existing 23 activations to date (all based on the Cotonou Agreement), none was based solely on breaches of human rights, but came in response to breaches of the other non-trade objectives which occurred in various contexts of civil unrest.[3]

Furthermore, recent official reports claim that a link between the HRC and an improvement towards the human rights situations in certain third-party States (in this case, Mexico and Chile) is difficult to establish.[4]

From an International Law point of view, this raises several questions which the present article aims to answer. First, what is the status of the HRC in relation to treaty law? Second, does the current form of the HRC provide an actual effective mechanism for the protection of human rights? Third, how and can the HRC be improved by the EU in order to provide better results for individuals?

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[1] For instance, the North American Agreement on Labor Cooperation functioned as a supplement agreement to the North American Free Trade Agreement.

[2] Bulletin of the European Union. No. 5/1995, par. 1.2.3.

[3] Anne-Carlijn Prickartz, Isabel Staudinger, "Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements", *Europe and the World: A law review*, vol. 3, issue 1/2019, p. 20.

[4] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 114.

2. A short comparative history of the European Union's HRC

Promoting human rights worldwide represents a fundamental aspect of the Union's foreign policy.[1] Nevertheless, conditioning international agreements to human rights protection has been the source of numerous internal debates at EU level which will not be pursued in this paper. It suffices to mention that the European Parliament has been a close promoter of introducing the HRC, while the Council and Commission have had a more trade-oriented perspective.

The first such clause has been introduced in the fourth iteration of the Lomé Convention in 1989 (now replaced by the Cotonou Agreement).[2] This was a trade liberalisation treaty between the States of the European Community and more than 60 former colony States from Africa, the Caribbean and the Pacific (ACP) regions. The initial forms of the Convention did not feature references to human rights which were later added following the Ugandan massacres of the 1970s.[3] A short text analysis shows that no legal obligations were in fact entailed. Lomé III only featured references in the preamble and in an annexed joint declaration,[4] while Lomé IV's Article 5 features wording which does not express legal obligations (e.g. *"deep attachment to human dignity and human rights"*).[5] Therefore, the first versions of the HRC were only political by nature.

The early 1990's saw the EU ratify numerous agreements with States from South America and Eastern Europe. The large number of agreements concluded with nations from different political mediums in such a short span of time determined a heterogenous development of the HRC dependent to specific region policies. This is demonstrated in an EU report from 1995 which classifies all the human rights references in all agreements in force at the time.[6] For example, most of the States from Middle East and Maghreb (with the notable exception of Tunisia) only included references in the preamble of the agreements, while most nations of the OSCE have included essential clauses which had potential legal implications. Additionally, certain treaties named the HRC as essential clauses without also introducing non-execution clauses (e.g. Argentina, Brazil, Vietnam). This is relevant as the

[1] https://europa.eu/european-union/topics/human-rights_en, last visited on 5/11/2020.

[2] Daniela Donno, Michael Neureiter, "Can human rights conditionality reduce repression? Examining the European Union's economic agreements", *The Review of International Organizations*, vol. 13, issue 3/2018, pp. 335- 357, p. 338.

[3] Karen Elizabeth Smith, "The use of political conditionality in the EU's relations with third countries : how effective?", *EUI Working Papers SPS,* no. 7/1997, p. 11.

[4] Third ACP-EEC Convention (Lomé III), preamble recital 4 and Annex I.

[5] Fourth ACP-EEC Convention (Lomé IV), Article 5.

[6] COM(95) 216, Annex 3, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51995DC0216&from=EN], last visited on 5/11/2020.

interpretation of the agreement in case of a breach would have to be made in light of the customary rules codified in the Vienna Convention on the Law of Treaties (VCLT).

Moreover, the essential clauses seen in Europe were split between the "Baltic clauses" and the "Bulgarian clauses". The former ones were considered more rigid as they only allowed either party to suspend the agreement in case of serious breaches of human rights. The latter consider the suspension of the agreement to be a last-case scenario which should only be applied after other "appropriate measures" are first taken. Such measures include consultations of the breaching party and, in some cases, of a committee established through the agreement. Thus, a criterion of proportionality was introduced.[1]

By 1995, the EU decided to systematically include the HRC throughout all of its agreements. Thus, generally, the EU will seek to first conclude a "Framework Agreement" with the third State which features relevant details to the HRC (e.g. essential element clauses, non-execution clauses, observation mechanisms, dispute settlement mechanisms). All subsequent agreements with the State, irrespective of their scope, will contain references to the framework. However, discrepancies remain to this day, as some negotiations resulted in objectively better mechanisms than others. For example, in regard to monitoring mechanisms, none of the agreements included permanent committees to assess human rights violations. Therefore, only a few States went further and established *ad hoc* HRC committees.[2]

Another issue noted since 1995 has referred to the fact that the HRC was seldom implemented in sectorial agreements. This introduces further issues since such treaties tend to cover areas in which human rights abuses are frequent (e.g. textile production). The EU seems interested in remedying this situation and has begun introducing relevant references through Protocols to Fisheries Agreements concluded with Morocco and Cote d'Ivoire in 2013.[3]

At the present time, an additional obstacle can be observed during treaty negotiations. Developed States tend to refuse such clauses as they consider

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[1] Nicolas Hachez, "'Essential Elements' Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?", *Leuven Centre for Global Governance Studies*, Working Paper 158, 2015, p. 10.

[2] Lorand Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" study requested by the European Parliament, 2014, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf], last visited on 5/11/2020, p. 10.

[3] Lorand Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" study requested by the European Parliament, 2014, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf], last visited on 5/11/2020, p. 7.

them irrelevant to their situation. This led to various stalemates during negotiations with Australia[1] and Canada.[2]

3. HRC – between soft law and hard law

The previous part demonstrated that the HRC has had a unique development. As such, it requires an in-depth analysis of its variations in regard to the law of treaties in order to properly asses its implications.

First, it should be assessed whether the HRC is a form of soft law or hard law according to its binding character. Doctrine identifies three frequently used instruments of soft law: resolutions of international organisations, non-binding international agreements, and abstract non-committal clauses of international agreements.[3] While it is clear that the first situation is not relevant, it must be analysed whether the HRC-containing agreements or only the clauses themselves can be understood as forms of soft law.

Determining the binding nature of an entire agreement is a complex task, as demonstrated by modern practice. There is a clear tendency towards concluding international agreements which are not necessarily legally binding, commonly denominated as "memorandums of understanding".[4] In order to establish the legal character of an agreement, the International Court of Justice applies a series of customary conditions[5] codified by the VCLT.[6] In this regard, all of the EU framework agreements undoubtedly fall under the purview of the definition set forth by the VCLT. They are conventions concluded by the Union based on its international legal personality and third States with the express goal of introducing legal obligations in a plethora of

[1] Tobias Dolle, "Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages", in the volume *The Influence of Human Rights on International Law,* Springer International Publishing, London, 2014, p. 220.

[2] Katharina Meissner, Lachlan McKenzie "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes*", Journal of European Public Policy*, volume 26, no. 9, 2019, pp. 1273-1291, p. 1273.

[3] Karolina Podstawa, Viorica Vita, "Report analysing the findings of the research of the other work packages on policy tools", Work Package No. 14 – Deliverable No. 1 of the FRAME FP 7 research project, [http://www.fp7-frame.eu/wp-content/uploads/2017/03/Deliverable-14.1.pdf], last visited on 5/11/2020, p. 29.

[4] Anthony Aust, "Modern Treaty Law and Practice", 2nd Ed., Cambridge University Press, Cambridge, 2007, p. 33.

[5] Jan Klabbers, "Qatar v. Bahrain: the Concept of „Treaty' in International Law." *Archiv Des Völkerrechts*, vol. 33, no. 3, July 1995, pp. 361–376, p. 366.

[6] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgement, ICJ Reports 1994. p. 112, par. 23.

domains. For instance, the Cotonou Agreement mentions that is based on cooperation "underpinned by a legally binding system".[1]

As far as the legality of the clause itself is concerned, professors Abbot and Snidal's theory of relative hard law will be applied. They argue that the line between soft law and hard law is currently so unclear that any clause's legality can only be appreciated based on three main attributes: precision, delegation and the level of obligation entailed.[2]

Precision refers to the amount of details provided by the parties in order to avoid overinterpretation. Unlike other States' clauses of conditionality which tend to include references to specific labour rights, the HRC is drafted as a generalised article concerning the protection of human rights as a whole. There is a distinct lack of precision in this matter. Some HRC include references solely to the Universal Declaration of Human Rights,[3] others also reference the European Convention of Human Rights or the Helsinki Final Act[4] and one even goes as far as referencing any "other relevant international human rights instruments".[5] Given the lack of precision, one may interpret that this also includes jurisprudential evolutions of such conventions, in particular of the ECtHR. Thus, the HRC appears akin to a soft law clause from this point of view.

Delegation implies that the parties ensure the existence of an efficient body which analyses possible breaches of the clause and provides solutions. Abbot and Snidal further classify such bodies in order to determine the weakness of the delegation trait. For example, an "international consultative body that facilitates political bargaining" would only demonstrate a low level of legality.[6] In fact, as previously mentioned, the HRC have never included a permanent and dedicated monitoring committee. Exceptionally, ad hoc committees dedicated to other sectors were created which could exceptionally take human rights issues into account.[7] However, it should be mentioned that

[1] Partnership Agreement 2000/483/EC — between ACP countries and the EU (Cotonou Agreement), Article 2.

[2] Kenneth W. Abbott, Duncan Snidal, "Hard and Soft Law in International Governance", *International Organization*, vol. 54, no. 3, 2000, pp. 421–456, p. 422.

[3] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, Article 1.

[4] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, Article 2 (1).

[5] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Article 1 (1).

[6] Kenneth W. Abbott, Duncan Snidal, "Hard and Soft Law in International Governance", *International Organization*, vol. 54, no. 3, 2000, pp. 421–456, p. 424.

[7] Decision No 1/2003 of the EU-Morocco Association Council of 24 February 2003 setting up subcommittees of the Association Committee, Annex 1.

EU association agreements include the formation of interparliamentary committees which have a general mandate over all aspects included in the treaty.[1] As an example, the EU Global Agreement with Mexico introduces no less than three monitoring mechanisms: a joint parliamentary committee, a joint council and a dispute settlement mechanism through the World Trade Organisation, yet only useable for trade issues. The former two are mostly political by nature and tend to have neutral stances on human rights problems, as an EU report aptly shows.[2]

The level of obligation refers to whether the clause is legally binding and, if so, how. This aspect ties heavily with the following chapter, the value of breaching the HRC, and will be thus continued.\

4. The HRC and material breaches under VCLT

Following the purely political clauses featured in the Lomé Convention, the HRC included in the EU – Argentina cooperation agreement of 1990 is considered to be the first one to be "operative". In fact, its text does not seem much different to that of Lomé IV: *"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."* Similar clauses were introduced in agreements with Uruguay, Paraguay or Chile.[3]

It seems that the European Commission's (EU's negotiator) logic was to implement a clause that states the factual situation at the moment of treaty's ratification in order to be able to invoke a fundamental change of circumstance (*rebus sic stantibus*) as defined by Article 62 of the VCLT if a human rights crisis would erupt in Argentina.[4] As professor Bartels notes, this is not a sensible solution, as it would demonstrate that the EU has foreseen the change of circumstances.[5] Thus, the EU later went further and expressly

[1] Lorand Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" study requested by the European Parliament, 2014, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf], last visited on 5/11/2020, p. 10.

[2] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", pp. 90-91.

[3] Anne-Carlijn Prickartz, Isabel Staudinger, "Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements", *Europe and the World: A law review*, vol. 3, issue 1/2019, p. 8.

[4] Written Question No 115/78 [1978] OJ C 199/27.

[5] Anne-Carlijn Prickartz, Isabel Staudinger, "Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements", *Europe and the World: A law review*, vol. 3, issue 1/2019, p. 12

mentioned in its next agreements that the clause represents "an essential element of this agreement" in order to be able to invoke a material breach in accordance with Article 60 of VCLT. Of course, Article 60 is also a codification of a well-recognised custom[1] and therefore should have ensured maximum applicability.

Mentioning the essential elements formula does indeed create a right to invoke material breaches under international law irrespective of the clause's relation to the treaty's purpose.[2] Nevertheless, the applicable rule should depend on the way in which the clause is drafted. For instance, the afore-cited HRC merely mentions the protection of human rights as a fundament for cooperation; there is no clear action or inaction which binds the parties. Therefore, invoking a material breach in the sense of Article 60 (par. 3, letter b) appears inapplicable. Furthermore, it is difficult, if not impossible, to argue that breaching human rights would amount to a repudiation of an entire treaty, the second possible reason to invoke Article 60.

These are the probable reasons for which the EU decided to subsequently introduce non-execution clauses for the HRC. The clauses expressly allow the parties to suspend, terminate or adopt specific measures in case of human rights abuses. Thus, the issue of material breaches is entirely avoided as the parties establish a much lower and consented threshold. For the "Baltic" clause, the level of legal obligation is clear: the party must respect the human rights requirement or it will face suspension or termination of the agreement if the other party wishes so.

The more recent and popular "Bulgarian" clause raises certain practical issues. In this case, the EU must first take appropriate and proportionate measures in case of human rights abuses and only as a last resort may apply a suspension of the agreement. Therefore, in theory, a legal sanctionable obligation exists in case of breaches. In practice, the EU has never used the suspension and, from a political point of view, it is difficult to imagine it will since promoting human rights over the economic benefits of a trade agreement is an issue about which even internal EU organs still have their debates. As for the "appropriate measures", their effect seems to be lacklustre for individuals, as seen in several post-factum official reports which will be analysed in the next subsection. The situation has evolved to the point in which the 2015 EU – Republic of Korea Framework Agreement does not even

[1] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Reports 16, par. 47.

[2] International Law Commission, "Draft Articles on the Law of Treaties with commentaries", Yearbook of the International Law Commission, 1966, vol. II, p. 255.

contain the words "suspension" or "termination" in relation to the HRC. The only clue towards this possibility is an annexed Joint Declaration which qualifies the HRC's "cases of special urgency" as, in fact, material breaches of the agreement (which can, thus, be sanctioned through suspension).[1]

To summarise the legal analysis, the HRC appears to fall somewhere in the middle of the axis between soft law and hard law, as seen in the Abbot and Snidal non-binary theory. Thus, as long as the clause does not clearly express actions or inactions for the States to respect, the material breach cannot be invoked and the HRC falls under soft law territory. If human rights obligations are clearly stated, then the material breach becomes invokable under Article 60 (par. 3, letter b) and it becomes an issue of hard law. Furthermore, if a 'non-execution clause' is added then, irrespective of the precision of the formulation, hard law nature becomes a certainty. While the practical nature of the clause may be debatable, theoretical legal consequences certainly exist if the mentioned conditions are met.

5. Assessing the effectivity of the HRC – is it possible?

Determining the practical impact of the clause proves to be a difficult task. This is both because the EU has never applied this sanction, but also because a clear link between European action and foreign improvements of human rights situations cannot be established. Thus, the analysis will proceed twofold. First, how is the HRC supposed to motivate the contracting State to respect human rights? Second, what makes noticing the effects at individual level so difficult?

As far as the theoretical motivation is concerned, a now popular theory of international relations implies that there are two types of treaty conditionality, positive and negative, also commonly named the "carrot and stick" approach.[2] In order to achieve maximum efficiency, the HRC should benefit from both.

Negative conditionality (the stick), on one hand, implies that a party can sanction the other in order to obtain its goal (in this case, respecting human rights). The EU can achieve this by invoking the suspension/termination of the agreement with the abusing State in accordance with the afore-mentioned

[1] Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part - Joint Interpretative Declaration Concerning Articles 45 and 46.

[2] Hadewych Hazelzet, "Carrots or Sticks? EU and US reactions to Human Rights violations (1989-2000)", *EUI PhD Theses*, 2001, [https://cadmus.eui.eu/bitstream/handle/1814/7157/2003_Hazelzet.pdf?sequence=3], last visited on 5/11/2020, p. 4.

rules. Making use of the other political measures required by the "Bulgarian" clause cannot amount to more than simple warnings. This becomes an issue as the EU does not seem politically interested in applying the maximum sanctions at its disposal, having not done so in over 25 years when referring exclusively to human rights violations. Moreover, as the European Parliament itself puts it, not exercising this sanction affects the credibility of the Union's human rights policy.[1]

Positive conditionality (the carrot), on the other hand, implies an incentive-based approach in order to attain human rights protection. This becomes a problem for EU trade agreements which already usually provide full elimination of tariffs, thus rendering future economic reward impossible.[2] Undoubtedly, some examples of incentives can be found in practice, especially in relation with States interested to become part of the EU in the future. For instance, enlargement has been recognised as an EU "carrot" for Turkey for many years.[3] Still, the issue that not all of EU's agreement network benefits from the same reward suggests a double standard which can determine certain States to be less interested in respecting the HRC.

Having these aspects considered, from a State-side perspective, the clause's efficiency seems to be low.

From the individual's perspective, the effects are difficult to observe. This is not only due to the fact that the EU has not sanctioned its partners' grave abuses of human rights. In fact, a clear relation between improvement of human rights situation and the HRC cannot be determined because, generally, the contracting State will be under numerous sources of pressure to improve its situation. Notwithstanding the clause, the EU itself has turned towards other means of promoting human rights protection, including the Generalised Scheme of Preferences (GSP) or even sanctions in order to protect specific rights (e.g. in order to protect the right to life, the EU has restricted exports of instruments linked to the death penalty to States such as Vietnam).[4] In addition, other international actors such as the United Nations may also take

[1] European Parliament resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008IP0405&from=FR], last visited on 5/11/2020, par. 21.

[2] Ingo Borchert, Paola Conconi, Mattia Di Ubaldo, Cristina Herghelegiu, "The Pursuit of Non-Trade Policy Objectives in EU Trade Policy" Working Papers ECARES, September 2020, p. 20.

[3] Piotr Zalewski, "Sticks, carrots and great expectations: Human rights conditionality and Turkey's path towards membership of the European Union", *Warsaw Center for International Relations Working Paper*, no.9, 2004, pp. 11-12.

[4] Daniela Sicurelli "The conditions for effectiveness of EU human rights promotion in non-democratic states. A case study of Vietnam", *Journal of European Integration*, vol. 39, no. 6, 2017, pp. 739-753, p. 745.

simultaneous actions towards the same goal.[1] Moreover, internal actors such as NGO's may also have a large influence over the matter.

This obstacle led not only to a lack of literature on the matter, but, in fact, even the EU's amount of ex-post assessments of the agreements' human rights effects appears unremarkable. By 2015, no official ex-post report has been completed and methodologies were only beginning to be proposed by specialists.[2] In 2017, one comprehensive ex-post report has been published in relation with the HRC included in trade agreements with Mexico and Chile. The conclusions of the Mexican report indicate similar findings to that of the present paper: a legally binding clause which has never been invoked, a difficulty in assessing actual effects over human rights and, in the few cases where human rights improvements were found, they were mainly caused by internal political reasons and not thanks to the HRC. At best, the clause had modest results.[3] Similarly, the Chilean clause's effects are characterised as "very small".[4] What the HRC did manage was to implement various fora for political discussion and engagement between EU and national institutions.

Thus, the level of efficiency for individuals is also low.

6. Is improving the HRC a realistic solution anymore?

Following the numerous previous criticisms of the current HRC system, it is only natural that there is also a lot of room for improvement. Various authors have been providing suggestions for many years. Some of them will be thus presented together with their own disadvantages.

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[1] Enrico Carisch, Loraine Rickard-Martin, Shawna Meister, "The Evolution of UN Sanctions from a Tool of Warfare to a Tool of Peace, Security and Human Rights", Springer International Publishing, Cham, 2017, p. 165.

[2] Nicolás Brando, Nicolas Hachez, Brecht Lein, Axel Marx, "The impact of EU trade and development policies on human rights", Work Package No. 9.2 of the FRAME FP 7 research project, p. 97.

[3] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 114.

[4] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 179.

From a treaty law point of view, enhancing the hard law status of the clause is a must. Regarding the delegation side of the issue in particular, the Union should seek to introduce dedicated mechanisms such as legal commissions to analyse breaches of human rights following individual complaints and enable the EU sanctions to fare efficiently in a non-political way. Thus, the uncertainty of a sanction that depends solely on political factors would be eliminated.

The ex-post assessment for the Mexico Agreement also provides suggestions for monitoring mechanisms such as one that would perform regular human rights impact assessments, one that would allow individuals to raise complaints against human rights abuses which would trigger an EU investigation or even a human rights commission to regularly analyse the parties' overall compliance with the HRC.[1] Professor Bartels mentions that a standard HRC should include an obligation for the parties to perform regular human rights impact assessments.[2] Still, in light of the methodology issues described in the previous sub-section, this particular solution does not seem feasible. Of course, another caveat of the proposed mechanisms is that they rely on the negotiator's ability to introduce them in a legally binding agreement. It would seem unlikely that third States, after not being subjected to meaningful sanctions through the HRC for many years, would agree to a legal and more efficient way of identifying and dealing with human rights abuses.

Another potential improvement refers to increasing the European Parliament's internal role in deciding over applying the sanctions of agreement suspension or termination.[3] Currently, the Parliament has no role in this domain, the Council being the sole institution able to decide over suspensions.[4] As mentioned previously, the EP tends to have a stronger tie to the protection of human rights and, as such, it should have a more important role which, in turn, would ensure better results for the HRC beneficiaries. On the other hand, allowing the Parliament such prerogatives may lead to even more politicised results. Thus, the application of sanctions may find itself

[1] Isabelle Ioannides, "The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement", Ex-Post Impact Assessment performed by the European Parliamentary Research Service, 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf], last visited on 5/11/2020, p. 45.

[2] Lorand Bartels, "A Model Human Rights Clause for the EU's International Trade Agreements" *German Institute for Human Rights and Misereor*, 2014, [https://ssrn.com/abstract=2405852], last visited on 5/11/2020, p. 31.

[3] Lorand Bartels, "A Model Human Rights Clause for the EU's International Trade Agreements" German Institute for Human Rights and Misereor, 2014, [https://ssrn.com/abstract=2405852], last visited on 5/11/2020, p. 33.

[4] Treaty on the Functioning of the European Union, Article 218 (9).

under an even more subjective situation: the EP may find itself inclined not to sanction abuses committed in States with which it may share ideologies at a certain point in time.

Relevant analyses show that the HRC faces a plethora of issues. Furthermore, while some experts suggest improvements, their implementation does not only depend on the EU's will to introduce them, but also on the ability to ensure that the contracting party will also agree with them. One might go as far as asking what even is the point of the clause since it does not produce much in terms of results for the protection of individuals. Moreover, the EU already implements other measures of external human rights protection through the GSP and other sanctions which have arguably clearer results. For instance, by banning exports of death penalty instruments to Vietnam, the EU managed to both heavily delay the application of capital punishments, but also sparked civil debates on the matter in the Asian State.[1]

Unfortunately, it would seem that the role of the HRC appears to be rather political by default; it is more of a way for the EU and its institutions to present themselves as international promoters of human rights than to provide meaningful change through legal means. To illustrate this issue, the negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada can be mentioned. In this case, the contracting State was heavily opposed to introducing the HRC. Furthermore, the EU Commission and the Member States were interested in making concessions on the matter.[2] Nevertheless, the European Parliament decided to use this as an opportunity to take a firm stance and made implementing the HRC as one of its strategic objectives. By being the sole EU institution to press on this matter, the EP was in fact interested in promoting itself as a protector of human rights and, thus, increase its legitimacy. This is further confirmed through interviews with EP officials at the time.[3] On the other hand, the Parliament has also been somewhat more forgiving during negotiations with States which featured a much worse human rights record (e.g. Columbia).[4] Thus, it would appear that the EP is more interested in projecting a certain image of itself as a human

[1] Daniela Sicurelli "The conditions for effectiveness of EU human rights promotion in non-democratic states. A case study of Vietnam", *Journal of European Integration*, vol. 39, no. 6, 2017, pp. 739-753, p. 748.

[2] Katharina Meissner, Lachlan McKenzie, "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes", *Journal of European Public Policy*, vol. 26, no. 9, 2019, pp. 1273-1291, p. 1281.

[3] Katharina Meissner, Lachlan McKenzie, "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes", *Journal of European Public Policy*, vol. 26, no. 9, 2019, pp. 1282-1283.

[4] Lore Van den Putte, Ferdi De Ville, Jan Orbie "The European Parliament as an international actor in trade. From power to impact", in the volume *The European Parliament and its International Relations*, Routledge, London, 2015, pp. 52–69 p. 64.

rights promoter for its own citizens through high profile negotiations such as those concerning CETA, than by enforcing the same standards to other States.

Certainly, this does not affect the Union's overall role in human rights protection, which it ensures through other mediums aforementioned. Regardless, this raises the questions on the relevancy of the HRC which may be seen as a somewhat outdated mechanism, especially in relation with partners outside of future enlargement objectives.

7. Conclusions

This paper has exposed a number of problems that the human rights clause encounters or may encounter at the present moment. In sum, two main issues can be identified.

First, by analysing the history of the clause, great differences in drafting were found which have the potential of leading to double standards. Furthermore, differences in drafting lead to some clauses not being legally binding which can be a major issue if the EU's intention is to effectively ensure human rights protection.

Second, as far as effectivity of the HRC is concerned, ex-post assessment appears to be a difficult task which not even the EU has been able to perform consistently. Thus, suggestions of implementing assessment commissions for every EU Agreement appear unrealistic.

Moreover, data suggests that the EU already implemented other mechanisms of enforcing external human rights protection which feature clear results. Thus, the HRC appears as an outdated mechanism which only serves political purposes for the Union and its institutions. At best, the clause can be used only when there is a political interest from the EU such as if the agreement is concluded with a neighbouring State which may become part of a future enlargement. In such a case, it is imperative that the State meets the required criteria. Thus, the clause can become an effective mechanism since the State now has both an incentive (enlargement) and a possible sanction (suspension of agreement) related to respecting human rights.

As an overall conclusion, the high number of issues identified in relation with the HRC indicate not only a lack of effectivity for human rights protection and an obstacle for the EU during its negotiations, but also that it may be time for the Union to stop introducing such a clause in a generalised manner and begin relying more on its other mechanisms. This would provide benefits such as better strength in agreement negotiation and more time for the EU's human

rights impact assessment specialists to focus on the effects of the GSP or other means of promoting human rights.

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