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Jacob Batinga

Antitrust's Social "Ripple Effect"

Sandra Marco Colino

Banksy 'Walled Off': A Human Rights Perspective to Graffiti and Street Art

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Human Rights Respectful Trade

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Complicity, International Law, and the American Subsidization of Israel's Arms Exports

Jacob Batinga*

For the past four decades, the United States has heavily subsidized Israel's domestic arms industry and funded the research, development, and production of Israeli weapons systems. With substantial American financial support, Israel has become the world's tenth-largest arms exporting State. Furthermore, Israel routinely exports these American-subsidized weapons to States engaged in serious human rights violations like Myanmar throughout the ethnic cleansing of the Rohingya population, South Sudan during its civil war, and Azerbaijan as the conflict in Nagorno-Karabakh escalated.

Scholars, human rights organizations, and United Nations experts have concluded that these Israeli arms exports likely violate Common Article 1 of the Geneva Conventions, which prohibits arms transfers to States engaged in violations of international humanitarian law. Therefore, the United States has subsidized the development and production of weapons systems which are subsequently exported in violation of international law. Though many scholars have analyzed the legality of Israel's arms exports, one question has remained largely overlooked: Should the United States also incur liability under international law for its heavy subsidization and support of Israel's unlawful arms exports?

Under Article 16 of the Articles on State Responsibility for Internationally Wrongful Acts, a State is complicit under international law when its "aid or assistance" facilitates another State's unlawful conduct. This Article presents a novel contribution to our understanding of the arms trade and complicity under international law by applying Article 16's jurisprudence and scholarship to the United States' aid and assistance for Israel's unlawful arms exports. By subsidizing the development of indigenous Israeli weapons systems, the United States may be liable for the unlawful transfers of these weapons, too.

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INTRODUCTION

The United States has assisted in the development of Israel's domestic arms industry by directly subsidizing the research, development, and production of indigenous Israeli weapons systems. Through the Foreign Military Financing program ("FMF"), the United States issues grants or loans to "foreign militaries

for the purchase of US defense equipment, training, and services.”¹ All recipients are required to use these funds “exclusively” for the purchase of American defense equipment—except Israel.² Not only does Israel receive far more Foreign Military Financing than any other recipient, but it also enjoys a unique privilege through a mechanism known as the “Offshore Procurement Clause.” Under this clause, the United States grants Israel the right to use a significant portion of its Foreign Military Financing to fund its own “research, development and procurement of advanced weapons systems.”³ No other recipient of American Foreign Military Financing is granted this right. Over the last 35 years, the United States has given Israel tens of billions of dollars to directly fund its own weapons production, allowing Israel to build up a massive defense industry oriented toward exports.⁴ Due in large part to this significant subsidization and support, Israel is now the tenth largest arms exporter in the world.⁵

Furthermore, Israel’s arms export policy lacks sufficient human rights vetting mechanisms, oversight, and transparency.⁶ Israel routinely exports American-subsidized weapons to States engaged in gross violations of international law, including ethnic cleansing and genocide.⁷ For example, Israel has transferred American-subsidized Israeli weapons to South Sudan during its civil war; Myanmar throughout the ethnic cleansing of the Rohingya population; and Azerbaijan during its attack on Nagorno-Karabakh.⁸ In total, Israel has

1. *U.S. to Provide Latvia with Foreign Military Financing to Strengthen Deterrence*, U.S. EMBASSY IN LATVIA (Oct. 7, 2022), <https://lv.usembassy.gov/u-s-to-provide-latvia-with-foreign-military-financing-to-strengthen-deterrence/>.

2. JEREMY M. SHARP, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL 8 (2023), <https://sgp.fas.org/crs/mideast/RL33222.pdf> [hereinafter U.S. FOREIGN AID TO ISRAEL].

3. Jacob Batinga, *Should Biden’s New Arms Transfer Policy Apply to Israel?*, RESPONSIBLE STATECRAFT (Mar. 8, 2023), <https://responsiblestatecraft.org/2023/03/08/should-bidens-new-arms-transfer-policy-apply-to-israel/>.

4. Donatas Palavenis, *Adaptive Israel Defense Industry: Myth or Reality?*, 27 ISR. AFFS. 976-77 (2021).

5. Pieter D. Wezeman, Alexandra Kuimova & Siemon T. Wezeman, *Trends in International Arms Transfers, 2021* STOCKHOLM INT’L PEACE RSCH. INST., (March 2022) https://www.sipri.org/sites/default/files/2022-03/fs_2203_at_2021.pdf.

6. See Oded Yaron, *‘The State’s Right’: Top Court Refuses to Rule on Israeli Sale of Spy Tech to Russia*, HAARETZ (June 28, 2021), <https://www.haaretz.com/israel-news/tech-news/2021-06-28/ty-article/.premium/top-court-refuses-to-rule-on-israeli-sale-of-spy-tech-to-russia/0000017f-e568-d97e-a37f-f76dc4350000>; Avidan Freedman, *Opinion: How Israel’s Supreme Court Rubber Stamps Arms Deals to Dictators*, HAARETZ (July 16, 2023), <https://www.haaretz.com/opinion/2023-07-16/ty-article-opinion/.premium/how-israels-supreme-court-rubber-stamps-arms-deals-to-dictators/00000189-5ebe-d481-afbd-5ebe14a00000>.

7. See Amos Harel, *Arming Dictators, Equipping Pariahs: Alarming Picture of Israel’s Arms Sales*, HAARETZ (May 19, 2021) <https://www.haaretz.com/israel-news/2019-05-19/ty-article/.premium/israel-arms-sales-to-dictators-pariahs-states-alarming-picture/0000017f-e8d7-dc91-a17f-fcdafab40000>.

8. See Oded Yaron, *Israel Sold Arms to Myanmar Even After the 2021 Military Coup*, HAARETZ (Sept. 5, 2023), <https://www.haaretz.com/israel-news/security-aviation/2023-09-05/ty-article/.premium/israel-sold-arms-to-myanmar-even-after-the-2021-military-coup/0000018a-6000-d339-a3af-f5b673e90000>; Avi Scharf & Oded Yaron, *92 Flights From Israeli Base Reveal Arms*

exported weapons to over 100 States, many of which engage in serious and well-documented human rights abuses with these weapons.

Israel's exports constitute violations of the Geneva Conventions. Common Article 1 of the Conventions requires States to "refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used" to commit gross violations of international humanitarian law.⁹ Scholars and human rights organizations have analyzed Israel's arms exports to States engaged in these gross violations of international law and concluded that Israel's arms transfers are likely unlawful under Common Article 1.¹⁰ However, the question of the United States' liability under international law for subsidizing these unlawful exports has yet to be comprehensively analyzed.

Under Article 16 of the Draft Articles on State Responsibility, a State incurs liability under international law when it facilitates the wrongful acts of another State through its "aid or assistance."¹¹ Article 16 has attained the status of customary international law and is therefore binding on all States.¹² Courts, States, and human rights organizations have interpreted this provision broadly to include "aid or assistance" in the form of arms sales, logistical support, access to airspace and territory, and intelligence sharing.¹³ If a sufficient link exists between an assisting State's support of a recipient State's violations of international law, and the assisting State has knowledge of those violations, the assisting State is liable under Article 16.¹⁴

This Article offers a novel contribution by applying Article 16 jurisprudence and scholarship to the United States' subsidization of Israel's arms industry and subsequent exports to States engaged in gross violations of international law. A *prima facie* case can be made that the United States is liable under Article 16 due to its significant subsidization and support for Israel's unlawful arms exports. To

Exports to Azerbaijan, HAARETZ (Mar. 6, 2023), <https://www.haaretz.com/israel-news/security-aviation/2023-03-06/ty-article-magazine/.premium/92-flights-from-israeli-base-reveal-arms-exports-to-azerbaijan/00000185-fd3d-d96e-adeb-ff3dc38e0000>; Gili Cohen, *Israeli Arms Exports to South Sudan Are Lawful, State Tells High Court*, HAARETZ (Aug. 10, 2017), <https://www.haaretz.com/israel-news/2017-08-10/ty-article/state-to-high-court-arms-exports-to-south-sudan-lawful/0000017f-e57b-df2c-a1ff-f7bb3b900000>.

9. Commentary of 2020, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

10. See H.R. COUNCIL, THE ECONOMIC INTERESTS OF THE MYANMAR MILITARY INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON MYANMAR, 107, U.N. Doc. A/HRC/42/CRP.3 (Aug. 5, 2019); *UN Security Council: Impose Arms Embargo on Myanmar*, HUM. RTS. WATCH (Feb. 24, 2021), <https://www.hrw.org/news/2021/02/24/un-security-council-impose-arms-embargo-myanmar#:~:text=Governments%20that%20permit%20arms%20transfers,%2C%20munitions%2C%20and%20related%20equipment>.

11. U.N. Int'l Law Comm'n, 53rd Sess., *Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/49 Vol. I (2001).

12. Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* 6 (Chatham House, 2016).

13. *Id.* at 8.

14. See Moynihan, *supra* note 12, at 10.

this end, Section I of this Article briefly overviews the history of American military aid to Israel, showing that Israel's massive domestic arms industry and export capability can be directly attributed to American subsidization. Section II scrutinizes Israel's arms exports to States engaged in gross violations of international law using exports to Myanmar and Azerbaijan as case studies. Section II concludes that Israel's exports of American-subsidized weapons constitute clear violations of Common Article 1 of the Geneva Conventions. Section III defines Article 16 of the Draft Articles on State Responsibility's scope and application as established by the International Court of Justice, domestic courts, scholars, and human rights organizations. Section III further examines the elements required to establish a State's liability for its "aid and assistance" of another State's internationally unlawful acts. Finally, Section IV applies Article 16 of the Draft Articles on State Responsibility to the United States' subsidization of Israel's arm exports, arguing that this subsidization is sufficient to generate American liability for Israel's unlawful arms exports.

This Article does not address American liability for Israel's violations of international humanitarian law in the Occupied Palestinian Territories,¹⁵ and instead focuses on the humanitarian impact and legal implications of the United States' support for Israel's weapons transfers.

I. BACKGROUND: A BRIEF HISTORY OF ISRAEL'S ARMS INDUSTRY AND AMERICAN SUPPORT

A. *Israel's Military Development*

Israel's arms industry first emerged in the 1930s when the Haganah (the pre-State predecessor to the Israeli Defense Forces) established "Israel Military Industries" and began manufacturing small arms in clandestine weapons factories in British Mandatory Palestine.¹⁶ Pre-State arms production was largely limited to producing rifles, mortars, and other light weaponry. In the years leading up to the establishment of the State of Israel and the war with the Arab States in 1948, the Haganah domestically produced weapons at a greater scale using "surplus United States machinery acquired as scrap after World War II."¹⁷ The Haganah also repurposed weapons left by the British following its withdrawal from Mandatory Palestine and imported large quantities of arms from Czechoslovakia, which were considered "crucial to Israel's victory in its war with the Arab States that year."¹⁸ The United States did not send weapons to the Israeli forces during

15. See USA: Stop Arms Transfers To Israel Amid Growing Evidence Of War Crimes In Gaza, AMNESTY INT'L, (July 31, 2014), <https://www.amnesty.org/en/latest/news/2014/07/usa-stop-arms-transfers-israel-amid-growing-evidence-war-crimes-gaza>.

16. See HELEN CHAPIN METZ, ISRAEL: A COUNTRY STUDY 314 (1988).

17. *Id.* at 314.

18. Guy Laron, *Working Paper #55: Cutting the Gordian Knot: The Post-WWII Egyptian Quest for Arms and the 1955 Czechoslovak Arms Deal*, COLD WAR INT'L HIST. PROJECT WORKING PAPER

the war and instead maintained an arms embargo on both the Jewish militias and the Arab States.¹⁹

Following its victory against the Arab States and the establishment of the State of Israel, Israel began importing greater quantities of arms from foreign States and developing an official defense industry.²⁰ Though the United States began selling arms to Israel in 1962, this support was limited because of its wariness to cause conflict with neighboring Arab States and provoke a regional arms race in the Middle East.²¹ France, on the other hand, already had a strained relationship with these Arab States due to its ongoing colonial war with Algeria and “shared with Israel a strategic interest in combating radical Arab nationalism.”²² From the early 1950s to 1967, France was Israel’s primary supplier of both advanced weaponry (such as fighter jets and tanks) and small arms (such as rifles).²³

During this period of French support, Israel’s arms industry experienced modest growth but remained small and relatively unsophisticated. In the 1950s, Israel established and expanded several State-owned weapons companies, producing “mainly ammunition, mortars and small arms.”²⁴ These companies assembled fighter jets and manufactured parts for advanced weaponry under a license agreement with the French government.²⁵ Israel’s nascent arms industry did not develop significant indigenous advanced weaponry during this period and continued to be heavily dependent on French technology and arms imports, which Israeli authorities expected to continue.²⁶ Following France’s defeat in Algeria in 1962, however, French President Charles de Gaulle shifted policy towards mending relationships with the Arab world and minimizing France’s close alliance with Israel.²⁷ France imposed an arms embargo on Israel three days before the Six-Day War of 1967, cutting off exports of French advanced weaponry (including orders that Israel had already paid for).²⁸

Though Israel was ultimately victorious against belligerent Arab States in the Six-Day War, the abrupt and unexpected termination of weapons imports from France caused Israel to radically overhaul its industrial policy and prioritize the

SERIES, 5 (Feb. 2007),
https://www.wilsoncenter.org/sites/default/files/media/documents/publication/WP55_WebFinal.pdf.

19. JEFFREY HERF, *ISRAEL’S MOMENT: INT’L SUPPORT FOR AND OPPOSITION TO ESTABLISHING THE JEWISH STATE, 1945–49*, 293 (2022).

20. See Metz, *supra* note 16, at 314–16.

21. Abraham Ben-Zvi, *Influence and Arms: John F. Kennedy, Lyndon B. Johnson and the Politics of Arms Sales to Israel, 1962–66*, 10 *ISR. AFFS.* 29 (2004).

22. Gary J. Bass, *When Israel and France Broke Up*, *N.Y. TIMES* (Mar. 31, 2010), <https://www.nytimes.com/2010/04/01/opinion/01bass.html>.

23. See Farah Naaz, *Israel’s Arms Industry*, 23 *STRATEGIC ANALYSIS* 2077 (2000).

24. *Id.*

25. *Id.*

26. *Id.*

27. See *id.*; see also Bass, *supra* note 22.

28. Naaz, *supra* note 23.

development of a powerful domestic arms industry. Following these experiences during the war, Israel “embarked on an all-out policy of self-sufficiency trying to develop and produce all its defense needs.”²⁹

The Six-Day War also marked a major shift in American-Israel military relations. The American government recognized the strategic value of a stronger alliance with Israel; Israel had just defeated a coalition of Arab States, which, according to American policymakers, had “permanently drifted toward the Soviets.”³⁰ With bipartisan support from Congress, President Johnson increased arms sales to Israel in 1968, and transferred advanced weapons systems including a fleet of F-4 Phantom fighter jets.³¹ Five years later, during the Yom Kippur War between Israel and Egypt, the Nixon Administration increased weapons transfers and replenished Israel’s arms supplies in an emergency airlift.³² Following Israel’s victory over Egypt, the United States quadrupled its military aid to Israel.³³ This made the United States Israel’s largest arms supplier and “virtually the sole outside source of sophisticated weaponry” for Israel.³⁴ In 1974, President Nixon approved \$2.2 billion in military aid to Israel, and, in 1975, President Ford lifted the restrictions on sending Israel the most advanced military equipment, including F-15s and F-16s.³⁵ By the mid-1970s, the United States was sending Israel a “steady flow of aircraft, Hawk missiles, self-propelled artillery, M-48 and M-60 tanks, armored personnel carriers, helicopters, and antitank missiles.”³⁶

Under official and unofficial United States policy, Israel has had a significant regional advantage in the import of US weaponry since the late 1960s. Though tacitly embraced by every administration since President Johnson, the United States officially adopted a policy of “Qualitative Military Edge” (“QME”) towards Israel during the Reagan Administration, which has since been codified in American law.³⁷ The QME policy obligates the United States to ensure that Israel has a military advantage over any regional adversary by “downgrading the capability of weapons systems that it sold to the Arab States or upgrading versions sold to Israel.”³⁸ Thus, in practice, when the United States sells arms packages to regional allies in the Middle East, even larger arms packages are sold to Israel in order to ensure the superiority of Israel’s military capabilities. Under the policy

29. *Id.*

30. William Wunderle & Andre Briere, *U.S. Foreign Policy and Israel’s Qualitative Military Edge: The Need for a Common Vision* 5 WASH. INST. FOR NEAR E. POL’Y, Policy Focus No. 80 (2008), <https://www.washingtoninstitute.org/media/3468>.

31. *See id.*

32. Metz, *supra* note 16, at 321.

33. Wunderle & Briere, *supra* note 30, at 5.

34. Metz, *supra* note 16, at 320.

35. Bernard Gwertzman, *U.S. Decides to Sell Some Arms to Israel That It Blocked in Past*, N.Y. TIMES (Oct. 12, 1976), <https://www.nytimes.com/1976/10/12/archives/us-decides-to-sell-some-arms-to-israel-that-it-blocked-in-past.html>.

36. Metz, *supra* note 16, at 321.

37. *See* Wunderle & Briere, *supra* note 30, at 1, 6.

38. *Id.* at 6.

of QME, the United States also provides Israel with significant technical assistance, joint weapons development programs, and research sharing.³⁹

Consecutive presidential administrations continued to increase American military aid to Israel. In 1999, the Clinton Administration signed a 10-year Memorandum of Understanding (“MOU”), granting Israel \$21.2 billion in military aid over ten years.⁴⁰ The Bush Administration signed a second MOU in 2008, agreeing to dispense \$30 billion in military aid over the ten-year period from 2009 to 2018.⁴¹ Finally, in 2016, the Obama Administration signed a third ten-year MOU with Israel, committing to provide an additional \$38 billion in military aid: \$33 billion in direct aid and \$5 billion earmarked specifically for missile defense programs.⁴² In total, Israel is the largest recipient of American weapons and military aid since 1945 and currently receives more military aid from the United States than any other country.⁴³

B. From Transfers to Direct Subsidization exclusively for Israel via the Offshore Procurement Clause

From 1968 to the present, Israel’s indigenous arms industry has experienced a massive expansion. Israel’s domestic investments in arms development increased during this period, but the Israeli arms industry did not gain substantial size and export capability solely through internal funding and foreign arms imports. Through the “Offshore Procurement Clause” of the Foreign Military Financing Program, the United States has heavily subsidized—and continues to subsidize—Israel’s domestic arms industry, greatly contributing to its current status as the tenth largest arms exporter in the world.

The United States sells weapons to foreign governments through direct commercial sales or “Foreign Military Sales.” Through direct commercial sales, foreign governments purchase weapons directly from American-based defense corporations with oversight from the US State Department.⁴⁴ Through Foreign Military Sales, foreign governments purchase weapons from the United States through the Defense Security Cooperation Agency (a division of the Department of Defense), which negotiates the contracts and procures weapons from American defense corporations.⁴⁵ According to the Department of Defense, Foreign

39. *Id.* at 16.

40. Joint Statement by the President and Prime Minister Ehud Barak of Israel, 2 PUB. PAPERS 1252, (July 19, 1999), <https://www.govinfo.gov/content/pkg/PPP-1999-book2/pdf/PPP-1999-book2-doc-pg1252.pdf>.

41. U.S. FOREIGN AID TO ISRAEL, *supra* note 2.

42. JEREMY M. SHARP ET AL., CONG. RSCH. SERV., R44984, ARM SALES IN THE MIDDLE EAST: TRENDS AND ANALYTICAL PERSPECTIVES FOR U.S. POLICY (2020), <https://crsreports.congress.gov/product/pdf/R/R44984>.

43. U.S. FOREIGN AID TO ISRAEL, *supra* note 2, at 10, app. A.

44. U.S. DEP’T OF STATE, BUREAU OF POL.-MIL. AFF., U.S. ARMS SALES AND DEFENSE TRADE FACT SHEET (2021), <https://www.state.gov/u-s-arms-sales-and-defense-trade/>.

45. Batinga, *supra* note 3.

Military Sales are a “fundamental tool of US foreign policy” and play a vital role in maintaining and strengthening American allies.⁴⁶

Additionally, the United States provides funding to dozens of countries to finance their acquisition of American weapons. Through the FMF, the United States issues grants or loans “to foreign militaries for the purchase of US defense equipment, training, and services.”⁴⁷ In other words, the United States supplies foreign governments with funds that are exclusively earmarked for the purchase of American weapons and defense-related services. Currently, Israel receives more than \$3.3 billion in FMF annually, which is more than every other FMF recipient combined.⁴⁸ In total, the United States has provided Israel upwards of \$150 billion in military aid since 1948.⁴⁹

Crucially, Israel enjoys a unique privilege under the FMF program: unlike all other recipients of American military aid, the United States government allows Israel to spend a significant portion of these funds on domestic weapons production, thereby directly subsidizing Israel's domestic defense industry.⁵⁰ Whereas all other FMF recipients are required to use their FMF to purchase American defense equipment, Israel is permitted to convert 26.3% of its FMF funds to local currency (Israeli Shekels) and invest in research, development, and production of indigenous weapons systems.⁵¹ Israel's ability to use a portion of its FMF for domestic subsidization is known as the “Offshore Procurement Clause” (“OSP”).⁵²

The United States' subsidization of Israel's arms industry has shifted from earmarked grants for production of specific Israeli weapons systems to broad subsidization of Israel's weapons development via OSP. The United States first granted Israel permission to use a portion of its FMF for domestic procurement in 1977, when Israel requested to use \$107 million of its FMF to develop and produce the Merkava Tank.⁵³ In 1983, the United States also granted Israel's

46. Press Release, U.S. Dep't of Def., Department of Defense Unveils Comprehensive Recommendations to Strengthen Foreign Military Sales (June 13, 2023), <https://www.defense.gov/News/Releases/Release/Article/3425963/departments-of-defense-unveils-comprehensive-recommendations-to-strengthen-forei/>.

47. U.S. EMBASSY IN LATVIA, *supra* note 1.

48. Josh Ruebner et al., *Bringing Assistance to Israel in Line with Rights and U.S. Laws*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 12, 2021), <https://carnegieendowment.org/2021/05/12/bringing-assistance-to-israel-in-line-with-rights-and-u.s.-laws-pub-84503>.

49. SHARP, *supra* note 42, at 2.

50. NAME REDACTED, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL 5 (2016), https://www.everycrsreport.com/files/20161222_RL33222_38d8a59f2caabdc9af8a6cdabfabb963ae8b63ae.pdf.

51. *Id.* at 11; See also ANNE MARIEL ZIMMERMAN, US ASSISTANCE, DEVELOPMENT, AND HIERARCHY IN THE MIDDLE EAST: AID FOR ALLIES, 8-9, (2017).

52. CONG. RSCH. SERV., *supra* note 50.

53. Guy Paglin, *New/Old Trends Affecting the Defense Industries*, in ISRAEL'S DEFENSE INDUSTRY AND US SECURITY AID 121-22 (Sasson Hadad et al. eds., 2020) https://www.inss.org.il/wp-content/uploads/2020/08/Memo202_e.pdf.

request to use \$250 million of its FMF to develop the Lavi, an advanced fighter jet.⁵⁴ Congressional legislation passed in 1983 allowed for additional annual FMF funding of the Lavi between 1983–88, which amounted to a total of between \$1.3 and \$1.8 billion.⁵⁵ However, the United States had a change of heart in 1988 when it recognized that the Lavi, if completed, would be a major competitor to American-made F-16s.⁵⁶ In order to extinguish the threat that the Lavi posed to the United States' advanced jet exports, American policymakers pressured Israel to terminate production of the Lavi, and Israel obliged.⁵⁷ In exchange for termination—and to offset the costs associated with the Lavi program—the United States incorporated the OSP into American-Israeli military aid agreements, granting Israel the right to use 26.3% of its FMF annually on domestic research, development, and production.⁵⁸ Unlike the earlier earmarked grants to fund the Merkava tank and Lavi jet, the OSP funding was not tied to any specific weapons program but rather functioned as a general subsidization of Israel's arms industry.⁵⁹

Today, Israel has one of the largest defense budgets in the world, and American military aid accounts for around one-fifth of Israel's *total military budget*.⁶⁰ Since the OSP funds are tied to Israel's overall military aid (26.3% of its FMF), OSP funding has grown proportionally with increases in American military aid. This funding reached its height in 2019, when OSP funding "amounted to an \$815 million annual subsidization by US taxpayers of Israeli weapons manufacturers."⁶¹ Since the implementation of OSP funding in 1988, the United States has provided tens of billions of dollars in direct subsidization of Israel's now-massive domestic arms industry.⁶²

54. NAME REDACTED, *supra* note 50.

55. *Id.* at 5.

56. Sasson Hadad, *Is the Aid Agreement Essential for Israel? A Cost-Benefit Analysis*, in ISRAEL'S DEFENSE INDUSTRY AND US SECURITY AID 150-51 (Sasson Hadad et al. eds., 2020) https://www.inss.org.il/wp-content/uploads/2020/08/Memo202_e.pdf.

57. See generally, Duncan L. Clarke & Alan S. Cohen, *The United States, Israel, and the Lavi Fighter*, 40 MID. E. J. 16 (1986); JOHN W. GOLAN, LAVI: THE UNITED STATES, ISRAEL, AND A CONTROVERSIAL FIGHTER JET (2016).

58. *Id.*

59. *Id.*

60. Zimmerman, *supra* note 51.

61. Ruebner, *supra* note 48.

62. To note, the Offshore Procurement Clause is set to sunset by 2028. In the negotiations leading up to the 2016 Memorandum of Understanding, both Israeli and American diplomats recognized that Israel's arms industry was not a major US competitor. According to one negotiator, "Israeli defense industry was now mature, competitive, and had customers around the world — in some markets even competing with US companies — and therefore OSP had outlived its original purpose. Therefore, the US position was that Israel's FMF program could now return to normal, to be run as FMF was in all other countries." ISRAEL'S DEF. INDUS. AND US SEC. AID, *supra* note 56, at 66.

II. ISRAEL'S ARMS EXPORTS AND INTERNATIONAL HUMANITARIAN LAW

A. Common Article 1 of the Geneva Conventions

The Geneva Conventions and subsequent Additional Protocols to the Conventions represent the “core of international humanitarian law.”⁶³ Common Article 1 of the Geneva Conventions requires States to broadly “undertake to respect and to ensure respect” for international humanitarian law.⁶⁴ All United Nations member States are party to the Geneva Conventions, and the provisions therein are universally regarded as customary international law. The commentary of the International Committee of the Red Cross—widely considered the authoritative interpretation⁶⁵ of the Geneva Conventions—states that “Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.”⁶⁶ This negative obligation to avoid transferring weapons to States engaged in violations of international humanitarian law has additionally been recognized in multiple holdings of the International Court of Justice⁶⁷, the International Criminal Court,⁶⁸ and State parties to the Conventions.⁶⁹

Furthermore, Common Article 1 includes a positive obligation on arms exporting States to conduct “due diligence” and “make every effort” to terminate a recipient State’s violations of international humanitarian law.⁷⁰ States providing weapons and military support to parties engaged in violations of international humanitarian law are liable under Common Article 1 unless “they have done everything reasonably in their power to bring the violations to an end.”⁷¹ In the

63. *The Geneva Conventions and their Commentaries*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> (last visited Oct. 4, 2023) [hereinafter Geneva Commentary 2016].

64. Commentary of 2016, Geneva Convention Relative to the Treatment of Prisoners of War for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-12/commentary/2016>.

65. H.R. Council, *Enabling Atrocities: UN Member States’ Arms Transfers to the Myanmar Military* at 8, UN H.R.C., U.N. Doc A/HRC/49/CRP.1 (Feb. 22, 2022) [hereinafter H.R. Council, *Enabling Atrocities*].

66. Geneva Commentary 2016, *supra* note 63.

67. *Military and Paramilitary Activities in and Against Nicaragua*, Judgment, (Nicar. v. U.S.) 1986 I.C.J. Rep. 14, 191 (June 27).

68. Alexandra Boivin, *Complicity and Beyond: International Law and The Transfer of Small Arms and Light Weapons*, 87 INT’L REV. RED CROSS 467, 468 (2005).

69. Marko Milanovic, *Intelligence Sharing in Multinational Military Operations and Complicity Under International Law*, 97 INT’L L. STUD. 1269, 1329 (2021).

70. Geneva Commentary 2016, *supra* note 63.

71. *Id.*

Bosnian Genocide case, the ICJ held that this positive obligation is of “critical importance.”⁷²

Common Article 1 prohibits arms transfers where there is a mere “expectation”⁷³ that the weapons would be used to violate international humanitarian law; that is, there is no subjective “intent” requirement nor a severity threshold.⁷⁴ According to the Human Rights Council, once an assisting State becomes aware of the recipient State’s violations of international law, the “transferring [S]tate has to deny further transfers of those weapons, even if those weapons could also be used lawfully.”⁷⁵ Relevant violations of international humanitarian law include, for example, war crimes, attacks on civilians, deprivation of the right to life, forcible transfers, and ethnic cleansing.

B. Israel’s Arms Exports and International Law

Israel’s arms exports are not subject to disclosure procedures and are conducted by the Israeli Ministry of Defense in near-total secrecy.⁷⁶ Several human rights groups have sued the Israeli government for information on Israeli arms exports but to no avail. Recently, a high-profile group of human rights activists sued the Israeli government, demanding “that the country’s Ministry of Defense releases documents and records pertaining to the sale of weapons and military systems to countries under military embargo, engaged in civil wars and in systematic violation of human rights.”⁷⁷ The Israeli Supreme Court refused to hear the case, however, stating that “[t]he decision by regulators and those overseeing the exports is accepted... on the basis of defense considerations and Israel’s international commitments. Like with other issues relating to national defense and security, the prerogative is the State’s, and the law provides it with very wide discretion.”⁷⁸

72. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 1996 I.C.J. Rep. 595 (July 1996) [hereinafter “*Bosnia v. Serbia*”].

73. Geneva Commentary 2016, *supra* note 63.

74. Odile Dua, *Arms Supply to Saudi Arabia: A Possible Implementation of Belgium’s State Responsibility?*, 52 REV. BDI 531, 543 (2019).

75. H.R. Council, *Enabling Atrocities*, *supra* note 65.

76. Harel, *supra* note 7.

77. Shir Hever, *Israel Arms Sales: Court Decision Ends Hopes For Transparency*, MID. E. EYE, (July 1, 2021) <https://www.middleeasteye.net/news/israel-arms-sales-transparency-court-decision-ends-hopes>.

78. Yaron, *supra* note 6.

However, foreign States' import records,⁷⁹ government disclosures,⁸⁰ and leaks to the media⁸¹ have shed significant light on Israel's arms exports. Since the onset of American OSP funding in 1988, Israel has exported arms to over 100 countries, including many States engaged in gross human rights violations.⁸² According to a report by Amnesty International, "the absence of monitoring and transparency have for decades let Israel supply equipment and defense-related knowledge to questionable States and dictatorial or unstable regimes that have been shunned by the international community."⁸³ Two such examples are treated in turn.

1. Myanmar

In late 2016, revelations related to Myanmar's persecution of the Rohingya population sparked international outrage. The military's violence steadily increased until it peaked in the summer of 2017 with a "campaign of mass rape, burnings and drownings against entire families that killed more than 9,000 people and forced nearly one million to flee the country."⁸⁴ In 2021, the Myanmar military overthrew the civilian government and subsequently increased its persecution against the Rohingya population yet again. Since the 2021 coup, human rights organizations have documented that the military junta's additional "war crimes and crimes against humanity," including "mass killings, arbitrary arrests and detention, torture, sexual violence, and attacks on civilians in conflict areas."⁸⁵

There is widespread recognition among States, human rights organizations, and international bodies that Myanmar has engaged in gross violations of the Geneva Conventions. In June 2021, the United Nations General Assembly passed a resolution calling on "all member states to prevent the flow of arms into

79. Sahar Vadi, *This Database is Exposing Decades of Israel's Shady Arms Deals*, 972 MAG., (database updated Feb. 10, 2021), <https://www.972mag.com/israel-arms-exports-database/>.

80. Oded Yaron, *Israeli Governments Approved Every Single Arms Deal Brought to Them Since 2007*, HAARETZ (Dec. 2, 2022), <https://www.haaretz.com/israel-news/security-aviation/2022-12-02/ty-article/israeli-governments-approved-every-single-arms-deal-brought-to-them-since-2007/00000184-ce97-d4f4-a79d-de978e910000>.

81. Simona Weinglass, *Questions On Arms Sales, Funding Bring 2nd Israeli Astronaut Back Down To Earth*, TIMES OF ISR. (Jan. 21, 2021), <https://www.timesofisrael.com/questions-on-arms-sales-funding-bring-2nd-israeli-astronaut-back-down-to-earth/>.

82. Ayelet Shani, *'Israel Would Be Embarrassed if It Were Known It's Selling Arms to These Countries'*, HAARETZ (Aug. 7, 2015), <https://www.haaretz.com/2015-08-07/ty-article/premium/turning-blood-into-money/0000017f-eda5-d3be-ad7f-ffaf42480000>.

83. Harel, *supra* note 7.

84. Lara Jakes, *Myanmar's Military Committed Genocide Against Rohingya, U.S. Says*, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/us/politics/myanmar-genocide-biden.html>.

85. *Myanmar: Abuses Mount Since Military Coup*, HUM. RTS. WATCH (Jan. 12, 2023), <https://www.hrw.org/news/2023/01/12/myanmar-abuses-mount-military-coup>.

Myanmar,” with only one dissenting vote (Belarus).⁸⁶ The United Nations Special Rapporteur on the situation of human rights in Myanmar called on the international community to pass a binding arms embargo on Myanmar,⁸⁷ and the United Nations Security Council issued a resolution condemning the Myanmar military’s “attacks against civilians and civilian infrastructure.”⁸⁸ The European Union issued a resolution prohibiting all member States from sending weapons to the military junta, and the United States reaffirmed its binding “comprehensive” arms embargo on Myanmar.⁸⁹

Despite the clear evidence of widespread human rights violations and ethnic cleansing, Israel continued supplying weapons to the government of Myanmar as well as the subsequent military junta. The Stockholm International Peace Research Institute, which monitors the global arms trade, confirmed that Israel transferred Super Dvora MK gunboats and Armored Personnel Carriers to Myanmar until 2019, three years after the major upsurge in violence against the Rohingya in 2016.⁹⁰ According to a report by the Human Rights Council, Israel’s transfers of these weapons “likely violate[] international humanitarian law.”⁹¹

Furthermore, significant evidence has emerged suggesting that Israel’s arms exports to Myanmar were far greater in scale than initially assumed by the Human Rights Council. Import records and leaked documents published in *Haaretz* reveal that Israel continued sending weapons to Myanmar until early 2022—seven years after the escalation against the Rohingya and a full year after the military coup.⁹² According to *Haaretz*’s reports, between 2018 to 2022, Israel transferred over 100 tanks, advanced radar systems, naval patrol boats, drone parts, and molds for the production of rifles and other small arms to Myanmar.⁹³ Over these four years, Israeli exports to Myanmar totaled 250 metric tons.⁹⁴ As human rights organizations have demonstrated, Myanmar heavily relied on weapons supplied by foreign States—including Israel—to carry out grave violations of international humanitarian law.⁹⁵

86. *UN Adopts Nonbinding Arms Embargo on Myanmar*, ARMS CONTROL ASSOC. (2021), <https://www.armscontrol.org/act/2021-07/news-briefs/un-adopts-nonbinding-arms-embargo-myanmar>.

87. U.N. Hum. Rts. Off. of the High Comm’r, *Myanmar: UN Expert Urges Security Council Resolution to Stop Weapons Fueling Spike in Military Attacks on Civilians* (Feb. 22, 2022), <https://www.ohchr.org/en/press-releases/2022/02/myanmar-un-expert-urges-security-council-resolution-stop-weapons-fueling>.

88. S.C. Res. 2669 (Dec. 21, 2022).

89. *EU Arms Embargo on Myanmar (Burma)*, STOCKHOLM INT’L PEACE RSCH. INST. (last updated Dec. 20, 2022), https://www.sipri.org/databases/embargoes/eu_arms_embargoes/myanmar; H.R. Council, *Enabling Atrocities*, *supra* note 65; *see also UN Security Council: Impose Arms Embargo on Myanmar*, HUM. RTS. WATCH (Feb. 24, 2021), <https://www.hrw.org/news/2021/02/24/un-security-council-impose-arms-embargo-myanmar>.

90. *Id.*

91. H.R. Council, *Enabling Atrocities*, *supra* note 65.

92. Yaron, *supra* note 6.

93. *Id.*

94. *Id.*

95. H.R. Council, *Enabling Atrocities*, *supra* note 65.

Israel's arms exports to Myanmar clearly violate Common Article 1 of the Geneva Conventions, which obligates parties to "refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions."⁹⁶ There is no question that Israel had actual knowledge of Myanmar's violations of international humanitarian law while continuing to transfer weapons. Myanmar's violations of international humanitarian law have been well documented by human rights organizations, the United Nations, and State parties since 2017, yet Israel continued to send weapons to Myanmar until 2022. Indeed, the Special Rapporteur on the situation in Myanmar concluded that all State parties had the requisite knowledge of Myanmar's violations of international humanitarian law since 2018:

The Myanmar military's systemic violation of the Geneva Conventions and perpetration of atrocity crimes have been reported by a variety of organizations for over three decades. Despite the longstanding evidence, the Special Rapporteur submits that at a *minimum by 2018 all Member States knew, or would have expected, that arms transferred to Myanmar would be used in attacks against civilians in violation of international law.*⁹⁷

Israel continued to transfer weapons to Myanmar even *after* the General Assembly resolution calling for an arms embargo, the United States and European Union's comprehensive arms embargo, the Security Council's condemnation of the military junta's violence against civilians, and the wealth of documentation provided by human rights organizations. Though not required by Common Article 1, Israel's subjective knowledge of Myanmar's violations of international humanitarian law can also be conclusively demonstrated: not only did Israel vote in *favor* of the General Assembly resolution calling for an arms embargo on Myanmar, but Israel's Foreign Ministry also condemned Myanmar's violence against the Rohingya in 2019—and then continued to supply Myanmar with weapons for the next three years.⁹⁸

2. Azerbaijan

In September 2020, Azerbaijan launched a military offensive in the Armenian-populated region of the disputed territory of Nagorno-Karabakh.⁹⁹ The conflict lasted for nearly two months and resulted in the deaths of over 7,000

96. Geneva Commentary 2016, *supra* note 63.

97. H.R. Council, *Enabling Atrocities*, *supra* note 65 (emphasis added). See *Israel Denounces Atrocities Against Rohingya in Myanmar After Diplomat's Tweet*, TIMES ISR. (Nov. 28, 2019), <https://www.timesofisrael.com/israel-denounces-atrocities-against-rohingya-in-myanmar-after-diplomats-tweet/>.

98. See TIMES ISR., *supra* note 97; see also *Resolutions and Decisions adopted by the General Assembly*, G.A. RES. 75/49 (VOL. III), 74 (2021) https://www.unode.org/documents/Cybercrime/AdHocCommittee/Website/A_75_49_Vol._III-EN.pdf.

99. Michael Safi, *At Least 16 Dead in Armenia-Azerbaijan Clashes over Disputed Region*, GUARDIAN, (Sept. 27, 2020), <https://www.theguardian.com/world/2020/sep/27/armenia-martial-law-clashes-azerbaijan>.

people and the displacement of upwards of 70,000 Armenians.¹⁰⁰ By the time both sides accepted a ceasefire, Azerbaijan had won a decisive territorial and military victory.¹⁰¹ In September 2023, Azerbaijan violated the ceasefire and began shelling Armenian villages in Nagorno-Karabakh, reigniting the conflict.¹⁰²

Like the previous case study, Azerbaijan's violations of international humanitarian law have been widely documented and established. Investigations by Amnesty International¹⁰³ and Human Rights Watch¹⁰⁴ revealed that both Armenia and Azerbaijan committed grave war crimes, including indiscriminate attacks on civilians and summary executions. Human Rights Watch also documented Azerbaijan's "deliberate targeting" of civilian infrastructure in "violation of the laws of war."¹⁰⁵ The United Nations High Commissioner for Human Rights expressed concern over Azerbaijan and Armenia's "continuing indiscriminate attacks in populated areas in and around the Nagorno-Karabakh conflict zone."¹⁰⁶ Additionally, Amnesty International, Human Rights Watch, and the United Nations documented Azerbaijan's repeated use of cluster munitions on civilian-populated areas, in grave violation of international humanitarian law.¹⁰⁷

European and American policymakers harshly rebuked Azerbaijan's violations of international humanitarian law and called for investigation and

100. Ctr. for Preventive Action, *Nagorno-Karabakh Conflict*, COUNCIL ON FOREIGN REL. (Sept. 28, 2023), <https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict>.

101. Robyn Dixon, *Cease-Fire in Nagorno-Karabakh Provokes Protests in Armenia, Celebrations in Azerbaijan*, WASH. POST (Nov. 10, 2020), https://www.washingtonpost.com/world/europe/nagorno-karabakh-ceasefire-armenia-russia-azerbaijan/2020/11/10/b1b9bcc0-231b-11eb-9c4a-0dc6242c4814_story.html.

102. Editor's Note, *Azerbaijan's Offensive in Nagorno-Karabakh and the Evolution of its Dispute with Armenia*, INT'L INST. FOR STRATEGIC STUDS., STRATEGIC COMMENTS, Vol. 29, Dec. 2023, <https://www.iiss.org/publications/strategic-comments/2023/azerbaijans-offensive-in-nagorno-karabakh-and-the-evolution-of-its-dispute-with-armenia/>.

103. *Armenia/Azerbaijan: Decapitation and War Crimes in Gruesome Videos Must be Urgently Investigated*, AMNESTY INT'L (Dec. 10, 2020), <https://www.amnesty.org/en/latest/press-release/2020/12/armenia-azerbaijan-decapitation-and-war-crimes-in-gruesome-videos-must-be-urgently-investigated/>.

104. Tanya Lokshina, *Survivors of Unlawful Detention in Nagorno-Karabakh Speak Out About War Crimes*, HUM. RTS. WATCH (Mar. 12, 2021), <https://www.hrw.org/news/2021/03/12/survivors-unlawful-detention-nagorno-karabakh-speak-out-about-war-crimes>.

105. *Azerbaijan: Attack on Church Possible War Crime*, HUM. RTS. WATCH (Dec. 16, 2020), <https://www.hrw.org/news/2020/12/16/azerbaijan-attack-church-possible-war-crime>.

106. U.N. Office of the High Comm'r for Hum. Rts. (OHCHR), *Nagorno-Karabakh Conflict: Bachelet Warns of Possible War Crimes as Attacks Continue in Populated Areas* (Nov. 2, 2020), <https://www.ohchr.org/en/press-releases/2020/11/nagorno-karabakh-conflict-bachelet-warns-possible-war-crimes-attacks> [hereinafter Press Release, OHCHR].

107. *See Armenia/Azerbaijan: First Confirmed Use of Cluster Munitions by Armenia 'Cruel And Reckless'*, AMNESTY INT'L (Oct. 29, 2020), <https://www.amnesty.org/en/latest/press-release/2020/10/armenia-azerbaijan-first-confirmed-use-of-cluster-munitions-by-armenia-cruel-and-reckless/>; *see also Azerbaijan: Cluster Munitions Used in Nagorno-Karabakh*, HUM. RTS. WATCH (Oct. 23, 2020), <https://www.hrw.org/news/2020/10/23/azerbaijan-cluster-munitions-used-nagorno-karabakh>; *see also* Press Release, OHCHR, *supra* note 106.

prosecution of suspected war criminals.¹⁰⁸ Senator Bob Menendez, Chairman of the Senate Foreign Relations Committee, condemned Azerbaijan's "assault [...] on innocent civilians" and accused Azerbaijan of attempting to "eradicate Armenians from Nagorno-Karabakh."¹⁰⁹

While dozens of States imposed an arms embargo on Azerbaijan, Israel was its primary weapons supplier. In the five years leading up to the conflict, Israel equipped the Azerbaijani military with almost 70% of its weapons,¹¹⁰ accounting for roughly 17% of Israel's total arms exports.¹¹¹ Israeli arms sales to Azerbaijan—totaling upwards of \$5 billion since 2016—from small arms like assault rifles to advanced weapons systems such as battleships, ballistic missiles, artillery, anti-tank missiles, drones, and loitering munitions.¹¹² Israeli-made drones and loitering munitions—also known as "suicide drones"—were crucial to Azerbaijan's victory. According to one military strategist:

Azerbaijan's UAVs obliterated Armenia's formidable array of ground-based air defences, after which they systematically decimated Armenia's ground force matériel, including tanks, artillery pieces, and supply trucks. This onslaught forced Armenia to accept a humiliating ceasefire imposed by Russia.¹¹³

Israel's arms transfers to Azerbaijan clearly run afoul of Common Article 1 of the Geneva Conventions. Human rights organizations and journalists have documented that Azerbaijan used Israeli weapons—including ballistic missiles, artillery, UAVs, and loitering munitions—in the commission of grave violations of international humanitarian law.¹¹⁴ Azerbaijan reportedly fired several rounds of Israeli-origin cluster munitions in "residential areas" of Armenian-populated Nagorno-Karabakh.¹¹⁵ Most of the international community—over 124 States—

108. See Asbarez Staff, *European Lawmakers Accuse Azerbaijan of War Crimes*, ASBAREZ (Oct. 11, 2022), <https://www.asbarez.com/european-lawmakers-accuse-azerbaijan-of-war-crimes/>.

109. S. Foreign. Rels. Comm., *Chairman Menendez Statement on Azerbaijan's Assault in Nagorno-Karabakh* (Sept. 19, 2023), <https://www.foreign.senate.gov/press/dem/release/chairman-menendez-statement-on-azerbaijans-assault-in-nagorno-karabakh>.

110. Scharf & Yaron, *supra* note 8.

111. Pieter D. Wezeman et al., *Arms Transfers to Conflict Zones: The Case of Nagorno-Karabakh*, STOCKHOLM INT'L PEACE RSCH. INST. (Apr. 30, 2021), <https://www.sipri.org/commentary/topical-backgrounder/2021/arms-transfers-conflict-zones-case-nagorno-karabakh>.

112. Scharf & Yaron, *supra* note 8.

113. Eado Hecht, *Drones in the Nagorno-Karabakh War: Analyzing the Data*, 7 MIL. STRATEGY MAG. 31 (2022), <https://www.militarystrategymagazine.com/article/drones-in-the-nagorno-karabakh-war-analyzing-the-data/>.

114. Vinoam Idan & Brenda Shaffer, *Israel's role in the Second Armenia-Azerbaijan War*, in THE KARABAKH GAMBIT: RESPONSIBILITY FOR THE FUTURE 200–02 (Turan Gafarli & Michael Arnold eds., 2021) https://www.fdd.org/wp-content/uploads/2021/12/The-Karabakh-Gambit_IsraelRole-1.pdf; Eitay Mack, *As Tensions over Nagorno-Karabakh Rise, Israel Must Halt Arms Sales to Azerbaijan*, 972 MAG. (Oct. 9, 2020), <https://www.972mag.com/nagorno-karabakh-israel-weapons/>; Haaretz Staff, *Israel's Fingerprints Are All Over the Ethnic Cleansing in Nagorno-Karabakh*, HAARETZ (Sept. 27, 2023), <https://www.haaretz.com/opinion/editorial/2023-09-27/ty-article-opinion/israels-fingerprints-are-all-over-the-ethnic-cleansing-in-nagorno-karabakh/0000018a-d331-d13d-a98f-dbb5028e0000>.

115. Scharf & Yaron, *supra* note 8.

considered cluster munitions prohibited weapon of war due to their “widespread indiscriminate effect and long-lasting danger to civilians.”¹¹⁶

The evidence demonstrates that Israel knowingly supplied arms to Azerbaijan while it was committing grave violations of international humanitarian law. Between 2016 and 2023, Israel sent ninety-two arms shipments to Azerbaijan, all while violence in Nagorno-Karabakh escalated. Notably, Israel did not terminate arms sales to Azerbaijan during periods of extreme violence. On the contrary, Israel’s arms shipments to Azerbaijan *increased* as the conflict intensified: “[the arms sales] data expose an increasing pace of flights to Baku especially in the middle of 2016, in late 2020, and at the end of 2021 – which coincide with periods of fighting in Nagorno-Karabakh.”¹¹⁷ Additionally, Armenia brought this issue directly to Israel’s attention: In October 2022, Armenia withdrew its ambassador to Israel, explicitly denouncing “Israel’s supply of ultra-modern weapons to Azerbaijan.”¹¹⁸ That same month, *de facto* President Arayik Harutyunyan, the Armenian leader of Nagorno-Karabakh, stated that Israel was “responsible for the genocide in Karabakh” due to its transfers of advanced weaponry to Azerbaijan.¹¹⁹ Human rights organizations, journalists, the United Nations, policymakers in the United States, and the European Union all vocally condemned Azerbaijan’s violations of international humanitarian law, which is a clear indication that Israel knew of Azerbaijan’s human rights violations.

3. *A Consistent Pattern*

The two case studies of Myanmar and Azerbaijan are emblematic of Israel’s willingness to supply weapons to States engaged in gross violations of international humanitarian law. It is important to note that the foregoing case studies are not anomalous but rather represent a pattern of systematic and continuous Israeli violations of Common Article 1. Indeed, since the early 1980s, Israel has transferred weapons to the repressive Latin American military juntas in Guatemala, El Salvador, and Argentina;¹²⁰ apartheid-era South Africa even *after* the international arms embargo;¹²¹ South Sudan during its civil war which left

116. Convention on Cluster Munitions, States Parties and Signatories by Region, *Cluster Munition Coalition*, <https://www.clusterconvention.org/states-parties/> (last visited Oct. 4, 2023), HUM. RTS. WATCH, *supra* note 107.

117. Scharf & Yaron, *supra* note 8.

118. *Armenia Recalls Ambassador from Israel to Protest Sale of Weapons to Azerbaijan*, TIMES ISR. (Oct. 1, 2020), <https://www.timesofisrael.com/armenia-recalls-ambassador-from-israel-to-protest-sale-of-weapons-to-azerbaijan/>.

119. Cnaan Liphshiz, *Armenian Leader Accuses Israel of Aiding ‘Genocide’ Against His People*, TIMES ISR. (Oct. 19, 2020), <https://www.timesofisrael.com/armenian-leader-accuses-israel-of-aiding-genocide-against-his-people/>.

120. BISHARA BAHBAH & LINDA BUTLER, ISRAEL AND LATIN AMERICA: THE MILITARY CONNECTION (Bishara Bahbah ed., 1986), https://link.springer.com/chapter/10.1007/978-1-349-09193-5_3.

121. Glenn Frankel, *Israel’s Most Illicit Affair*, FOREIGN POL’Y (May 24, 2010), <https://foreignpolicy.com/2010/05/24/israels-most-illicit-affair/>.

400,000 dead;¹²² Chile during the dictatorship of Augusto Pinochet;¹²³ Serbia during the ethnic cleansing of Bosnians;¹²⁴ and the genocidal Hutu government of Rwanda.¹²⁵ Israel is currently exporting weapons to major human rights violators, including the United Arab Emirates,¹²⁶ Bahrain,¹²⁷ Morocco,¹²⁸ the Philippines,¹²⁹ Sri Lanka,¹³⁰ and Cameroon.¹³¹ In sum, Israel has transferred American-subsidized weapons to over 100 countries—including many serious human rights-abusing States.

The record demonstrates that Israel has repeatedly violated Common Article 1 through its weapons exports to States engaged in gross violations of international humanitarian law. Due to the United States' significant subsidization and support for Israel's arms exports, the United States could also incur liability under Article 16 of the Articles on State Responsibility.

III. ELEMENTS OF STATE LIABILITY UNDER ARTICLE 16

When certain conditions are met, a State may be liable under international law for facilitating or supporting another State's violations of international law.¹³² This principle of third-party liability is codified in Article 16 of the Articles on State Responsibility for Internationally Wrongful Acts ("ASRIWA"), drafted by

122. *Israel Named World's 8th Largest Arms Exporter*, TIMES ISR. (Mar. 13, 2019), <https://www.timesofisrael.com/israel-named-worlds-8th-largest-arms-exporter/>.

123. Harel, *supra* note 7.

124. Yair Auron, *Israel, Partner in Genocides*, HAARETZ (Oct. 2, 2017), <https://www.haaretz.com/opinion/2017-10-02/ty-article/.premium/israel-partner-in-genocides/0000017f-e33b-d804-ad7f-f3fb30370000>.

125. Uri Misgav, *The Israeli Guns That Took Part in the Rwanda Genocide*, HAARETZ (Jan. 3, 2015), <https://www.haaretz.com/2015-01-03/ty-article/.premium/the-israeli-guns-in-the-rwanda-genocide/0000017f-db06-df9c-a17f-ff1ef7130000>.

126. *Israel to Supply Air Defence System to the UAE*, AL JAZEERA (Sept. 23, 2022), <https://www.aljazeera.com/news/2022/9/23/israel-to-supply-air-defence-system-to-the-uae>.

127. *Israel Said to Agree to Sell Bahrain UAVs, Anti-Drone Systems*, TIMES ISR. (July 13, 2022), <https://www.timesofisrael.com/israel-said-to-agree-to-sell-bahrain-uavs-anti-drone-systems/>.

128. Pesha Magid & Andrea Prada Bianchi, *Israel Ramps Up Drone Sales to Morocco for Its Colonial War in Western Sahara*, INTERCEPT (July 1, 2023), <https://theintercept.com/2023/07/01/israel-drone-morocco/>.

129. Oded Yaron, *Revealed: Israel Supplies Philippines with Advanced Intelligence Planes*, HAARETZ (July 13, 2023), <https://www.haaretz.com/israel-news/security-aviation/2023-07-13/ty-article/.highlight/revealed-israels-elbit-systems-supplies-philippines-with-advanced-intelligence-planes/00000189-4f15-d6c2-a189-5f75fb090000>.

130. Eitay Mack, *Israeli Complicity in Sri Lanka War Crimes Must Be Investigated*, AL JAZEERA (June 27, 2023), <https://www.aljazeera.com/opinions/2023/6/27/israeli-complicity-in-sri-lanka-war-crimes-must-be-investigated>.

131. Database of Israeli Military and Security Export, <https://www.dimse.info/> (last visited Oct. 4, 2023).

132. Catherine Amirfar, *Expert Q&A on What International Law Has to Say About Assistance to Russia's War Against Ukraine*, JUST SECURITY (May 2, 2023), <https://www.justsecurity.org/86102/expert-qa-on-what-international-law-has-to-say-about-assistance-to-russias-war-against-ukraine/>.

the International Law Commission (“ILC”).¹³³ This provision, according to scholar and human rights lawyer Catherine Amirfar, establishes “a standard for what is effectively State ‘complicity’ in international law.”¹³⁴ The International Court of Justice determined in the *Bosnian Genocide* case that Article 16 of the ASRIWA has attained the status of customary international law, binding on all states.¹³⁵ In full, Article 16 affirms that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.¹³⁶

Under Article 16, an assisting State is not legally responsible for the underlying unlawful act but for the separate offense of facilitating the recipient State’s wrongful acts.¹³⁷ The assisting State, according to the ILC, “will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.”¹³⁸

For an assisting State to incur liability under Article 16, three elements must be met: (1) the assisting State’s unlawful conduct; (2) there is a sufficient link between the assisting State’s support and the recipient State’s unlawful conduct; and (3) the recipient State’s conduct must have been wrongful had it been committed by the assisting State.

A. Knowledge

First, the assisting State must be aware of the recipient State’s unlawful conduct.¹³⁹ This condition—labeled by scholars as the “*mens rea*” element of Article 16—means that if an assisting state lacks the requisite knowledge of the recipient State’s unlawful acts, the assisting State will not be considered liable under international law.¹⁴⁰ The *type* of knowledge necessary to trigger the assisting State’s liability is somewhat unclear. An assisting State’s *actual* knowledge of the recipient State’s violations plainly satisfies the *mens rea* element of Article 16.¹⁴¹ Moreover, there is a consensus among scholars that the “knowledge element can be met by virtual certainty, on the part of the assisting

133. U.N. Int’l Law Comm’n, 53rd Sess., Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/10 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter Draft Articles on Responsibility].

134. Amirfar, *supra* note 132.

135. *Bosnia v. Serbia*, *supra* note 72.

136. Draft Articles on Responsibility, *supra* note 133.

137. Silke Zwijsen et al., *The Law of State Responsibility and the Arms Trade Treaty*, ARS AEQUI 151 (2020), <https://dspace.library.uu.nl/handle/1874/394557>.

138. Draft Articles on Responsibility, *supra* note 133.

139. *Id.*

140. Dua, *supra* note 74.

141. See Moynihan, *supra* note 12, at 13.

State, of the eventual possibility of unlawful use of its assistance.”¹⁴² A State’s actual knowledge or “virtual certainty” of the recipient State’s unlawful conduct is therefore sufficient to satisfy Article 16’s *mens rea* requirement.

However, the issue of whether an assisting State’s constructive knowledge can satisfy the *mens rea* element of Article 16 is disputed. Constructive knowledge means that a State *should* have known about the recipient State’s violations but failed to exercise due diligence. Proponents of a constructive knowledge standard argue that an assisting State’s lack of active oversight of its aid or assistance could render it complicit under Article 16.¹⁴³ However, most scholars reject the constructive knowledge interpretation.¹⁴⁴ A report by Chatham House, for example, concludes that the International Court of Justice’s language in the *Bosnia Genocide* case—that “at least” knowledge is required—implies that “a higher standard of knowledge [is required] than ‘should have known.’”¹⁴⁵

i. Proving knowledge

The availability and quality of evidence—in both the government’s possession and public sphere—is the determinative factor when analyzing an assisting State’s knowledge under Article 16.¹⁴⁶ If a recipient State’s violations of international law are sufficiently well known and widely publicized, a State’s knowledge can be inferred. Widely publicized violations of international law will hamper a State’s ability to claim that it lacked the requisite knowledge to terminate its aid or assistance. After reviewing the relevant legal frameworks and international court decisions related to a State’s knowledge and complicity, the Chatham report concludes that “a court may be reluctant to allow an assisting State to rely on ignorance when in today’s ‘information era’ significant amounts of data are potentially available to States, including in the form of reports from non-governmental organizations.”¹⁴⁷ Under Article 16, States are “expected to be knowledgeable of any number of reports of U.N. treaty bodies, special procedures,

142. *Id.*

143. André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International Law*, 31 EUR. J. INT’L L. 15 (2020), <https://academic.oup.com/ejil/article/31/1/15/5882075>; Dua, *supra* note 74.

144. See, e.g., Tina Drolec Sladojevic, *Military Aid as Complicity in International Crimes: Individual or State Responsibility?*, 70 PRAVNIK 643 (2015), <https://www.proquest.com/docview/1795668294?sourcetype=Scholarly%20Journals>; Marko Milanovic, *Intelligence Sharing in Multinational Military Operations and Complicity Under International Law*, 97 INT’L L. STUD. 1269 (2021), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2985&hx0026;context=ils>; Moynihan, *supra* note 12, at 13–14.

145. Moynihan, *supra* note 12, at 13.

146. *Id.*

147. *Id.* at 16.

country reports of other States and a plethora of reputable human rights organizations.”¹⁴⁸

Furthermore, scholars and international jurists are increasingly embracing the principle that an assisting State’s “willful blindness” does not absolve it of liability under Article 16.

According to the report by Chatham House:

[W]here the evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a State cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence. . . . If a state has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye.¹⁴⁹

Professor Vaughan Lowe, former counsel for several cases before the International Court of Justice, endorsed this position, stating that States cannot “avoid responsibility by deliberately holding back from inquiring into clear indications that its aid would probably be employed in an unlawful manner.”¹⁵⁰ According to Human Rights Watch, Amnesty International, and Rights Watch UK, there is presently “strong support for a ‘willful blindness’ standard.”¹⁵¹ To note, the willful blindness standard differs from the widely disregarded constructive knowledge standard. A State is willfully blind when it refuses to terminate its aid or assistance toward widely known and well-established violations of international law. Under a constructive knowledge standard, on the other hand, the availability and quality of evidence are irrelevant.

While an assisting State’s official affirmation of the recipient State’s wrongful acts clearly satisfies the knowledge requirement, such an affirmation is not required. The International Court of Justice’s opinion in the *Bosnian Genocide* case demonstrates that an assisting State does not need to affirmatively declare that it is aware of the recipient’s unlawful conduct to establish knowledge under Article 16.¹⁵² In this case, the Court determined that Serbia was not complicit in the unlawful conduct of a Serbian-supported, non-State actor, since Bosnia did not establish that these unlawful acts were “brought to the attention of the Belgrade authorities.”¹⁵³ If the unlawful acts had been brought to the attention of Serbia, then the knowledge element would have been satisfied. Human Rights Watch, Amnesty International, and Rights Watch UK interpreted the Court’s

148. Theresa A. DiPerna, *Small Arms and Light Weapons: Complicity with a View toward Extended State Responsibility*, 20 FLA. J. INT’L L. 25, 67 (2008), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1515&context=fjil>.

149. Moynihan, *supra* note 12, at 15–16; Written Submissions on Behalf of Amnesty International, Human Rights Watch & Rights Watch (UK), *Queen v. Sec. of State for Business, Innovation, and Skills*, Claim No. CO/1306/2016 (U.K. 2016), https://www.rightsandsecurity.org/assets/downloads/CAAT_v_Secretary_of_State_Submission_1.pdf.

150. Vaughan Lowe QC, *Responsibility for the Conduct of Other States*, 58 JAPAN. J. INT’L L. 515, 1–15 (2002).

151. Written Submissions, *supra* note 149.

152. *Bosnia v. Serbia*, *supra* note 72.

153. *Id.*

holding to mean that the knowledge requirement can be met “without the need for any wide-ranging analysis or positive determination” by the assisting State that their aid or assistance was being used to commit unlawful acts. Rather, the publicly available “bare facts” of the recipient’s unlawful acts are sufficient.¹⁵⁴

ii. *Intent as a necessary element?*

Finally, there is “a tension between the text in Article 16 and the ILC Commentary,” according to scholar Harriet Moynihan, with the former requiring mere knowledge and the latter suggesting an additional element of actual intent.¹⁵⁵ While the text of Article 16 does not require “intent” to demonstrate State liability (instead concluding that assisting States must merely have “knowledge of the circumstances of the internationally wrongful act”), the ILC commentary proposes intent as a necessary element.¹⁵⁶ The commentary on Article 16 concludes that an assisting State is not “responsible for aid or assistance under Article 16 unless the relevant State organ *intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.*”¹⁵⁷

However, most scholars now understand the tension between Article 16 and the ILC Commentary as a “false dilemma.” First, many scholars conclude that the text of Article 16 is more authoritative than the ILC commentary, and therefore, no intent element exists.

Furthermore, there is now widespread recognition among scholars that “there is no practical difference between the two interpretations of Article 16.”¹⁵⁸ Under the modern, dominant interpretation of Article 16, sufficient knowledge can be enough to establish intent. If a State is aware of the likely outcome of its aid or assistance, it can be inferred that it intended such an outcome.¹⁵⁹ Indeed, according to Professor Vaughan Lowe, “as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts.”¹⁶⁰ In her analysis of Article 16, Harriet Moynihan states that:

Intent’ in this context does not require the assisting state to desire that the unlawful conduct be committed. Nor does the assisting state have to be in common cause with the principal. Knowledge or virtual certainty that the recipient state will use

154. Written Submissions, *supra* note 149 (internal quotation marks omitted).

155. Moynihan, *supra* note 12.

156. Draft Articles on Responsibility, *supra* note 133.

157. *Id.* (emphasis added).

158. Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 J. INT’L HUM. L. STUDS. 251 (2022), https://brill.com/view/journals/ihls/13/2/article-p251_004.xml?language=en.

159. Marko Milanovic, *Ukraine Symposium – The Complicity of Iran in Russia’s Aggression and War Crimes in Ukraine*, LIEBER INST. WEST POINT (Oct. 19, 2022), <https://lieber.westpoint.edu/complicity-iran-russia-aggression-war-crimes-ukraine/>.

160. Oona A. Hathaway & Ryan Goodman, *Why China Giving Military Assistance to Russia Would Violate International Law*, JUST SECURITY (Mar. 17, 2022), <https://www.justsecurity.org/80709/why-china-giving-military-assistance-to-russia-would-violate-international-law/>.

the assistance unlawfully is capable of satisfying the intent element under Article 16, whatever the assisting state's desire or purpose.¹⁶¹

This view—that an assisting State's knowledge can impute intent for the purposes of Article 16—represents the scholarly “consensus,” according to Professor Suzanne Egan.¹⁶² Moreover, in his book, *State Complicity in International Law*, scholar Miles Jackson argues that “where a [S]tate provides assistance to another [S]tate with the actual knowledge that the aid will be used to commit a wrongful act, the [S]tate's intent that its aid facilitates that act may be inferred.”¹⁶³ Professor James Crawford, former Judge at the International Court of Justice, endorses this position. According to Crawford, “[i]f aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed. It is thus wrong to suggest that the complicit State must be in common cause with the principal in order for ... Article 16 to apply.”¹⁶⁴

State practice further supports this position. According to Lowe, “[t]here is no persuasive evidence in State practice of a requirement that a State giving aid or assistance must not merely know of the manner in which it is to be used, but must, in addition, intend or desire that it should be so used.”¹⁶⁵

B. Sufficient link to the Wrongful Conduct

Under Article 16, the assisting State's aid or assistance must be “clearly linked to the subsequent wrongful conduct.”¹⁶⁶ According to ILC commentary, an assisting State's support need not be “essential” to incur liability. Rather, the assistance must have only “contributed significantly” to the recipient State's wrongful acts.¹⁶⁷ Beyond the requirement that the assistance must contribute significantly to the recipient State's wrongful acts, the ILC has not defined the exact level of assistance necessary to trigger liability under Article 16. After reviewing the complicity frameworks used by the International Court of Justice and International Criminal Court, scholar Helmut Aust proposed the following test:

In order to find responsibility of a complicit State, its support should have changed the situation for the main actor. It must have made it ‘substantially easier’ to commit the internationally wrongful act.¹⁶⁸

The causal link required to trigger Article 16 has both a minimum and maximum threshold; if the causal link is too attenuated and removed from the

161. Moynihan, *supra* note 12, at 20.

162. Suzanne Egan, *Mapping State Responsibility for Complicity in Extraordinary Rendition*, in EXTRAORDINARY RENDITION & HUM. RTS. (Suzanne Egan ed., 2018), https://link.springer.com/chapter/10.1007/978-3-030-04122-9_4#FPa1.

163. Miles Jackson, *COMPLICITY IN INTERNATIONAL LAW* 160 (2015).

164. Written Submissions, *supra* note 149.

165. Lowe, *supra* note 150.

166. Draft Articles on Responsibility, *supra* note 133.

167. *Id.*

168. HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 215 (2011).

recipient State's wrongful act, Article 16 is not implicated, but if an assisting State's actions rise above a certain threshold, the assisting State will be considered a "co-belligerent" rather than a simple facilitator. For example, scholars have concluded that Western States' military aid to Ukraine could trigger Article 16 if the weapons provided are used in the commission of war crimes. However, acts *beyond* military aid—such as the implementation of a no-fly zone—would require such active participation that the implementing States would be considered "co-belligerents."¹⁶⁹

In general, an assisting State's provision of aid, which frees up the recipient's resources and allows it to engage in wrongful acts, is too attenuated to create a link between the arms sale and the unlawful act for the purposes of Article 16. By way of example, a State that provides food aid to another State and incidentally allows the recipient State to divert its resources toward wrongful acts is not liable under Article 16. However, there is one exception: "if the assisting [S]tate *knows* that the resources will be diverted for illegal purposes, this in itself suggests the existence of a nexus between the assistance and the illegal act."¹⁷⁰

In sum, a supporting State's aid or assistance that significantly contributes to the recipient State's wrongful acts is sufficient to establish the nexus requirement under Article 16.

C. Wrongfulness of the act

The final requirement of Article 16 is that the wrongful act committed by the recipient State "would be internationally wrongful if committed" by the assisting State.¹⁷¹ Under this element, the assisting State must also be prohibited from committing the wrongful act that the recipient State is accused of committing.¹⁷² An assisting State cannot be "held independently liable for the breach of a bilateral treaty to which it was not itself a party."¹⁷³ However, every State can be held liable under Article 16 for aiding or assisting violations of customary international law, to which all States are bound. Therefore, the facilitation of a violation of customary international law definitionally satisfies the wrongful act element of Article 16.

1. Scope of Article 16

If these three elements, described *supra*, are met, Article 16 complicity for assisting another State's wrongful conduct can be established. States, scholars, and international courts have applied Article 16 to a wide array of assistance-related activities.

169. Heller & Trabucco, *supra* note 158.

170. Moynihan, *supra* note 12, at 10 (emphasis added).

171. Draft Articles on Responsibility, *supra* note 133, at 65.

172. Moynihan, *supra* note 12, at 10.

173. *Id.*

i. Article 16 and Arms Transfers

The most common application of Article 16 involves instances where one State provides arms and military aid to another State engaged in violations of international law. Scholars have written extensively on how American arms transfers to Saudi Arabia during the war in Yemen violated Article 16. According to Professor Oona Hathaway, there is little question that Saudi Arabia used American-origin weapons to commit serious violations of international humanitarian law.¹⁷⁴ Following the onset of the war in Yemen in 2015, the United States sold billions of dollars' worth of weapons to Saudi Arabia. Since those weapons were directly used in the commission of war crimes, the United States facilitated Saudi Arabia's internationally wrongful acts.¹⁷⁵ In this way, American aid was "clearly linked" to the wrongful acts of the recipient State, Saudi Arabia. Because such acts constituted violations of customary international law—to which the United States is also bound—the requirement in Article 16 that the unlawful acts of the recipient State would have been unlawful "had [they] been committed by the assisting [S]tate itself" is satisfied.¹⁷⁶ Finally, Hathaway argues that Saudi Arabia's violations of international law were well publicized and widely known, and therefore, the United States was "undoubtedly aware that there [were] numerous credible allegations of violations of international humanitarian law" made against Saudi Arabia.¹⁷⁷ This awareness satisfies the knowledge requirement of Article 16. Moreover, the United States' temporary suspension of military support to Saudi Arabia due to concerns over international human rights law violations further satisfies the knowledge requirement:

[T]he prior cessation of support and subsequent decision to seek assurances reveals that the United States was very much aware of credible allegations of IHL violations by the coalition to that point.¹⁷⁸

Similarly, scholars have roundly concluded that foreign arms sales to Russia following its invasion of Ukraine in February 2022 constitute a clear violation of international law under the principle of State responsibility. According to Professor Ryan Goodman, since Russia is flagrantly violating international law and China clearly has knowledge of this violation, "[i]t is near certain that the requirement of Article 16 would be met if China were to supply arms or other military assistance to Russia for operations in Ukraine."¹⁷⁹ Scholar Catherine Amirfar similarly argues that Iran's military assistance to Russia since the invasion of Ukraine likely violates international law under Article 16's principle of State complicity. According to Amirfar, if an intent requirement exists, then

174. Oona A. Hathaway et al., *State Responsibility for U.S. Support of the Saudi-Led Coalition in Yemen*, JUST SECURITY (Apr. 25, 2018), <https://www.justsecurity.org/55367/state-responsibility-u-s-support-saudi-led-coalition-yemen/>.

175. *Id.*

176. Draft Articles on Responsibility, *supra* note 133, at 66.

177. Hathaway et al., *supra* note 160.

178. *Id.*

179. *Id.*

Iran “can be presumed to intend the foreseeable consequences of its assistance—namely, assisting Russia’s commission of these [international human rights law violations],” thus satisfying the knowledge requirement.¹⁸⁰

Professor Michael N. Schmitt likewise argued that Iran is clearly liable under Article 16 for violations of international law due to its arms sales to Russia. In Schmitt’s view, Iranian weapons have made a significant positive contribution to Russia’s successes in its invasion of Ukraine, and the Iranian weapons were transferred with the knowledge that they would be used for that very purpose.¹⁸¹ Regarding the *mens rea* element of Article 16, Schmitt stated that “it would be absurd to suggest there is a lack of intent (if intent is required) when the support’s very purpose (and highly visible use) is to enable operations that are barefaced international law violations.”¹⁸²

ii. *Other Instances of “Aid and Assistance”*

States, scholars, and courts have concluded that Article 16 applies to a broad array of “supportive” activities that are less direct even than arms sales and military assistance. Activities that implicate Article 16 include data and intelligence sharing, access to airspace and territory, financial support, logistical assistance, and provision of facilities.¹⁸³ According to Professor Jackson, so long as the selling State’s support furthers the recipient State’s wrongful act, “all kinds of aid and assistance fall within the [Article 16] rule.”¹⁸⁴ Professor Lowe concurs, stating that “whether material, legal, political, or otherwise, the aid or assistance generates responsibility insofar as it can be established that it facilitates or contributes to the commission of the internationally wrongful act by another entity.”¹⁸⁵ The decisive factor in determining the scope of Article 16, therefore, is not the specific *type* of aid given but rather the *connection* between the aid and the subsequent harm.

Participation in and facilitation of rendition, for example, can implicate Article 16. A 2009 report by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concluded that rendition can be sufficient for liability under Article 16:

180. Amirfar, *supra* note 132.

181. Michael N. Schmitt, *Ukraine Symposium – The Complicity of Iran in Russia’s Aggression and War Crimes in Ukraine*, LIEBER INST. WEST POINT (Sept. 12, 2023), <https://lieber.westpoint.edu/complicity-iran-russia-aggression-war-crimes-ukraine/>.

182. *Id.*

183. Draft Articles on Responsibility, *supra* note 133; Miles Jackson, *Complicity in International Law* (Oct. 2013) (unpublished D.Phil thesis, Univ. of Oxford), <https://ora.ox.ac.uk/objects/uuid:4f6db506-c5a7-43d6-af49-fec9ad2d7461/files/m7fe8f56dea581e5442d15b5a9e8af568>.

184. *Id.*

185. Vladislav Lanovoy, *Complicity in an Internationally Wrongful Act*, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* (André Nollkaemper & Ilias Plakokefalos eds., 2014).

[States] are responsible where they knowingly engage in, render aid to or assist in the commission of internationally wrongful acts, including violations of human rights.

Accordingly, grave human rights violations by States such as torture, enforced disappearances or arbitrary detention should therefore place serious constraints on policies of cooperation by States, including by their intelligence agencies, with States that are known to violate human rights.¹⁸⁶

Several European Court of Human Rights cases have affirmed that participation in rendition is sufficient for liability under Article 16. In the case of *Al Nashiri v. Poland*, the court held that the Polish government was complicit under Article 16 in allowing the CIA to use Polish territory for the purposes of torture.¹⁸⁷ The Court stated that:

[F]ailure to take effective measures to prevent such operations, in circumstances where the State authorities knew or ought to have known of the risk that they would be carried out, would breach the State's positive obligations under the Convention read in the light of Article 16 of the ILC Articles.¹⁸⁸

The European Court of Human Rights has similarly referenced Article 16's application to rendition in *El-Masri v. The Former Yugoslav Republic of Macedonia* and *Husayn (Abu Zubaydah) v. Poland*.¹⁸⁹

An assisting State's logistical support in facilitating a recipient State's unlawful acts similarly implicates Article 16. Following the US -led invasion of Iraq in 2003, the question of State complicity in the war received prominent public attention. The practice of neutral States allowing the United States to utilize their airspace, territory, and technical support in the administration of the war was highly controversial due to the contested legality of the invasion. The question of whether Article 16 could apply in this situation and others like it was brought before the Federal Administrative Court of Germany in a case where a conscientious objector to the Iraq War refused to produce software that the United States could use to wage war in Iraq.¹⁹⁰ The Court acquitted the conscientious objector and held that Germany's logistical support for the war—the legality itself of which the Court considered dubious—could implicate Article 16.¹⁹¹ In a sweeping decision, the Court held that Germany was “neither allowed to grant fly-over rights for military airplanes crossing federal territory on their way to or

186. H.R. Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 53, U.N. Doc. A/HRC/10/3 (Feb. 4, 2009).

187. *Al Nashiri v. Poland*, App. No. 28761/11, Judgment (July 24, 2014) (Fourth Section), <https://hudoc.echr.coe.int/eng?i=001-146044>.

188. *Id.*

189. *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Judgment (Dec. 13, 2012) (Grand Chamber), <https://hudoc.echr.coe.int/eng?i=001-115621&%7B%22itemid%22%3A%5B%22001-115621%22%5D%7D>; see also *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Judgment (July 24, 2014).

190. Daniel Bodansky & Ilja Baudisch, *Germany v. N.*, 100 AM. J. INT'L L. 911 (2006).

191. *Id.*

back from Iraq, nor to permit the transport of troops, weapons, or military supplies from German soil.”¹⁹²

Human rights organizations and scholars have similarly found that European support for the United States’ drone programs in Pakistan and Yemen likely implicates Article 16. A report by Amnesty International on European complicity in the United States’ drone operations concludes that Italy, the Netherlands, Germany, and the United Kingdom have provided extensive support to the United States in the form of intelligence and data sharing, access to airspace and territory, and technological support.¹⁹³ American drone operators stationed in Germany’s Ramstein Air Force Base and Italy’s Naval Air Station Sigonella have committed, in the opinion of Amnesty International, extrajudicial executions in violation of the Geneva Convention.¹⁹⁴ Alongside the use of their territory, these States have also provided crucial intelligence in support of American drone strikes, furthering their complicity.¹⁹⁵ This support, Amnesty International concludes, constitutes a significant contribution to the US drone program, satisfying the nexus requirement between the aid provided and the wrongful acts. Moreover, due to the publicly available information from human rights monitors and journalists, these States knew “that [their] assistance would be used in an unlawful drone strike,” satisfying the knowledge requirement.¹⁹⁶ Finally, since the wrongful acts in question are grave violations of the Geneva Convention—which is customary international law—the acts would have been wrongful if performed by the supporting States themselves. Therefore, the report concludes that Italian, Dutch, German, and British support triggers Article 16, and these States may be liable for facilitating the United States’ wrongful acts in Pakistan and Yemen.¹⁹⁷

Perhaps most applicable to the case at hand, the ILC commentary and subsequent scholarship clearly indicate that a supporting State incurs liability under Article 16 by “financing the [wrongful] activity in question.”¹⁹⁸ Indeed, a wealth of commentary and court decisions confirm that when a recipient State uses military aid for unlawful purposes, a supporting State may be complicit under Article 16. Even non-military economic aid can cause the assisting State to incur liability. In the mid-2000s, for example, Turkey began construction on the Ilisu Dam in Southeastern Turkey, near the Iraqi border.¹⁹⁹ To fund the project, Turkey received export credits from Austria, Switzerland, and Germany’s Export Credit

192. *Id.* (translation by the author).

193. *Deadly Assistance: The Role of European States in US Drone Strikes*, AMNESTY INT’L (2018), <https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT3081512018ENGLISH.pdf>.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Draft Articles on Responsibility, *supra* note 133, at 66.

199. Corner House & Kurdish Human Rights Project, *Ilisu Dam Downstream Water Impacts and Iraq* 4 (Mar. 29, 2007), <http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/IlisuDownstream.pdf>.

Agencies.²⁰⁰ Since the construction of the dam had significant downstream effects on Iraq's water resources, Turkey was required to "consult and negotiate" with Iraq under both customary international law and Turkey's bilateral treaty obligations.²⁰¹ On behalf of the World Economy, Ecology, and Development Organization, James Crawford,²⁰² Laurence Boisson De Chazournes,²⁰³ Kate Cook,²⁰⁴ and Phillipe Sands²⁰⁵ drafted an opinion on the legality of the project, finding that Austria, Switzerland, and Germany should incur liability for Turkey's violations of international law due to their funding of the project.²⁰⁶ The authors concluded that these States' funding of the Ilisu Dam project "constitute[d] aid or assistance in the commission of an internationally wrongful act, namely the violation of rights of notification, consultation, and negotiation of a downstream riparian State."²⁰⁷ Several scholars consider this assessment authoritative.²⁰⁸

Crucially, under certain circumstances, economic aid not tied to any specific program or project can give rise to liability under Article 16. In "Complicity and the Law of State Responsibility," Professor Helmut Aust argues that "provision of funds pure and simple may constitute aid or assistance." If that aid is then used to commit internationally wrongful acts, the aid-providing State may incur liability.²⁰⁹ Recognizing that it may be difficult to demonstrate the requisite nexus between economic aid and wrongful acts, States cannot avoid liability under Article 16 "simply by resorting to cash flows instead of providing material aid in the traditional sense."²¹⁰ This view has been adopted by scholars such as Lukas Pirnay, who concluded that "granting a credit line to an oppressive regime" is enough to trigger Article 16.²¹¹ This suggests that an assisting State's provision of fungible funds—monies not tied to any specific program or request—can trigger liability if the recipient uses those funds for internationally wrongful acts, and the assisting State possesses the requisite knowledge.

200. *Id.*

201. *Id.*

202. Former Judge at the International Court of Justice.

203. Professor and former President of the European Society of International Law.

204. Barrister who served as counsel before the International Court of Justice.

205. Professor who served as counsel before the International Court of Justice.

206. Corner House & Kurdish Human Rights Project, *supra* note 199.

207. *Id.*

208. AUST, *supra* note 168, at 2; Moynihan, *supra* note 12, at 6.

209. AUST, *supra* note 168, at 210.

210. *Id.*

211. Lukas Pirnay, US Drone Strikes in Pakistan and Yemen – German Responsibility under Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 125 (May 31, 2022) (Inaugural Dissertation, Ludwig Maximilian University of Munich).

IV. ARTICLE 16 AND THE UNITED STATES' SUBSIDIZATION OF ISRAEL'S
ARMS EXPORTS

As detailed in Section III, a State may incur liability under Article 16 if it facilitates or supports another State's violations of international law.²¹² The "aid or assistance" necessary to trigger Article 16 has been evaluated by States and scholars quite broadly to include arms transfers, intelligence sharing, logistical support, access to airspace and territory, financial assistance, and export credits. Indeed, "all kinds of aid and assistance fall within the rule,"²¹³ so long as it can be "established that [the aid] facilitates or contributes to the commission of the internationally wrongful act."²¹⁴ Given Israel's repeated and ongoing arms exports in violation of the Geneva Conventions and the United States' significant subsidization of Israel's arms industry, there is a *prima facie* case for the United States' liability under Article 16.

A. Knowledge

In order to incur liability under Article 16, a State must have "knowledge of the circumstances of the internationally wrongful act," which can be satisfied through actual knowledge, "virtual certainty," or "willful blindness."²¹⁵ There is convincing evidence that the United States had actual knowledge of Israel's past internationally wrongful acts, or at the very least acted with "willful blindness."

First, the American government is indisputably aware of its role in the subsidization of Israel's arms industry. The initial and original purpose of the OSP was to fund "the development and production of advanced weapon systems" in Israel.²¹⁶ Successive administrations, from Ronald Reagan to Barack Obama, have implemented and maintained the OSP financing policy, often memorializing the agreements through ten-year MOU.²¹⁷

Furthermore, there is a substantial amount of public information detailing Israel's arms exports to States engaged in gross violations of international humanitarian law.²¹⁸ From the 1980s to the present, Israeli arms exports to human rights-abusing States have been cataloged by the United Nations, human rights NGOs, scholars, and individual States, and have also been the subject of several

212. Amirfar, *supra* note 132.

213. Jackson, *supra* note 183.

214. Lanovoy, *supra* note 185.

215. Moynihan, *supra* note 12, at 13–15.

216. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-751, ISRAEL U.S. MILITARY AID SPENT IN-COUNTRY (1991), <https://apps.dtic.mil/sti/pdfs/ADA242139.pdf>.

217. U.S. CONG. RSCH. SERV., U.S. FOREIGN AID TO ISRAEL, (2022), <https://crsreports.congress.gov/product/pdf/RL/RL33222/44>.

218. Harel, *supra* note 7.

high-profile cases before the Israeli Supreme Court. The New York Times,²¹⁹ The Washington Post,²²⁰ The Wall Street Journal,²²¹ and other prominent news outlets have also reported on these exports.²²² Israel's arms sales to Myanmar, Azerbaijan, and South Sudan were particularly well publicized and widely criticized.²²³

The wide reporting of these exports alone should be sufficient to satisfy the knowledge requirement under Article 16. To determine whether the requisite “*mens rea*” element of Article 16 has been met, “[S]tates can be expected to be knowledgeable of any number of reports of U.N. treaty bodies, special procedures, country reports of other States and a plethora of reputable HR organizations.”²²⁴ A State does not need to make any “positive determination” or official recognition of the acts in question, since the availability and quality of evidence is the determinative factor in the analysis of an assisting State’s knowledge under Article 16.²²⁵ As stated by Chatham House:

[W]here the evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a State cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence.

Given the widely available evidence of Israel’s practice of exporting arms to States engaged in violations of international law, the United States cannot maintain that it lacked knowledge of Israel’s unlawful acts.

Moreover, there is dispositive evidence that the United States was not only aware of Israel’s arms exports, but also closely monitored—and even exercised a degree of control over—these exports. In recognition of the substantial financial subsidization and technical assistance provided to Israel’s arms industry, including the presence of American-origin components in Israel’s indigenous weapons systems, the United States enjoys a “*de facto* veto power over Israeli

219. Thomas L. Friedman, *How Israel’s Economy Got Hooked on Selling Arms Abroad*, N.Y. TIMES (Dec. 7, 1986), <https://www.nytimes.com/1986/12/07/business/how-israel-s-economy-got-hooked-on-selling-arms-abroad.html>.

220. Scott Wilson, *Israel Set to End China Arms Deal Under U.S. Pressure*, WASH. POST (June 27, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/27/israel-set-to-end-china-arms-deal-under-us-pressure/72734d39-e37c-4ae7-a61f-2cca56516a1e/>.

221. Dasl Yoon, *Ukraine’s Hunger for Howitzers Transforms an Arms Industry*, WALL ST. J. (Sept. 18, 2023), <https://www.wsj.com/world/ukraines-hunger-for-howitzers-transforms-an-arms-industry-a1b907c4>.

222. *Israel Reports Record \$12.5 Billion Defence Exports, 24% Of Them To Arab Partners*, REUTERS (June 13, 2023), <https://www.reuters.com/business/aerospace-defense/israel-reports-record-125-bln-defence-exports-24-them-arab-partners-2023-06-13/>.

223. *Israeli Weapons for War Criminals*, HAARETZ (Sept. 7, 2023), <https://www.haaretz.com/opinion/editorial/2023-09-07/ty-article-opinion/israeli-weapons-for-war-criminals/0000018a-6bb2-dfd9-ad9f-efb6e06f0000>; Yaron, *supra* note 6; *Israel Among 7 Nations Faulted In UN Report For Arming Myanmar Army*, TIMES OF ISR. (Aug. 5, 2019), <https://www.timesofisrael.com/israel-among-7-nations-faulted-in-un-report-for-arming-myanmar-army/>.

224. DiPerna, *supra* note 148.

225. Moynihan, *supra* note 12; Written Submissions, *supra* note 149.

third-party arms sales that the United States deems harmful to its national security interests.”²²⁶ The United States has exercised this de facto veto power several times in order to prevent Israeli arms transfers to States perceived as adversarial to American national security.

In 2004, for example, Israel signed an agreement to sell upgraded Harpy UAV drones (loitering munitions or “suicide drones”) to China. Citing national security concerns, the United States exercised its de facto veto power to pressure Israel to cancel the contract, and Israel complied.²²⁷ Yet, the United States did not exercise its de facto veto power just a few years later when Israel transferred Harpy UAV drones—those very same weapons—to Azerbaijan, which subsequently used the drones to commit grave violations of international humanitarian law against Armenians in Nagorno-Karabakh, as demonstrated in Section II.²²⁸

The United States similarly vetoed Israel’s proposed transfer of Kfir jets to Uruguay, but allowed Israel to sell the same jets to Colombia²²⁹ and Sri Lanka.²³⁰ Kfir jets were notorious during the Sri Lankan Civil War, where they were used to “deliberately [bomb] civilians and humanitarian sites and helped win the war at a heavy human cost.”²³¹ The United States also blocked Israeli arms sales to India, Venezuela, and Croatia, but did not veto transfers to Myanmar, South Sudan, Cameroon, or the overwhelming majority of the more than 100 countries that Israel has exported weapons to, even though many of those transfers included weapons not only subsidized by the United States, but also weapons containing American-origin components.²³²

The United States’ close monitoring of and significant degree of control over Israel’s arms exports greatly exceeds the knowledge threshold required by Article 16. The United States had the ability to terminate its aid and assistance to Israel after repeated violations of the Geneva Conventions, but chose not to. The United States cannot plead ignorance when it exercises this level of oversight and control over Israel’s arms exports and knows that States engaged in violations of international humanitarian law are actively using American-subsidized weapons.

Finally, the intent requirement, if one exists, would also clearly be satisfied by this degree of oversight and control. The dominant interpretation of Article 16

226. JEREMY M. SHARP, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL (2013), https://www.everycrsreport.com/files/20130411_RL33222_3831ef6fa0005618eed693ec05f19c58f979c1fd.pdf.

227. *Id.*

228. Tyler Rogoway, *Meet Israel’s ‘Suicide Squad’ of Self-Sacrificing Drones*, THE WARZONE (Sept. 29, 2021), <https://www.thedrive.com/the-war-zone/4760/meet-israels-suicide-squad-of-self-sacrificing-drones>.

229. José Higuera, *Colombia Relaunches Plan to Buy Fighter Jets*, DEFENSE NEWS (Sept. 19, 2022), <https://www.defensenews.com/global/the-americas/2022/09/19/colombia-relaunches-plan-to-buy-fighter-jets/>.

230. Mack, *supra* note 130.

231. *Id.*

232. Duncan Clarke, *Israel’s Unauthorized Arms Transfers*, 99 FOREIGN POL. 89 (1995).

is that knowledge or near certainty is enough to meet the intent requirement, as States are “presumed to intend the foreseeable consequences of [their] assistance.”

²³³ Intent can therefore be presumed on the part of the United States due to its subsidization, oversight, and facilitation of Israel’s unlawful arms exports.

B. There is a Sufficient Link Between the United States’ Support and Israel’s Unlawful Exports

The United States’ subsidization of Israel’s arms industry is “clearly linked to the subsequent wrongful conduct,” namely, Israel’s exports of American-subsidized arms to States engaged in violations of international humanitarian law.²³⁴ Under Article 16, the aid or assistance must only have “contributed significantly” to the wrongful acts of the recipient State; it does not need to be “essential.” In this case, however, the United States’ aid and assistance to Israel exceeds the “contributed significantly” threshold and may meet the higher bar of being “essential.”

As demonstrated in Section I, American aid to Israel in the form of OSP funding was partly responsible for the development and growth of Israel’s arms industry and export capabilities. This was intentional: the initial purpose of the OSP was to fund Israel’s “development and production of advanced weapon systems.”²³⁵ The former American Ambassador to Israel affirmed that the privilege of using American FMF for domestic procurement has helped “build up and sustain Israel’s young defense industry.”²³⁶ Similarly, the former head of the Israeli Defense Forces Budget Division and Israeli negotiator for the 2018-2028 military aid package stated that OSP funding “provided a major stimulus for the Israeli defense industry, and [was] used to generate large-scale domestic demand for the industry.”²³⁷ Israel has, according to a Congressional Research Service report, “an active and growing indigenous arms industry, the development of which has been subsidized in part by United States support.”²³⁸

Furthermore, the US Government Accountability Office audited American military aid to Israel, and emphasized that the OSP funds were vital to upholding Israel’s massive defense industry:

Without [OSP funding], maintaining the same level of domestic defense expenditures would add to Israel’s deficit. This, in turn, could limit Israel’s capacity to invest additional resources in its own defense industries. . . . Offshore procurement funding has allowed Israel to maintain its defense industrial base, which promotes military self-sufficiency. Israel produces its own tanks, [p]atrol

²³³. Amirfar, *supra* note 132.

²³⁴. Draft Articles on Responsibility, *supra* note 133.

²³⁵. U.S. GOV’T ACCOUNTABILITY OFF., *Israel U.S. Military Aid Spent in-Country*, *supra* note 216, at 2.

²³⁶. Zimmerman, *supra* note 51, at 66.

²³⁷. *Id.*

²³⁸. U.S. FOREIGN AID TO ISRAEL, *supra* note 2.

boats, sophisticated avionics, remotely piloted vehicles, missiles, and many other systems.²³⁹

American subsidization allowed Israel to elevate its nascent defense industry from modest internal production to large-scale exports. In the 1970s, Israel's exports accounted for only 15-20% of its total weapons production. However, by the second half of the 1980s—after a significant increase in American financing—Israel's exports jumped to 60-80% of overall weapons production output. Scholars have attributed this shift in Israel's export capabilities to American OSP funding. The ability to spend billions of American dollars on domestic development allowed Israel's defense industry to “perform required economies of scale and to reorientate production towards exports.”²⁴⁰

Furthermore, under the Qualitative Military Edge policy, the United States also gives Israel substantial technical support for weapons production. Though the exact figures are not known, a substantial portion of indigenous Israeli weapons systems contain American components.²⁴¹ Indeed, Israel routinely exports weapons that have both been heavily subsidized by the United States and contain substantial American technology.²⁴² The United States' support has, therefore, been essential to Israel's arms exports.

The “aid or assistance” necessary to trigger Article 16 has been applied broadly to include, for example, arms transfers, intelligence sharing, logistical support, access to airspace and territory, export credits, and even generalized financial aid. However, some may argue that the link between the United States' subsidization of Israel's arms industry and Israel's subsequent unlawful exports is too removed and attenuated to implicate Article 16. The immediate result of American subsidization—funding the development and production of Israeli weapons systems—is not *per se* unlawful, and it could, therefore, be argued that Israel's subsequent exports were, at most, incidental to American funding. In contrast, arms sales can result in immediate, direct, and non-incidental violations of international humanitarian law. While this may seem persuasive at first blush, court decisions, scholarship, and State positions indicate that the link between American subsidization and Israeli exports would fall within the scope of Article 16.

Comparison to the Ilisu Dam controversy is instructive. The Export Credit Agencies of Germany, Austria, and Switzerland issued development credits to facilitate the construction of a Turkish Dam—which is clearly not an *ipso facto* internationally wrongful act. Rather, Germany, Austria, and Switzerland were found to be liable under Article 16 for Turkey's subsequent failure to “consult and negotiate” with Iraq in violation of international law.²⁴³ In other terms, the act of

239. U.S. GOV'T ACCOUNTABILITY OFF., ISRAEL U.S. MILITARY AID SPENT IN-COUNTRY, *supra* note 216, at 8–9.

240. Palavenis, *supra* note 4 at 976.

241. Zimmerman, *supra* note 51.

242. Clarke, *supra* note 232.

243. Corner House, Kurdish Human Rights Project, *supra* note 199.

financing a construction project was not *per se* unlawful, but the recipient State's subsequent unlawful conduct with the funds rendered the continued financing wrongful under Article 16. Here, the same reasoning should apply: the initial subsidization of Israel's arm industry was not unlawful, but continued subsidization—after decades of documented, publicized, and repeated Israeli exports in violation of the Geneva Conventions—should implicate Article 16.

Similarly, Germany's initial decision to allow the United States use of Ramstein Air Force Base did not itself violate international law. Germany did not incur liability under Article 16 until the United States began using Ramstein as a base for drone operators. It was at that point when Germany's *failure to terminate* American access to the base constituted a sufficient link between German support and American internationally wrongful acts.²⁴⁴ It can therefore be concluded that the United States' failure to terminate its subsidization of Israel's arms industry, once it became clear that these funds were essential to Israel's violations of the Geneva Conventions, is an equally sufficient link for the purposes of Article 16.

Furthermore, as demonstrated in the previous section, the United States has exercised significant control over Israel's arms exports. States are liable under Article 16 "to the extent that its own conduct has caused or contributed to the internationally wrongful act." Article 16 scholarship and jurisprudence demonstrates that States can incur liability through failing to prevent violations within their control. States exercise control over their airspace, territory, arms transfers, and intelligence, and a State incurs liability to the extent that it is able to terminate—or at least not participate in—the internationally wrongful acts of another State. The United States' choice to veto Israel's arms exports in some cases but not others, even where recipient States were engaged in serious violations of humanitarian law, is further evidence that there is a sufficiently strong nexus between American conduct and Israel's unlawful acts. Since the United States has the authority to prevent unlawful exports of American-subsidized weapons, it should incur liability under Article 16.

Finally, applying a "but for" causation test to Article 16 interpretation—which scholars have used in similar analyses—indicates that there is a sufficient link between American support and Israel's wrongful acts. Indeed, this test would result in an even more compelling case of State complicity under Article 16 than the other examples of aid and assistance fell squarely within Article 16 liability. For example, if mere access to Germany's airspace can generate liability on the part of the assisting State, then it would be unreasonable to suggest that direct subsidization of a major foreign arms exporter would not.

Though still considered "facilitation" of rendition or an unlawful use of force, an assisting State's airspace is typically not the "but for" cause or even a dispositive factor upon which a recipient State depends on to commit a wrongful act. For instance, if Germany refused access to American aircrafts transporting materials to Iraq, this would not terminate the United States' military operations. On the other hand, were it not for the United States' significant financial

244. Deadly Assistance, *supra* note 193, at 51–58.

subsidization of Israel's arms industry, Israel likely would not have become one of the world's largest arms producers and exporters. For the last thirty-five years, the United States has funded the development and production of weapons, and continued to do so even after it became clear that American-subsidized weapons were repeatedly exported by Israel in violation of the Geneva Conventions. Furthermore, unlike Germany, the United States has a de facto veto power over Israel's arms exports and had the power to block these unlawful weapons transfers. American aid and assistance can be considered the "but for" cause of Israel's massive defense exports. Using the normative test suggested by Aust, the United States' continuous OSP funding made it "substantially easier" for Israel to commit an internationally wrongful act, and it can therefore be established that the United States—at the very least—"contributed significantly" to Israel's wrongful acts.

C. *Wrongful Act*

Finally, a State only incurs liability under Article 16 if the recipient State's unlawful acts "would be internationally wrongful if committed" by the assisting State itself.²⁴⁵ Since Common Article 1 of the Geneva Conventions is customary international law and therefore binding on all States, there is no question that Israel's arms exports would be unlawful if committed by the United States. The United States has even recognized the wrongfulness of, and condemned arms transfers to many of the recipients of American-subsidized Israeli weapons. The United States called on the international community to cease weapons transfers to Myanmar, for example, declaring that the government "committed genocides and crimes against humanity against Rohingya."²⁴⁶ The United States similarly supported arms embargoes on Azerbaijan²⁴⁷ and South Sudan²⁴⁸—both recipients of American-subsidized Israeli weapons.

Since all three elements of Article 16 are satisfied, a persuasive case can be established that the United States should incur liability due to its subsidization of Israel's unlawful arms exports.

CONCLUSION

Over the last decade, international trade in conventional weapons has reached its peak since the end of the Cold War.²⁴⁹ Recognizing that the arms trade fuels

245. Draft Articles on Responsibility, *supra* note 133, at 5.

246. U.S. Dep't of State, Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma (Mar. 21, 2022), <https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/>.

247. Foreign Operations, Export Financing, And Related Programs Appropriations Act, 2002, Pub. L. No. 107-15, 115 Stat. 2118 (2002).

248. *South Sudan: Extension Of UN Arms Embargo Welcome News for Victims of Decade Long Conflict*, AMNESTY INT'L (May 30, 2023), <https://www.amnesty.org/en/latest/news/2023/05/south-sudan-extension-of-un-arms-embargo-welcome-news-for-victims-of-decade-long-conflict/>

249. International Arms Transfers, STOCKHOLM INT'L PEACE RESEARCH INST. (2022), <https://www.sipri.org/yearbook/2022/09>.

conflict, exacerbates poverty, and increases human suffering around the world, States and civil society actors alike have increasingly sought to regulate international weapons transfers via international agreements such as the Arms Trade Treaty.²⁵⁰ This push for increased regulation of conventional arms transfers is also reflected in the domestic policies of major arms exporting States.

In response to pressure from human rights organizations, the Biden Administration overhauled the United States Conventional Arms Transfer policy, establishing a heightened human rights standard for American weapons exports.²⁵¹ The purpose of this heightened standard is to “prevent arms transfers that risk facilitating or otherwise contributing to violations of human rights or international humanitarian law.”²⁵² This new emphasis on compliance with international law and preventing arms exports to States engaged in human rights violations has been hailed as a victory by human rights organizations.²⁵³ If followed, this heightened standard could decrease the extent of American weapons used to facilitate unlawful acts in foreign States.

However, despite this increased global and domestic attention on establishing legal frameworks designed to regulate the flow of conventional weapons, the issue of American subsidization of Israel’s arms exports has received minimal scrutiny. Though this issue is excluded from mechanisms such as the Arms Trade Treaty, this Article demonstrates that existing international law may provide a useful framework for establishing legal liability for the United States’ funding of Israel’s domestic arms industry.

American financing of Israel’s domestic arms industry has been central in the development of Israel’s status as a major arms exporting State. Through applying Common Article 1 of the Geneva Conventions and Article 16 of the Draft Articles on State Responsibility, a *prima facie* case can be made that United States can incur liability for its role in funding the development and procurement of Israeli weapons which are subsequently exported in violation of international law. Under this framework, the United States has responsibility not only for the unlawful uses of its own weapons, but also for the weapons it subsidizes.

250. Arms Trade Treaty, Apr. 2, 2013, 3013 U.N.T.S 269 (entered into force Dec. 24, 2014); *Why We Need A Global Arms Trade Treaty*, OXFAM INT’L, <https://www.oxfam.org/en/why-we-need-global-arms-trade-treaty> (last visited: Oct. 4, 2023).

251. Memorandum on United States Conventional Arms Transfer Policy, National Security Mechanism/NSM-18 (Feb. 23, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>.

252. *Id.*

253. Connor Echols, *New Biden Arms Sale Policy Puts Human Rights Abusers on Notice*, RESPONSIBLE STATECRAFT (Feb. 23, 2023), <https://responsiblestatecraft.org/2023/02/23/new-biden-arms-sale-policy-puts-human-rights-abusers-on-notice/>.

Antitrust’s Social “Ripple Effect”

Sandra Marco Colino *

The relentless discussion on the value of social goals in antitrust is currently governed by two pressing concerns: rising wealth inequality and the plight for sustainability. On the one hand, the alarming upward trend in wealth concentration has been linked to issues antitrust may have the power to tackle, such as the intensification of market power. On the other hand, as the world tries to grapple with an impending environmental catastrophe, it seems unacceptable to compel companies to invest in green initiatives if there is a risk that they may incur antitrust liability. More antitrust enforcement is usually invoked as a means to narrow the wealth gap, while less antitrust is portrayed as the best way to enable environmentally friendly collaborations. This Article constructs a consistent path for competition policy to embrace non-economic goals without losing sight of its pivotal role as the guardian of well-functioning markets. Instead of laxer enforcement, I contend that a robust strategy can provide adjuvant protection to social goals. In this context, I propose a strategy to maximize antitrust’s social “ripple effect” within the current boundaries of competition policy.

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INTRODUCTION

Elegance does not sit well with competition law.¹ It is not in the DNA of a discipline that is a political construct,² intrinsically prone to ideological shifts, and shaped by a compound of societal variants.³ The boundaries of antitrust are fuzzy, yet the legal certainty imperative requires looking for ways to contain its expansive nature and develop a cogent analytical framework. Attempts to groom competition law tend to rely on neat economic premises and quantifiable data and embrace only efficiency or consumer welfare considerations.⁴ Unfortunately, this approach has proven antithetical to the tenets of discipline. As well-intentioned as such efforts may be, they are like “[t]rying to measure a three-dimensional world with a one-dimensional yardstick.”⁵ The result could be a tidy but rather meaningless policy that fails to heed the problems it was designed to tackle.

1. See, e.g., Eleanor M. Fox, *Outsider Antitrust: “Making Markets Work for People” as a Post-Millennium Development Goal*, in *COMPETITION POLICY FOR THE NEW ERA: INSIGHTS FROM BRICS COUNTRIES* 22, 27 (Tembinkosi Bonakele et al. eds., 2017) (claiming that antitrust “has been seduced by beautiful, elegant, but unfitting economic assumptions”).

2. See Spencer Weber Waller & Jacob E. Morse, *The Political Face of Antitrust*, 15 *BROOK. J. CORP. FIN. & COM. L.* 75, 95 (2020) (asserting that “antitrust has always been political in nature”); See also Ariel Ezrachi, *Sponge*, 5 *J. ANTITRUST ENF’T.* 49, 51 (2017) (describing antitrust as a “political creation”).

3. Ezrachi, *supra* note 2, at 51.

4. See, e.g., Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 *FORDHAM L. REV.* 2575, 2580 (2013) (asserting that US “antitrust analysis over the past thirty years overstated the importance of competitive dynamics that were easier to assess (productive efficiencies and short-term price effects) and marginalized or ignored what was harder to assess (dynamic efficiencies; systemic risk; and political, social, and moral implications of concentrated economic power”).

5. Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 *COLUM. L. REV.* 422, 422 (1965).

The tensions between the messy nature of antitrust on the one hand and the need for consistency and objectivity on the other foster an intrinsic existential "permacrisis."⁶ The discussion around whether competition policy should consider non-economic goals is rich and prolific.⁷ It is a dispute pushed by those willing to sacrifice validity for the sake of reliability,⁸ leading to oscillations between workability and predictability.⁹ They may be opposite forces, but ultimately, workability and predictability coexist in a state of mutual dependency. Competition law needs a dose of each to function. The question of which should prevail is at the heart of antitrust's core doctrinal dispute, one that will never be completely settled. It has spawned some of the most fascinating literature in the field. Yet, much like Walter Gallie's essentially contested concepts, it will never succumb to "a definite or judicial knock-out."¹⁰

Doctrinal excitement aside, the constant tug-of-war exposes some of antitrust's vulnerabilities and contradictions. Attempts to erode it have come both from those who want minimalist (efficiency focused) antitrust and those who consider the policy a hindrance to non-competition goals.¹¹ Its political roots make it prone to be used to pursue partisan agendas, but sometimes solid investigations are unfairly put down to political interests just because the outcome is unpalatable.¹² Notably, the acceptance that competition law can never be fully purified triggers an intense battle of policy goals. Not only can non-economic purposes run counter to efficiency, but they may also clash with one another, thus potentially affecting antitrust in opposing fashions. Two concerns of global dimensions increasingly prominent in the goal discussion illustrate this tension: rising wealth inequality and the desire for sustainability. On the one hand, the

6. "Permacrisis" was Collins Dictionary's 2022 word of the year. See David Shariatmadari, *A year of 'permacrisis,'* COLLINS LANGUAGE LOVERS BLOG (Nov. 1, 2022), <https://blog.collinsdictionary.com/language-lovers/a-year-of-permacrisis/> (last visited Dec. 15, 2024).

7. See generally CHRISTOPHER TOWNLEY, ARTICLE 81 EC AND PUBLIC POLICY (2009); OLES ANDRIYCHUK, THE NORMATIVE FOUNDATIONS OF EU COMPETITION LAW: ASSESSING THE GOALS OF ANTITRUST THROUGH THE LENS OF LEGAL PHILOSOPHY (2017); OR BROOK, NON-ECONOMIC INTERESTS IN EU ANTITRUST LAW (2022); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012).

8. Susan Martin, *Two Models of Educational Assessment: A Response from Initial Teacher Education: If the Cap Fits...*, 22 ASSESSMENT & EVALUATION IN HIGHER EDUCATION 337, 339 (1997).

9. ANDRIYCHUK, *supra* note 7, at 53–54.

10. Walter Bryce Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 179 (1956).

11. See Douglas H. Ginsburg, *Remarks on the Consumer Welfare Standard, on the Occasion of Receiving the John Sherman Award from the Antitrust Division Department of Justice* (Oct. 23, 2020), <https://www.justice.gov/opa/speech/file/1355386/download> (stating that "[t]he antitrust enterprise is going to be under assault from two directions, from people who are agitating for non-consumer welfare criteria as a general matter, and by firms that are interested in collaborating on ESG in the hope of circumventing the antitrust laws").

12. On partisan antitrust rhetoric, see generally William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687 (2014).

alarming upward trend in wealth concentration¹³ has been linked to issues competition law may have the power to tackle, such as the intensification of unchallengeable market power.¹⁴ On the other hand, as the world grapples with an impending environmental catastrophe¹⁵ and pressure mounts on the business community to take action,¹⁶ it seems politically unacceptable to compel companies to invest in green initiatives if there is a risk that these might be punishable under competition law.¹⁷ From this perspective, *more* competition law enforcement is usually invoked as a means to help narrow the wealth gap, while *less* antitrust intervention is often portrayed as the best way to enable environmentally friendly collaborations.

13. See, e.g., ANTHONY B. ATKINSON, *INEQUALITY. WHAT CAN BE DONE?* (2015); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014); Stefano Filastro, *The EU-wide Income Distribution: Inequality Levels and Decompositions*, EUROPEAN COMMISSION (May 2018) https://publications.europa.eu/resource/cellar/97058bfe-62f6-11e8-ab9c-01aa75ed71a1.0001.01/DOC_1.

14. See, e.g., Lina M. Khan & Sadeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 53–59 (2012); Maurice E. Stucke, *Occupy Wall Street and Antitrust*, 85 S. CAL. L. REV. 33 (2012); ATKINSON, *supra* note 13; Ariel Ezrachi et al., *The Effects on Competition Law on Inequality—An Incidental By-product or a Path for Societal Change?*, 11 J. ANTITRUST ENF'T. 51 (2023); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L. J. 1 (2015); Joseph E. Stiglitz, *Towards a Broader View of Competition Policy*, in *COMPETITION POLICY FOR THE NEW ERA*, *supra* note 1, at 4; Herbert J. Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI ANTITRUST CHRON. (Oct. 2017); Michal S. Gal, *The Social Contract at the Basis of Competition Law*, in *RECONCILING EFFICIENCY AND EQUITY* 88 (Damien Gerard and Ioannis Lianos eds., 2019); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018); Ioannis Lianos, *The Poverty of Competition Law: The Long Story* (UCL Centre for Law, Economics and Society Research Paper No. 2/2018, 2018), https://www.ucl.ac.uk/cles/sites/cles/files/cles_2-2018.pdf [<https://perma.cc/AD3V-QMC5>]; JONATHAN TEPPER WITH DENISE HEARN, *THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION* (2018); Mark Glick, *The Unsound Theory behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455 (2018); Shi-Ling Hsu, *Antitrust and Inequality—The Problem of Super-Firms*, 63 ANTITRUST BULL. 104 (2018); PIKETTY, *supra* note 13.

15. Initiatives include: *The European Green Deal (Communication to the European Parliament, the European Council, the Council, the European Social and Economic Committee and the Committee of the Regions)* COM (2019) 640 final (Dec. 11, 2019); *RECOGNIZING THE DUTY OF THE FEDERAL GOVERNMENT TO CREATE A GREEN NEW DEAL*, H.Res.109, 116th Cong. (Feb. 7, 2019) <https://www.congress.gov/116/bills/hres/109/BILLS-116hres109ih.pdf>; National Environmental Protection Agency, *China's Ten Strategic Policies on Environment and Development* (1994).

16. See generally Daina Mazutis & Anna Eckhart, *Sleepwalking into Catastrophe: Cognitive Biases and Corporate Climate Change Inertia*, 59 CAL. MANAG. REV. 74 (2017) (on the importance of corporate action to tackle climate change).

17. See generally Simon Holmes, *Climate Change, Sustainability, and Competition Law*, 8 J. ANTITRUST ENF'T. 354 (2020); Kevin Coates & Dirk Middelschulte, *Getting Consumer Welfare Right: The Competition Law Implications of Market-driven Sustainability Initiatives*, 15 EUR. COMPETITION J. 318 (2019); Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 ECOLOGY L. Q. CURRENTS 219 (2020). On the issue of competition law and sustainability objectives, see generally SUZANNE KINGSTON, *GREENING EU COMPETITION LAW AND POLICY* (2011).

Despite the predominance of the more antitrust/less antitrust narrative in the scholarship, it paints an incomplete picture. Wealth equality and sustainability need not, and most often do not, exert opposite forces on competition policy. There are times when antitrust enforcement will bear negative consequences on distribution. For instance, inequality has been portrayed as “a natural byproduct of a market economy,”¹⁸ and may be exacerbated by the selective effects of innovation. Consequently, if antitrust policy successfully boosts innovation, it may inadvertently widen the wealth gap. Similarly, applying antitrust law can often curb conduct harmful to both competition and the environment. A clear example is the European Commission’s 2021 decision to fine carmakers for colluding to hamper innovation in diesel car emission standards.¹⁹ Importantly, environmental protection and wealth equality are not conflicting, but connected pursuits. The 2030 United Nations (“UN”) Agenda for Sustainable Development lists “reduced inequalities” among the seventeen goals of sustainable development,²⁰ and antitrust enforcers have acknowledged that sustainability encompasses “numerous domains,” ranging “from ecological preservation ... to economic equality.”²¹ The circumstances should determine the need for enforcement on a case-by-case basis, but the interdependence of these pursuits requires coherence in the wider policy repercussions of specific decisions.

This Article constructs a consistent path for competition policy to embrace non-economic goals without losing sight of its pivotal role in safeguarding the proper functioning of markets. Through a careful comparison of the US and EU regimes and by drawing on legal theory, this Article considers how environmental and equality considerations have shaped and influenced antitrust enforcement. The work is premised upon three demonstrable (and demonstrated) realities. First, antitrust does not exist in a vacuum, but is “an aspect of the social and economic policy of the system to which it belongs.”²² It is one of the pieces of the legal system designed to protect the values of the society it serves. Since those values are not immutable, antitrust may have to adapt to ensure it continues to fit in that system.²³ Second, the role of competition law in pursuing non-economic goals is

18. Baker & Salop, *supra* note 14, at 5.

19. European Commission Press Release IP/21/3581, Antitrust: Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars (Jul. 8, 2021) (IP/21/3581). See also Julian Nowag, *Antitrust and Sustainability: An Introduction to an Ongoing Debate*, PROMARKET (Feb. 23, 2022) <https://www.promarket.org/2022/02/23/antitrust-sustainability-climate-change-debate-europe/> (describing the “competition v. sustainability” narrative as “simplistic, reductionist” and “sensationalist”).

20. United Nations, *Sustainable Development Goals*, <https://www.un.org/sustainabledevelopment/> (last visited Dec. 15, 2024).

21. Hellenic Competition Commission (HCC) & Netherlands Authority for Consumers and Markets (ACM), *Technical Report on Sustainability and Competition* 1 (Jan. 2021), https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf.

22. MAHER M. DABBAH, *INTERNATIONAL AND COMPARATIVE COMPETITION LAW* 230 (2010).

23. Ezrachi et al., *supra* note 14, at 54.

secondary. The discipline “cannot be all things to all people,”²⁴ and there are often more effective tools for attaining social goals than antitrust. Third, competition law is possibly underenforced, particularly in the United States.²⁵ The prevailing ideology behind antitrust policymaking favors minimal intervention and tends to underestimate the costs and risks of false negatives.²⁶

Based on these assertions and the findings of the comparative and doctrinal research conducted, this Article rejects calls for laxer antitrust enforcement. Instead, I contend that the best tactic to provide adjuvant protection to non-economic goals resides in the robustness of antitrust regimes. Grounded on this premise, I propose a strategy to maximize antitrust’s social “ripple effect” within the boundaries of current antitrust policy. To this end, Section I ponders whether there is any room for social pursuits in the (efficiency-focused) ideological framework that underpins contemporary antitrust policy. Section II explores two main routes for balancing competition and non-competition goals—less antitrust and robust enforcement. Section III conducts a critical reflection and puts forward normative and policy proposals. Finally, I draw conclusions on the basis of this analysis.

I. ANTITRUST’S “WIGGLE ROOM” FOR NON-ECONOMIC AIMS

A. *The Consumer Welfare Standard in US Antitrust and EU Competition Law*

To assess the viability of initiatives pursuing non-economic purposes in competition law, one must explore whether they are compatible with the orthodox aims of antitrust. This ubiquitous reflection is complicated by the fact that there is no definitive consensus on what those aims ought to be. The consumer welfare standard undoubtedly plays a fundamental role, but interpreting the meaning of this objective can be obfuscated by two factors: first, its meaning is far from unanimous, and second, its specific function has not been construed in a consistent manner.²⁷

24. Ezrachi, *supra* note 2, at 50.

25. See, e.g., THURMAN ARNOLD PROJECT: YALE SCHOOL OF MANAGEMENT, MODERN ANTITRUST ENFORCEMENT, <https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement> (last visited Dec. 15, 2024) (stating that the “bulk of the research featured in our interactive database on these key topics in competition enforcement in the United States finds evidence of significant problems of underenforcement of antitrust law”); on merger control underenforcement, see generally Jason Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (Mar. 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

26. See generally Jonathan B. Baker, *Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1 (2015). Ideology is discussed *infra* section I.A.

27. See Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 AM. BUS. L.J. 97, 113 (2016) (claiming that the protection of competition, consumer welfare, and efficiency are “nearly impossible to define ... without creating contradictions and inconsistencies”).

To illustrate the first of these issues, one need only consider Robert Bork's understanding of consumer welfare as a synonym of "the wealth of the nation."²⁸ Whether that wealth benefits consumers or, as in most cases resulting from Bork's postulates, producers is less relevant. However, such a notion would be more aligned with the economic concept of *total* welfare, that is, the sum of producer and consumer surplus.²⁹ In economics, the concept of consumer welfare refers to "anything that factors into demand," including "price, quality, innovation, [and] privacy."³⁰ Instead, the notion used in US antitrust policy mainly³¹ follows Bork and the Chicago School movement.³² It focuses solely on achieving efficient markets or wealth maximization, which translates into high output, increased choice, and low prices.³³ It principally seeks the allocative side of efficiency.³⁴ Legislative history does not lend support to this view.³⁵ Leah Samuel and Fiona Scott-Morton have denounced that the consumer welfare standard has been distorted by a school of thought to justify "a defendant-friendly antitrust standard that dismisses the benefit of quality and innovation."³⁶ Advocates of Bork's redefinition claim that, in the decades before it was adopted, "[c]ourts were freely choosing among multiple, incommensurable, and often conflicting values."³⁷

28. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 90 (1978).

29. See, e.g., Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, in *THE GOALS OF COMPETITION LAW* 3–24 (Daniel Zimmer ed. 2012); ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* (1920). For criticisms of Bork's definition of consumer welfare, see generally Kenneth Hayer, *Consumer Welfare and the Legacy of Robert Bork* 57 J.L. & ECON. S19 (2014); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

30. Leah Samuel & Fiona Scott-Morton, *What Economists Mean When They Say "Consumer Welfare Standard,"* PROMARKET (Feb. 16, 2022), <https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/>.

31. While Bork's polarizing views are more widely known, centrist Harvard School scholars also called for a single-goal policy around the same time *The Antitrust Paradox* was published. The influence of Philip Areeda and Donald Turner in US antitrust law is highlighted by William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 476 (2020) (comparing the work of Bork with that of Areeda and Turner, Kovacic points out that the "flamboyant" and "apocalyptic" tone of the former's writings made *The Antitrust Paradox* "the more memorable text and more frequently the focus of attention in contemporary debates").

32. See, e.g., Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

33. Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Imperiled?*, 45 J. CORP. L. 101, 102 (2019).

34. See generally VILFREDO PARETO, *MANUALE DI ECONOMIA POLITICA* (1906). For an English version, see VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* (2014).

35. Herbert J. Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008).

36. Samuel & Scott-Morton, *supra* note 30.

37. Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 950 (2014). See also Okeoghene Odudu, *The Wider Concerns of Competition Law*, 30 OXFORD J. LEGAL STUD. 599, 599 (2010) (criticizing the "state of disarray" and "incoherence" of pre-Chicago antitrust policy).

Those who adhere to this view see it as the only way to ensure institutional administrability.³⁸

Inconsistencies in the role of the consumer welfare standard can be seen in the different understandings of its purpose and meaning held by antitrust authorities around the world. In a 2011 survey among members of the International Competition Network (“ICN”), only seven out of fifty-seven agencies understood consumer welfare in the way that Bork did.³⁹ Discrepancies exist even within jurisdictions, and the European Union provides a good example. The black letter law suggests that increases in producer welfare cannot be offset against consumer harm, but at the same time benefits to consumers do not justify the complete absence of competition.⁴⁰ In practice, while at times the efficiency of markets is considered paramount,⁴¹ other times the competitiveness and openness of those markets appears to be more important (though this is ultimately a way to make markets more efficient).⁴² In the early 2000s, with the introduction of the “more economic approach,”⁴³ the former of these views gained significant ground. The European Commission insisted that the aim of EU antitrust rules is “to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources”⁴⁴—a view corroborated by the European courts.⁴⁵ This translated, *inter alia*, into greater pressure on the Commission to elaborate robust theories of harm and more opportunities for companies to demonstrate that their behavior might be ultimately justified.

The more economic approach may address, in part, situations where less competition law is required. The harder it is to enforce the law, the less likely it

38. See, e.g., D. Daniel Sokol, *Antitrust’s “Curse of Bigness” Problem*, 118 MICH. L. REV. 1259, 1280 (2020); Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985); Christine Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, Luncheon Keynote Address, George Mason Law Review 22nd Antitrust Symposium (Feb. 15, 2020), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

39. MARSHALL STEINBAUM & MAURICE E. STUCKE, *THE EFFECTIVE COMPETITION STANDARD* 11–12 (2018).

40. Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3), 2012 O.J. (C 326) 47 [hereinafter TFEU] (requiring that consumers be allowed “a fair share” of the compensatory benefits of any competition restrictions in breach of 101(1) TFEU). For an analysis of this provision, see *infra* section II.A.3.

41. See, e.g., opinion of Advocate General Wahl, Case C-413/14 P, *Intel Corp. v. Eur. Comm’n*, ECLI:EU:C:2016:788 (Oct. 20, 2016).

42. See, e.g., opinion of Advocate General Kokott, Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, ECLI:EU:C:2015:343 (May 21, 2015); opinion of Advocate General Kokott, Case C-376/20P, *Eur. Comm’n v. CK Telecoms UK Investments Ltd.*, ECLI:EU:C:2022:817 (Oct. 20, 2022).

43. Eur. Comm’n, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, 1999 O.J. (C 132) 1 (Apr. 28, 1999).

44. Eur. Comm’n, *Guidelines on the Application of Article 81(3) of the Treaty*, 2004 O.J. (C 101) 97, ¶ 33 (Apr. 27, 2004) [hereinafter 101(3) Guidelines].

45. See, e.g., Case T-168/01, *GlaxoSmithKline Services v. Eur. Comm’n* ECLI:EU:T:2006:265 ¶¶ 118, 273 (GC Sept. 18, 2003).

will be for conduct pursuing social objectives to run counter to antitrust provisions. However, the focus on allocative efficiency exacerbates the risk of no intervention, where taking action could help protect additional goals. This should worry those wanting to see antitrust play a more relevant role in the protection of social values, particularly in light of the flagrant underenforcement of the law.⁴⁶ It is from this standpoint that commentators have asserted that the consumer welfare standard falls short and needs to be replaced so that enforcement may be (re)invigorated.⁴⁷ These claims are considered in the next subsection.

B. Breaking with the System or Change from Within? Incorporating Non-Economic Goals into Antitrust Analysis

In the United States, plenty of antitrust revitalization proposals have been put forward by those who dispute that wealth maximization should be the main purpose of competition law. For instance, relying on behavioral economics, scholars have questioned the rational predictions of firms' conduct that frequently guide neoclassical-rooted competition policy development,⁴⁸ and have proposed ways to overcome "the shortcomings of relying on an effects-based legal standard built on faulty assumptions to promote an ill-defined consumer welfare goal."⁴⁹ In a similar vein, post-Chicagoans have attempted to show that "markets are much more varied and complex than Chicago theorists were willing to admit,"⁵⁰ and have advocated for more intervention to quash the harmful effects of conduct that almost invariably escapes scrutiny under current policy. This intervention would be mainly achieved through improved economic tools, without necessarily tampering with the consumer welfare standard.⁵¹

There have been explicit calls for focusing on wider objectives. Scholars have, for instance, proposed relying on welfare economics to take into account factors improving well-being and quality of life.⁵² This would allow enforcers to

46. See sources *supra* note 25.

47. See, e.g., Mark Glick et al., *Why Economists Should Support Populist Antitrust Goals*, UTAH L. REV. 769, 812 (2023) (describing the consumer welfare standard as being "too narrow, too biased, and too unreliable"); Lianos, *supra* note 14, at 99 (noting that consumer welfare or harm "is notoriously vague, from an operational perspective").

48. See generally James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J. L. ECON. & POL'Y 779 (2012); Maurice E. Stucke, *Behavioral Economics at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007).

49. Maurice E. Stucke, *How Can Competition Agencies Use Behavioral Economics?*, 59 ANTITRUST BULL. 695, 741 (2014).

50. Herbert J. Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, COLUM. BUS. L. REV. 257, 268 (2001).

51. See, e.g., HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST (Robert Pitofsky ed., 2008); Christopher Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 9171 (2014); Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145 (2020).

52. See generally Glick et al., *supra* note 47; Stucke, *supra* note 7; TOWNLEY, *supra* note 7, at 50. See also Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV.

consider aspects that citizens value more than efficiency (such as cleaner air or better working conditions),⁵³ opening the door for social, political, and even moral goals in antitrust.⁵⁴ Another popular idea is to use the competitive process test to replace the consumer welfare standard as the lodestar of antitrust,⁵⁵ adopted in recent years by the progressive Neo-Brandeis movement. This young school of thought has been calling for greater focus on structural issues.⁵⁶ Representatives include Lina Khan, who was Biden's chair of the US Federal Trade Commission ("FTC"), and Tim Wu, former Special Assistant to President Biden for Technology and Competition Policy.⁵⁷ According to Khan, "competition policy should promote not welfare but competitive markets," thereby respecting Congress' intention to protect "a host of political economic ends—including our interests as workers, producers, entrepreneurs, and citizens"⁵⁸ via antitrust legislation.

From the Neo-Brandeisians' originalist perspective, low prices may be harmful if they come at the expense of reduced competition (eliminating competitors with higher costs) or unfair wages.⁵⁹ They express an aversion to "bigness"⁶⁰ and excessive market power, linking it to wealth inequality. In this regard, Wu claims that "extreme economic concentration yields gross inequality and material suffering,"⁶¹ and Khan, writing with Sandeep Vaheesan, argues that "market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few belonging to the 1 percent and 0.1 percent at the top of the income and wealth distribution."⁶² Wealth

1140, 1168 (1981) (highlighting the importance of ensuring equal opportunity for those without power in the early days of US antitrust). *But see* Thibault Schrepel, *Antitrust Without Romance*, 13 N.Y.U. J. L. & LIBERTY 326 (2020).

53. Stucke, *supra* note 7, at 590.

54. *Id.* at 595.

55. *See, e.g., Ohio v. American Express*, 138 S. Ct. 2274, 2294 (2018) (Breyer, J., dissenting); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE (Aug. 2015); Gregory J. Werden, *Antitrust's Rule of Reason*, 79 ANTITRUST L. J. 713 (2014); Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022) <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>.

56. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L 1 (2018).

57. *See, e.g., Lina M. Khan, Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 737 (2017); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

58. Khan, *supra* note 57, at 737.

59. *See also* Niamh Dunne, *Fairness and the Challenge of Making Markets Work Better*, 84 MOD. L. REV. 230, 247 (2021) (explaining that high prices may be positive "from the perspective of suppliers seeking an adequate return on investment, or the supplier's workforce pursuing fair wages, or would-be rivals hoping to enter the market with competitive offerings, or the exchequer where the excess profits are taxed appropriately—or even the customer herself, where high prices are designed to discourage harmful competition").

60. Wu, *supra* note 57, at 14.

61. *Id.*

62. Khan & Vaheesan, *supra* note 14, at 236.

redistribution thus becomes a valid aim of competition policy.⁶³ Neo-Brandeisians are less enthusiastic about environmental pursuits. Discussing whether competition concerns can be set aside if a practice may promote sustainability, Khan stated that “antitrust laws don’t permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit.”⁶⁴ The movement thus favors supporting the goals that antitrust laws were designed to protect and/or those that are connected to its general pursuits.

In the United States, those calling for more ambitious antitrust laws generally aspire to veer away from the impasse of the last four decades. By contrast, in Europe, a revival of non-economic concerns has been taking place from *within* the system. Former EU Competition Commissioner Margrethe Vestager’s calls for fairness, for example, have been advanced within the parameters of the more economic approach.⁶⁵ It is not so much about disregarding price effects as it is about *additionally* considering other issues, including structural or innovative harm.⁶⁶ In a 2021 Policy Brief, the European Commission insisted on the need to “ensure that antitrust enforcement remains anchored to the consumer welfare standard.”⁶⁷ Yet in October 2022, Vestager gave a speech positing that, “[b]y basing our policy intent and action on principles that stem directly from the Treaties, EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy.”⁶⁸

As contradictory as it may seem, the acceptance of assorted antitrust pursuits is consistent with a consumer welfare underpinning. EU competition law never gave up on other goals—it could not, since it was envisaged as a means to an

63. *But see* Herbert J. Hovenkamp, *supra* note 50, at 269 (claiming that “[a]ntitrust is no good at transferring wealth away from rich to poor, ... and cannot be defended on that basis in any way”).

64. Lina M. Khan, *ESG Won't Stop the FTC*, WALL ST. J. (Dec. 21, 2022) <https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135>.

65. *See, e.g.*, Margrethe Vestager, *Competition for a Fairer Society*, European American Chamber of Commerce (Sep. 29, 2016), <https://eacny.com/news/chapternews/eu-commissioner-margrethe-vestager-competition-for-a-fairer-society>; Margrethe Vestager, *Antitrust for the Digital Age*, Eur. Comm’n (Sep. 16, 2022), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5590. On fairness and competition law, see generally Damien Gerard, *Fairness in EU Competition Policy: Significance and Implications*, 9 J. EUR. COMPETITION L. & PRAC. 211 (2018); Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Antitrust*, J. BUS. L. 329 (2019); Dunne, *supra* note 59; Giuseppe Colangelo, *In Fairness We (Should Not) Trust: The Duplicity of the EU Policy Mantra in Digital Markets*, 68 ANTITRUST BULL. 618 (2023).

66. Johannes Laitenberger, *EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective*, Eur. Comm’n (Oct. 10, 2017).

67. Eur. Comm’n, *Competition Policy Brief No. 2021-01 6* (Sept. 2021) <https://data.europa.eu/doi/10.2763/962262>.

68. Margrethe Vestager, *A Principles Based approach to Competition Policy*, Keynote at the Competition Law Tuesdays (Oct. 22, 2022). The adequacy of the assertion that EU competition law pursues multiple goals is discussed *infra* section II.A.1.

(integration) end.⁶⁹ Both the black letter law and the ideology at the core of the origins of the system go beyond efficiency. The basic antitrust provisions are embedded in the Treaty on the Functioning of the European Union (“TFEU”),⁷⁰ where protection of competition is only one of multiple priorities. The most prominent goal is the single market imperative, which remains an explicit purpose of EU competition law.⁷¹ Other goals include: promoting employment and education;⁷² consumer protection;⁷³ social cohesion;⁷⁴ and environmental protection (a pursuit that needs to be integrated into all of the EU’s policies, as discussed later).⁷⁵ As for ideology, Ordoliberalism and the Freiburg School have exerted significant influence in EU competition law and policy development from the outset.⁷⁶ For this school, competition is not always a synonym of welfare and efficiency. It is only beneficial when subject to certain governmental limitations.⁷⁷

The backdrop of EU competition law compels policymakers to respect both the wider framework embedded with the core provisions and the motivation(s) of the Member States to adopt the law. It would be difficult to reconcile this setting with the *laissez-faire* traits of a Chicago School-infused policy.

C. *The Feasibility of Implementing a Socially Conscious Antitrust Policy*

The propositions for reform discussed above are certainly appealing and are driving a necessary discussion.⁷⁸ There is now overwhelming evidence that the coherence and elegance of the Chicago School and its near-blind faith in the markets’ ability to self-correct are not enough to respond to the complexities of real life.⁷⁹ Markets tend to be messy places and thus require messy policies, or at least, policies that are versatile enough to address conduct with ambiguous consequences. While the theoretical value of sophisticated, multi-goal

69. Konstantinos Stylianou & Marios Iacovides, *The Goals of EU Competition Law: A Comprehensive Empirical Investigation*, 42 LEGAL STUD. 620, 647 (2020).

70. TFEU, *supra* note 40.

71. Opinion of Advocate General Mischo, Case C-283/98 P, *Mo och Domsjö AB v. Eur. Comm’n*, ECLI:EU:C:2000:262 (May 18, 2000).

72. TFEU art. 9, *supra* note 40.

73. *Id.* art. 12.

74. *Id.* art. 174(1).

75. *Id.* art. 11. *See infra* section II.B.1.

76. *See, e.g.*, DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 232-265 (1998).

77. *See, e.g.*, Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism*, Freiburg Discussion Papers on Constitutional Economics, No. 04/11 (2004); SANDRA MARCO COLINO, VERTICAL AGREEMENTS AND COMPETITION LAW: A COMPARATIVE STUDY OF THE EU AND US REGIMES (2010).

78. Eleanor M. Fox, *The Battle for Reform of Antitrust*, 11 J. ANTITRUST ENF’T. 179, 184 (2023) (contending that the progress achieved in recent years “would not have been made but for the NeoBrandeis movement”).

79. Hovenkamp, *supra* note 50, at 258. *See also* Dunne, *supra* note 59, at 259 (describing as “uncontentious” the fact that current US antitrust is inadequate).

competition policymaking may be significant, taking non-economic issues into account is easier said than done. Questions arise as to the plausibility of developing consistent bright lines while striving for potentially incompatible goals and as to the enforceability of the resulting approach.

A first issue is that delineating the contours of non-economic purposes can be tricky, yet this would seem to be the necessary starting point of any discussion on how to incorporate these considerations into antitrust policy. From this perspective, it is not hard to understand the advantage of thinking of efficiency exclusively, a quantifiable concept producing "an unambiguous public benefit (it enhances the size of the pie available to all)."⁸⁰ The competitive process alternative does not do much beyond shifting the attention from the *outcome* to the *process* of attaining that (efficient) outcome. It has been described by skeptics as a "mercurial"⁸¹ and "toothless" concept vague enough to lend support to conflicting ideologies.⁸² The consumer welfare standard was meant to be "a method to resolve deep ambiguities about what 'competition and the competitive process' means," not a substitute.⁸³ This all shows that "[t]o destroy is easier than to create,"⁸⁴ and to date, critics have been better at demonstrating the shortcomings of efficiency-driven policymaking than at putting forward a workable action plan.⁸⁵ When discussing whether consumer welfare is the optimal standard, the words of Einer Elhauge spring to mind: "Perhaps it is not, though I have not seen so far a better one."⁸⁶

A second challenge is the aptness of competition law as a vehicle to attain these non-economic goals. The limitations of the tools available in antitrust, which are designed to examine specific actions of particular companies over a limited amount of time, complicate taking the bigger picture into account.⁸⁷ Competition enforcers cannot be expected to predict the repercussions of their decisions on *all* public policies and societal objectives, as this would force them to take into account a reality of unmanageable breadth.

A third general problem relates to the institutional complexity of policy development. Multi-goal policy development is complicated to implement and

80. Dunne, *supra* note 59, at 248–49.

81. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L. J. 501, 514 (2019).

82. Herbert J. Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 746 (2023). See generally Glick et al., *supra* note 47.

83. Einer Elhauge, *Should the Competitive Process Test Replace the Consumer Welfare Standard?*, PROMARKET (May 24, 2022) <https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/>.

84. IVAN KLÍMA, LOVE AND GARBAGE (2002) (originally published in Czech in 1986).

85. Dunne, *supra* note 59, at 259 (arguing that Neo-Brandeisian antitrust "is not a constructive movement" and lacks a "detailed blueprint for reform").

86. Elhauge, *supra* note 83.

87. Dunne, *supra* note 59, at 248.

almost inevitably increases enforcers' discretionary potential.⁸⁸ The prerequisite for embracing broader objectives, according to Ioannis Lianos, would be that "the authorities in charge of competition law are rules-based... rather than offered wide policy discretion which may lead to arbitrary decision-making."⁸⁹ Yet, it is hard to see how this could be effectuated if the power to take several abstract goals into account is bestowed upon enforcers. Concerns of this nature have been highlighted across jurisdictions.⁹⁰

From a European perspective, these institutional woes may be less conspicuous. The historical prominence of public over private enforcement⁹¹ has made, and often still makes, highly specialized administrative bodies in charge of applying competition law in the first instance. But this comes with its own challenges. The European Commission's multiple hats as "lawmaker, policeman, investigator, prosecutor, judge, and jury" raise procedural fairness concerns.⁹² While formal Commission decisions can be reviewed (and ultimately quashed) by the European judiciary,⁹³ informal settlements are difficult to challenge.⁹⁴ Because EU competition law enforcement was "decentralized" in 2004, 90 percent of its application currently happens in the Member States.⁹⁵ A recent study by Or Brook found that national competition authorities take assorted non-economic goals into account when applying (or not applying) antitrust.⁹⁶ They enjoy a wide latitude of decisional discretion since the EU Courts have yet to provide meaningful clarifications. The national agencies' (at times inconsistent) standpoints pose a threat to both the uniform development of antitrust policy and the legal certainty imperative.⁹⁷

88. On the administrability of a multi-goal policy, see PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, VOL. 1 ¶¶ 103–13, 7–33 (1978).

89. Lianos, *supra* note 14, at n. 66.

90. See, e.g., Hovenkamp, *supra* note 50, at 269 (asserting that there is a risk "antitrust tribunals will be confronted with antitrust solutions that they are not capable of administering"); ANGELA HUYUE ZHANG, *CHINESE ANTITRUST EXCEPTIONALISM* 36 (2021) (highlighting the wide discretion of Chinese antitrust agencies and the limited judicial review of their decisions).

91. See Andreas Stephan, *Does the EU's Drive for Private Enforcement of Competition Law Lack Coherent Purpose?*, 37 *UNIV. OF QUEENSLAND L.J.* 153, 157 (explaining that by 2004 "the EU's public competition law enforcement regime reached a point of maturity" but there were "apparent low levels of private enforcement.").

92. ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW: TEXT, CASES, AND MATERIALS* 893 (6th ed., 2016). For a critique of the Commission's allegedly excessive powers, see Ian Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 *EUR. L. REV.* 817 (2009).

93. Opinion of Advocate General Sharpston, Case C-272/09 P, *KME Germany and Others v Eur. Comm'n* ECLI:EU:C:2011:63 ¶ 69 (Feb. 10, 2011).

94. Dunne, *supra* note 59, at 262.

95. Directive (EU) No. 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive), 2019 O.J. (L 11) 3.

96. See generally BROOK, *supra* note 7. See also Jurgita Malinauskaite, *Competition Law and Sustainability: EU and National Perspectives*, 13 *J. OF EUR. COMPETITION L. & PRAC.* 336 (2022).

97. BROOK, *supra* note 7, at 403.

In the United States, the appointments of Neo-Brandeisians to key antitrust positions in the Biden era signaled a desire to implement changes, and there has been notable progress.⁹⁸ However, the attempts to invigorate enforcement at times hit a judicial brick wall, fueling concerns that the conservative tilt of the Supreme Court is bound to maintain a non-interventionist stance and reject any meaningful changes.⁹⁹ The courts have long been the driving force behind US antitrust policy, but they have not always been up to the mark. The jury system has taken part of the blame, yet the judges' ability to grasp intricate antitrust concepts has also been called into question. There is risk that "the subtleties of strategic behavior in complex markets" may be overlooked.¹⁰⁰ Importantly, the new Trump administration may be changing course. As of April 2025, no major changes have been announced, but it is too early to predict the intensity of enforcement in the years ahead.

It has been suggested that the judicial "inactivism" described above may be the result of covert corporate lobbying.¹⁰¹ Think tanks heavily subsidized by big companies (often at the center of antitrust investigations) train judges in economics while actively promoting minimal intervention.¹⁰² The strategy appears to be paying off, as research suggests that after receiving such training judges tend to "render conservative votes and verdicts, rule against regulation,

98. See generally Terry Calvani & Thomas Ensign, *The New Brandeisians are Here*, 11 J. ANTITRUST ENF'T. 168 (2023). Enforcement victories during the Biden administration include: Illumina's divestiture of Grail following the 5th Circuit Court of Appeals' acknowledgment that the deal would likely substantially lessen competition (*Illumina, Inc., & Grail, L.L.C. v. Fed. Trade Comm'n*, No. 23-60167 (5th Cir., Dec. 15, 2023); John Muir Health's abandonment of the deal to purchase San Ramon Regional Medical Center following a challenge (Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of John Muir's Takeover of San Ramon Regional Medical Center from Tenet Healthcare (Dec. 18, 2023) <https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-john-muir-takeover-san-ramon-regional-medical-center-tenet>); a temporary court order to block IQVIA's acquisition of healthcare advertising company DeepIntent (*Fed. Trade Comm'n v. IQVIA Holdings Inc. & Propel Media, Inc.* (23 Civ. 06188 (ER), Dec. 29, 2023); and a judgment of the district court in Massachusetts blocking the merger between airlines JetBlue and Spirit (Press Release, U.S. Dep't of Justice, Justice Department Statements on District Court Decision to Block JetBlue's Acquisition of Spirit Airlines (Jan. 16, 2024) <https://www.justice.gov/opa/pr/justice-department-statements-district-court-decision-block-jetblues-acquisition-spirit>). See also Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022) (embracing a non-CW approach on the powers of the Federal Trade Commission and how they should be exercised).

99. See generally Jonathan B. Baker, *What About the Supreme Court? The Lurking Threat to US Antitrust Reform*, 11 J. ANTITRUST ENF'T. 154.

100. Hovenkamp, *supra* note 50, at 273.

101. Daisuke Wakabayashi, *Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech*, N.Y. TIMES (Jul. 24, 2020) <https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html>.

102. Eric Cortellessa, *The Conservatives Out to Stop the New Bipartisan Antitrust Movement*, WASHINGTON MONTHLY (May 25, 2021), <https://washingtonmonthly.com/2021/05/25/the-conservatives-out-to-stop-the-new-bipartisan-antitrust-movement/> (explaining how a center financially supported by Big Tech is lobbying to neutralize bipartisan efforts to "attack corporate monopolies").

[be] somewhat more permissive on antitrust, and mete out harsher criminal sentences.”¹⁰³ Incidentally, they are also more likely to vote against environmental rules and restrictions.¹⁰⁴ If true, these tactics would further complicate the reconciliation of antitrust with social concerns.

II. PATHS TO CONSIDER NON-ECONOMIC OBJECTIVES IN ANTITRUST

The foundations of the contemporary antitrust regimes discussed above might allow sufficient leeway to enable nurturing an equality-enhancing and/or environmentally-friendly competition policy. The specific route for achieving this depends on whether, in a particular context, these goals and antitrust’s general pursuits are aligned or in opposition. Borrowing recurrent imagery in analyses of the role of sustainability benefits in antitrust, non-competition goals could act as a “shield” (sparing otherwise unlawful conduct from illegality) or as a “sword” (prodding competition law enforcement to combat behavior that harms non-economic objectives).¹⁰⁵ This section refers to the shield option as the “less antitrust” route, whereas the sword would require enhanced enforcement. In this section, the theory and practice of implementing these alternatives in the United States and the European Union are explored, with a view to ascertaining the aptitude of the current antitrust legal framework to respond to wider societal problems.

A. The “Shield”: Less Competition Law and Its Discontents

1. Premise and Roots

In the event that an anti-competitive act may conceivably enhance sustainability or equality, one obvious way to make room for non-economic aims in antitrust is to refrain from applying the law. Predictably, this strategy finds significant support among legal practitioners eager to find ways of defending their clients’ behavior.¹⁰⁶ But scholars have equally defended this route. Amelia

103. Elliott Ash et al., *Ideas Have Consequences: The Impact of Law and Economics on American Justice*, National Bureau of Economic Research, Working Paper No. 29788, 51 (2022) https://www.nber.org/system/files/working_papers/w29788/w29788.pdf [https://perma.cc/C3DY-YVUD].

104. *Id.* at 4.

105. Holmes, *supra* note 17, at 355. *See also* TOWNLEY, *supra* note 7, at 21 (claiming that the pursuit of consumer welfare “can affect other policy goals both positively and negatively”).

106. *See, e.g.*, Pierre Zelenko & Nicole Kar, *Sustainability Goals: Is Competition Law Cooperating?*, LINKLATERS (2020), <https://www.linklaters.com/en-hk/insights/publications/2020/january/competition-outlook-for-2020/sustainability-goals-is-competition-law-cooperating> (questioning whether competition law may be “a major obstacle to achieving sustainability objectives” and speculating that “competition enforcement may have prevented many [green] agreements getting off the ground”); Holmes (a former practitioner), *supra* note 17, at 405 (suggesting competition law should “cease to be ‘part of the problem’ and become ‘part of the solution’”) and at 357 (positing that “important initiatives that could help combat climate change are stifled or stillborn”); Coates & Middelschulte, *supra* note 17, at 319 (explaining that

Miazad, for instance, argues that the risk of being punished under antitrust laws hampers environmental improvements in the private sector,¹⁰⁷ and Daniel Crane posits that antitrust enforcement could, in some cases, aggravate inequality and social injustice.¹⁰⁸ Both conclude, albeit from different perspectives, that less competition law could help protect non-economic goals.¹⁰⁹ In Europe, the so-called "green antitrust" movement has ostensibly pushed for a revision of competition law "as far as [its rules] may stand in the way of companies contributing to sustainability factors and a climate-neutral economy."¹¹⁰ This suggests its proponents want less enforcement. Edith Loozen includes in the movement all scholars who prioritize sustainability over the protection of competition.¹¹¹

The less antitrust approach might not, in fact, be tantamount to the recognition of multiple valid objectives in competition law. Rather, it might be a case of suspending the law's application (and the pursuit of its purposes) for something considered more valuable.¹¹² From a doctrinal perspective, the strategy is akin to the principle of double effect, the origins of which can be traced back to the 13th century and Thomas Aquinas' justification of self-defense. Aquinas claimed that "[n]othing hinders one act from having two effects, only one of which is intended, while the other is beside the intention."¹¹³ The first of these acts would be beneficial and desirable, while the second would be harmful and unwanted.

Aquinas was thinking of the classic scenario in which one's life is saved by killing the aggressor. In antitrust, the double effect would entail situations where wealth maximization is sacrificed to protect more pressing non-economic objectives. Sustainability initiatives are particularly prone to such justifications since they often enter into conflict with economic efficiency—particularly when the environmental benefits have not been factored into the economic assessment. For example, airlines may decide to pursue environmentally-friendly joint

antitrust may be seen as "an obstacle for competitors to cooperate in order to scale-up their contribution to deliver on the [UN Sustainable Development Goals]").

107. Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L. J. 1637, 1640 (2022).

108. Daniel Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1175 (2016).

109. *Id.* (stating that "a significant set of antitrust interventions actually impede voluntary efforts to secure a more equitable and just society"); Miazad, *supra* note 107, at 1690 (arguing that any "collaboration which seeks to address a systematic [social or environmental] risk should always be analyzed under a rule of reason" even if it bears impact on price or output).

110. Maarten Pieter Schinkel & Leonard Treuren, *Green Antitrust: (More) Friendly Fire in the Fight Against Climate Change* (Amsterdam Law School Legal Studies Research Paper No. 2020-72, 2021), https://pure.uva.nl/ws/files/123876846/SSRN_id3749147.pdf [<https://perma.cc/3XQC-QRZQ>]. On the merits of green antitrust, with a specific focus on US literature, see Sandra Marco Colino, *Antitrust's Environmental Footprint: Redefining the Boundaries of Green Antitrust* (forthcoming 2024).

111. Edith Loozen, *EU Antitrust in Support of the Green Deal. Why Better Is Not Good Enough*, 12 J. ANTITRUST ENF'T. 75 (2024).

112. Giorgio Monti, remark at the conference *Hipster Antitrust, the European Way?*, European University Institute (Oct. 25, 2019). See <https://cadmus.eui.eu/handle/1814/65747>.

113. THOMAS AQUINAS, *SUMMA THEOLOGICA*, SECOND PART OF THE SECOND PART 279 (2018).

policies by adopting bigger aircrafts (a practice known as “upgauging”) and reducing the number of flights they offer, with the purpose of cutting greenhouse gas emissions (first positive act).¹¹⁴ The downside is that this would almost certainly decrease consumer choice—fewer flights available and a more rigid schedule—and raise prices (second negative act). Equality-related conflicts may also arise. An industry may decide to implement a policy that resists automation and refrains from replacing routine jobs with computers with the purpose of protecting low-wage jobs and income equality (first positive act).¹¹⁵ The problem here is that innovation may be stifled, and prices could rise (second negative act).

The double effect principle cannot justify *all* harmful unintended actions. Scholars have acknowledged important boundaries to the acceptability of the negative consequences of conflicts between good and bad acts.¹¹⁶ There are four requirements for the harmful action to be defensible. First, the act that justifies the bad deed must be good, or at least neutral. Second, the damaging effects may be anticipated but cannot be intended. Third, the harmful consequences cannot be the means to achieve the benefits. Fourth, the positive results must be proportional to the bad implications.¹¹⁷ If these conditions are not fulfilled, in Aquinas’ words, “though proceeding from a good intention, an act may be rendered unlawful.”¹¹⁸

In our context, while most collaborations with socially beneficial purposes between competitors would, in principle, not breach antitrust law, it is plausible that some initiatives could fall within the realms of its prohibitions.¹¹⁹ The textbook example is industry-wide projects that entail sustainability costs (leading

114. PETER PAUL FITZGERALD, *A LEVEL PLAYING FIELD FOR “OPEN SKIES”: THE NEED FOR CONSISTENT AVIATION REGULATION* (2016). See also Jae Woon Lee’s review of Fitzgerald’s book, 8 *ASIAN J. INT’L L.* 300 (2018).

115. On the negative impact of innovation on income equality, see Daron Acemoglu & Pascual Restrepo, *Robots and Jobs: Evidence from US Labor Markets*, 128 *J. POL. ECON.* 2188 (2020); Daron Acemoglu & Pascual Restrepo, *Automation and New Tasks: How Technology Displaces and Reinstates Labor*, 33 *J. ECON. PERSPEC.* 3 (2019). See also Jane G. Gravelle, *Wage Inequality and the Stagnation of Earnings of Low-Wage Workers: Contributing Factors and Policy Options*, Congressional Research Service Report R46212 7 (Feb. 5, 2020) <https://sgp.fas.org/crs/misc/R46212.pdf> (positing that automation “will make computers substitutes for nonroutine cognitive tasks and an expanded range of manual tasks,” thereby disproportionately affecting low-wage workers”).

116. See, e.g., Richard Huxtable, *Get Out of Jail Free? The Doctrine of Double Effect in English Law*, 18 *PALLIATIVE MEDICINE* 62 (2004); Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 *FLA. L. REV.* 469 (2005); Gareth B. Matthews, *Saint Thomas and the Principle of Double Effect*, in *AQUINAS’S MORAL THEORY: ESSAYS IN HONOR OF NORMAN KRETZMANN* 63 (Scott MacDonald & Eleonore Stump eds., 2018); Peter Knauer, *The Hermeneutic Function of the Principle of Double Effect* 12 *NAT’L L. F.* 132 (1967); Seana Valentine Shiffrin, *Speech, Death, and Double Effect* 78 *N.Y.U. L. REV.* 1135 (2003).

117. Rosemarie Monge & Nien-hê Hsieh, *Recovering the Logic of Double Effect for Business: Intentions, Proportionality, and Impermissible Harms*, 30 *BUS. ETHICS Q.* 361 (2020).

118. AQUINAS, *supra* note 113.

119. Scott, *supra* note 27, at 142 (positing that “antitrust continues to chill arrangements that would receive traditional per se treatment”).

to a price increase),¹²⁰ and/or which involve taking cheaper, less environmentally-friendly products out of the market (thereby reducing consumer choice).¹²¹ Taking industry-wide action is imperative, companies argue, to avoid the "first mover disadvantage": if a green initiative is costly to implement, the first company to adopt it might lose out to competitors producing less sustainable but cheaper alternatives.¹²²

2. The "Shield" Option in US Antitrust

Double effect-like considerations are plausible in both US antitrust and EU competition law. In the United States, the rule of reason is the default standard for conduct falling under Section 1 of the Sherman Act.¹²³ It requires individual scrutiny to establish whether restraints on trade are "ancillary," or secondary, "to the main purpose of a lawful contract," and thus necessary to ensure adequate execution.¹²⁴ Yet, there would be little leeway for such considerations if the arrangements in question are per se illegal (for instance, if they are tantamount to price fixing or price boycotts).¹²⁵ From this standpoint, Miazad contends that the rule of reason should always apply to collaborations between competitors addressing societal or environmental risks, "even if the collaboration will necessarily increase price or reduce output."¹²⁶

Escaping the Section 1 prohibition may be challenging for some socially minded forms of horizontal cooperation. It would even be hard to claim a lack of intent to engage in the illegal conduct since what needs to be demonstrated is intention to engage in the practice, not to harm competition.¹²⁷ As Makan Delrahim, former Assistant Attorney General of the Department of Justice's ("DOJ") Antitrust Division, has pointed out, "[t]he loftiest of purported motivations do not excuse anti-competitive collusion among rivals."¹²⁸ The

120. Sophie Long, *Competition Law and Sustainability*, FAIRTRADE FOUNDATION (2019) <https://www.fairtrade.org.uk/wp-content/uploads/legacy/Competition-Law-and-Sustainability—Fairtrade-Report.pdf> (last visited Dec. 15, 2024).

121. See, e.g., Case IV.F.1/36.718—CECED, Eur. Comm'n Decision ¶ 19, 2000 O.J. (L 187) 47.

122. Coates & Middelschulte, *supra* note 17, at 325. On the topic of first mover disadvantage, see Johannes Paha, *Sustainability Agreements and First Mover Disadvantages*, J. COMPETITION L. & ECON. (forthcoming 2023); Edith Loozen, *Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability*, 56 COMMON MKT. L. REV. 1265, 1266 (2019).

123. 15 U.S.C. § 1. See also Ronald A. Cass and Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657 (2001).

124. *United States v. Addyston Pipe & Steel*, 85 Fed. 271, 282 (6th Cir. 1898).

125. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 223 (1940); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 208–14 (1959).

126. Miazad, *supra* note 107, at 1690.

127. 310 U.S. at 224–26, n. 59.

128. Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019) <https://eu.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/>.

Supreme Court has similarly asserted that there is no room for considering non-economic aims in antitrust,¹²⁹ and judges have asserted that environmental issues do not seem to be “a problem whose solution is found in the Sherman Act.”¹³⁰ This would ostensibly rule out cooperation with sustainable purposes that negatively impact prices, consumer choice, or output.

Notwithstanding the foregoing, there have been instances where the judiciary has been prepared to make exceptions to the per se rule. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Supreme Court upheld a joint selling arrangement that,¹³¹ although falling into the “literal” price-fixing category, would not be “plainly anticompetitive.”¹³² The price restrictions were found to 1) be a means to achieve broader procompetitive aims and 2) attain efficiency.¹³³ In a similar vein, the Supreme Court has stated that it would not make sense to classify horizontal restraints as per se illegal when they are “essential if the product is to be available at all,” even when price and output competition are reduced.¹³⁴ This assertion effectively recognized a new category of restrictions that are neither per se illegal nor subject to the rule of reason, but rather a double effect style “intermediate standard” which “presumes competitive harm, and thus forces the defendant to assert some competitive justifications for the restraint.”¹³⁵

Thus, it would be conceivable for the courts to spare environmentally or equality-motivated restrictions from per se illegality, provided that they have some “redeeming virtue.”¹³⁶ The case law above suggests that there must be procompetitive efficiencies that outweigh the harm, and/or the restraints should be indispensable for the beneficial purposes of the arrangements. However, to date, environmental considerations have not been accepted by the judiciary. It does not help that, despite the scientific consensus on climate change,¹³⁷ tackling

129. See, e.g., *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

130. *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 414 n.9 (3d Cir. 1997).

131. The case dealt with blanket licenses, which allow “music users the immediate use of all musical compositions” of the copyright holder. IVAN L. PITT, *DIRECT LICENSING AND THE MUSIC INDUSTRY* 127 (2015).

132. *Broadcast Music, Inc. v. CBS, Inc. (BMI)*, 441 U.S. 1, 9 (1979).

133. *Id.* at 21.

134. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 86 (1984).

135. Theodore J. Stachtiaris, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 *FORDHAM L. REV.* 1745, 1748 (1994).

136. 441 U.S. at 9.

137. See, e.g., John Cook et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 *ENV’L RSCH. LETTERS* 024024 (2013); Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 *SCI.* 1686 (2004).

it has become a partisan issue¹³⁸ often portrayed as a “bastion of the left.”¹³⁹ The courts, said to have been packed “at all levels by conservatives” since the Reagan era,¹⁴⁰ have been disinclined to embrace environmental causes.¹⁴¹ Neal Devins and Lawrence Baum have further identified a trend suggesting that Republican appointments to the judiciary are increasingly conservative.¹⁴²

The reluctance to justify severe restrictions of competition on social or environmental grounds is in line with the boundaries of the principle of double effect and defensible on at least three grounds. The first is the importance of preserving the authority of antitrust systems for the attainment of the field’s main purposes *as well as* additional goals—a point that will be stressed in the next section of this article.¹⁴³ The second is the practical difficulty, previously sketched, of implementing a multi-goal policy.¹⁴⁴ The third issue is that there is little empirical support for the concerns voiced about the harm antitrust enforcement may inflict on non-competition objectives; most of the apprehension articulated by those advocating for less competition law has been theoretical or based on anecdotal evidence that does not support the case for diluting enforcement.

The investigation that may best exemplify the weak empirical substantiation of the case for less antitrust is the Department of Justice’s 2019 scrutiny of the efforts of four major automakers and the state of California to reduce harmful emissions.¹⁴⁵ The inquiry was eventually abandoned as there was no evidence of

138. See, e.g., Steve Cohen, *Building an American Political Consensus Behind Environmental Sustainability*, STATE OF THE PLANET (Dec. 27, 2021) <https://news.climate.columbia.edu/2021/12/27/building-an-american-political-consensus-behind-environmental-sustainability/>.

139. Blaine Fulmer, *Environmentalism Isn’t Partisan—At Least It Shouldn’t Be*, STATE OF THE PLANET (Aug. 2, 2022) <https://news.climate.columbia.edu/2022/08/02/environmentalism-isnt-partisan-at-least-it-shouldnt-be/>.

140. Jackie Calmes, *How Republicans Have Packed the Courts for Years*, TIME (June 22, 2021) <https://time.com/6074707/republicans-courts-congress-mcconnell/>. See also Howard Kurtz, *Reagan Transforms the Federal Judiciary*, WASH. POST (Mar. 31, 1985); CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE DC CIRCUIT COURT 102–103 (1999); Jess Bravin, *Supreme Court Marks New Era of Ambitious Conservatism*, WALL ST. J. (June 30, 2022) <https://www.wsj.com/articles/supreme-court-marks-new-era-of-ambitious-conservatism-11656618449>.

141. See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (in which the Supreme Court limited the powers of the Environmental Protection Agency (EPA) to curb carbon emissions); See also *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 236 (9th Cir. 1976) (positing that antitrust laws do not grant “a broad license to the court to issue decrees designed to eliminate air pollution”).

142. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, SUP. CT. REV. 301, 305 (2016).

143. See *infra* section II.B.

144. See *supra* section I.C.

145. California Air Resources Board, *Framework Agreements on Clean Cars* (Aug. 17, 2020), <https://ww2.arb.ca.gov/news/framework-agreements-clean-cars>; Terms for Light-Duty Green House Emission Standards (July 2019) <https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf>.

an agreement between the competing car manufacturers.¹⁴⁶ However, the fact that this initiative was investigated at all led commentators to argue for a reconsideration of the little that is left of the *per se* rule in the name of environmental protection.¹⁴⁷ This view overlooks that, ultimately, there were no consequences for the subjects of the inquiry. Moreover, it conflates an arguably misguided enforcement move with systemic problems in the legal discipline. The proceedings came under intense fire for being politically motivated¹⁴⁸ and for disregarding the *Noerr-Perrington* doctrine that protects companies from antitrust liability if they are cooperating to influence government policy.¹⁴⁹ Rather than from antitrust, the problem seems to stem from the documented polarization of political elites and the judiciary.¹⁵⁰ In fact, an ongoing inquiry is looking into whether the DOJ's case might have constituted an abuse of authority.¹⁵¹ This case is not illustrative of how antitrust is typically enforced, nor does it justify weakening the application of a law designed to curb the problems associated with excessive market power. Such a conclusion is counterproductive and as partisan as the investigation.

Other cases cited to support the argument for less competition law are similarly misleading. In the 1960s, automakers' attempts to jointly develop technology to curb vehicles' emissions were the subject of a (settled) DOJ lawsuit.¹⁵² For Miazad, this constitutes a "textbook example of collusion in

146. Coral Davenport, *Justice Department Drops Antitrust Probe against Automakers that Sided with California on Emissions*, N.Y. TIMES (Feb. 7, 2020) <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>.

147. See, e.g., Balmer, *supra* note 17, at 220 (referring to the investigation as "an example of the disconnect between the more recent role of corporate collaboration in society and traditional antitrust enforcement"); Dailey C. Koga, *Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change*, 95 WASH. L. REV. 1989 (2020) (positing that the inquiry "raises questions for agreements involving moral or social considerations—specifically those aimed at addressing environmental problems"); Miazad, *supra* note 107, at 1666 (saying that it "underscores antitrust's false dichotomy between economic and non-economic goals," despite admitting that it has been considered "partisan and not grounded in antitrust doctrine").

148. Mary Nichols, chair of the California Air Resources Board, said that the DOJ was attempting to frighten carmakers "out of voluntarily making cleaner, more efficient trucks and cars than [the EPA] wants," while the then Speaker of the House of Representatives Nancy Pelosi described the proceedings as an attempt to "weaponize law enforcement for partisan political purposes". Juliet Eilperin & Steven Mufson, *Justice Dept. Launches Antitrust Probe of Automakers over their Fuel Efficiency Deal with California*, WASHINGTON POST (Sept. 6, 2019) https://www.washingtonpost.com/climate-environment/justice-dept-launches-antitrust-probe-of-automakers-over-their-fuel-efficiency-deal-with-california/2019/09/06/29a22ee6-d0c7-11e9-b29b-a528dc82154a_story.html.

149. *Named after Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

150. See sources *supra* notes 140 and 142.

151. Leah Nylen, *DOJ Inspector General Investigating Trump-Era Car Emissions Case*, POLITICO (Oct. 6, 2021), <https://www.politico.com/news/2021/10/06/trump-car-emissions-investigation-515437>.

152. See *United States v. Auto. Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969).

violation of antitrust law" despite having noble intentions.¹⁵³ The facts paint a very different picture. The automakers' cooperation had originally been greenlighted and was in place for over a decade. Yet instead of making improvements, carmakers were found to be "deliberately retarding the progress of [pollution control device] development."¹⁵⁴ In a similar vein, Crane describes the antitrust case against various top universities that fixed the financial aid packages offered to students admitted to multiple schools¹⁵⁵ as an inquiry into a policy designed "to increase educational diversity."¹⁵⁶ This view obviates concerns that the scheme was designed to eliminate competition and raise the price of university degrees.¹⁵⁷ Crane further sees the challenge to the NCAA's practice of not paying athletes, deemed contrary to Section 1 by a unanimous Supreme Court in 2021,¹⁵⁸ as a potential obstacle to subsidizing "women's athletic programs and other less popular sporting programs."¹⁵⁹ This is despite a women's Division I basketball team acting as plaintiff and there being no evidence to suggest that carving out a remuneration for athletes from the NCAA's 4 billion USD revenue would prevent cross-subsidization.¹⁶⁰

3. *Less Competition Law Enforcement, the EU Way*

In the European Union, joint business conduct with an anticompetitive object or effect may fall foul of Article 101 TFEU.¹⁶¹ In the event that negative affects do accrue, they must be appreciable.¹⁶² The European Commission insists that most initiatives pursuing non-economic benefits will not be caught.¹⁶³ Nonetheless, when a joint arrangement (including one intending to improve sustainability or equality) bears an impact on price or consumer choice, it may be considered to have an anticompetitive object. In that case, a presumption of appreciability applies,¹⁶⁴ and the agreement will most likely be illegal.

153. Miazad, *supra* note 107, at 1679.

154. Bennett H. Goldstein & Howell H. Howard, *Antitrust Law and the Control of Auto Pollution: Rethinking the Alliance between Competition and Technical Progress*, 10 ENVIRONMENTAL L. 517, 525 (1980).

155. *United States v. Brown Univ.*, 5 F.3d 658, 661 (3d Cir. 1993).

156. Crane, *supra* note 108, at 1175.

157. *See, e.g.*, Theodore J. Stachtariis, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745 (1994).

158. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

159. Crane, *supra* note 108, at 1175.

160. *See case note NCAA v. Alston*, 135 HARV. L. REV. 471, 471 (2021).

161. TFEU art. 101(1), *supra* note 40.

162. Eur. Comm'n, Notice on Agreements of Minor Importance, 2014 O.J. (C 291) 1 (Aug. 30, 2014).

163. Eur. Comm'n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2023 O.J. (C 259) 1, ¶¶ 529–531 (June 1, 2023) [hereinafter EU Horizontal Cooperation Guidelines].

164. *Id.* ¶ 13.

Restrictions with an anticompetitive object differ from per se illegal restraints¹⁶⁵ in that there is a prospective path to absolution for the former. If the parties can demonstrate that the scheme meets the conditions of Article 101(3) TFEU, their arrangement may be spared. Nonetheless, as will be seen later in this section,¹⁶⁶ defending their activity would be an uphill battle. The interpretation of the (cumulative) conditions required for the conduct to be excepted is narrow, and it is rare for object restrictions to pass the test.

The TFEU refers to restrictions of competition by “object” to describe those restraints that are inherently harmful to the proper functioning of competition. They often involve hardcore cartels and the imposition of minimum resale prices. But the case law suggests that a finding of anticompetitive object is not so much about labels, but instead about repercussions. A “negative impact on competition” is the decisive factor.¹⁶⁷ To infer an agreement’s purpose, its content, objectives, and the “legal and economic context” must be considered.¹⁶⁸ The focus is on whether these factors suggest that “competition on [the] market would be eliminated or seriously weakened.”¹⁶⁹ Based on this premise, arrangements that do not amount to collusion nor minimum resale price maintenance have occasionally been considered object restrictions.¹⁷⁰ Conversely, in the landmark *Cartes Bancaires* case, the Court of Justice ruled that certain pricing measures jointly adopted by competitors effectively fixing some of their fees might not be anticompetitive by object since they could have plausibly been pursuing a legitimate aim.¹⁷¹

But just how much flexibility is afforded to arrangements between competitors that lead to restrictive behavior akin to collusion? The ongoing discussion around the application of Article 101 TFEU to joint sustainability-oriented initiatives suggests not much. Following the adoption of the European Green Deal in 2019,¹⁷² the European Commission considered making concessions for green agreements within the boundaries of the existing legal framework. In July 2023, it adopted a revised set of EU Horizontal Cooperation Guidelines with an entire chapter on sustainability agreements.¹⁷³ They set a soft

165. On per se illegality, see *supra* section II.A.2.

166. See *infra*.

167. Case C-8/08, *T-Mobile Neth. BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343 ¶ 31 (CJ, June 4, 2009).

168. *Id.* ¶ 31.

169. Case C-32/11, *Allianz Hungária Biztosító Zrt. v. Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160 ¶ 48 (CJ, Mar. 14, 2013).

170. Case C-403/08, *Football Ass’n Premier League Ltd v. QC Leisure*, ECLI:EU:C:2011:631 (CJ, Oct. 4, 2008) (relating to territorial exclusivity); Case C-493/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l’Autorité de la concurrence*, EU:C:2011:649 (CJ, Oct. 13, 2011) (relating to selective distribution systems).

171. Case C-67/13, *Groupeement des Cartes Bancaires v. European Commission*, ECLI:EU:C:2014:2204 (CJ, Sept. 11, 2014). See also case C-345/14, *SIA ‘Maxima Latvija’ v. Konkurences Padome*, ECLI:EU:C:2015:784 (CJ, Nov. 26, 2015).

172. European Green Deal, *supra* note 15.

173. EU Horizontal Cooperation Guidelines.

safe harbor for sustainability standardization agreements—by which competitors agree to comply with certain sustainability standards (such as halting the production of harmful products or adopting the same environmentally-friendly packaging materials).¹⁷⁴ These agreements will be lawful, provided that the standards are developed following a transparent procedure open to all competitors and that they impose no obligations on those unwilling to comply. Participating parties, whose market shares cannot exceed twenty percent, must remain free to adopt higher sustainability standards, cannot exchange commercially sensitive information, and must allow non-participating companies to have “effective and non-discriminatory access” to the developed standards.¹⁷⁵ As a reminder of the prevalence of consumer welfare, the Guidelines insist that prices should not increase nor quality decrease as a result.¹⁷⁶ The new guidance, therefore, confirms that the Article 101(1) prohibition will continue to be stringently applied to inherently harmful conduct affecting consumer welfare, regardless of any potentially redeeming beneficial purposes.

In the event that Article 101(1) TFEU does catch a socially driven joint corporate initiative, there is a clearly defined “saving clause” that can be used to weigh non-market benefits. Article 101(3) TFEU establishes the parameters by which conduct that would normally be prohibited may be justified by the compensatory benefits it can generate.¹⁷⁷ To benefit from this exception, companies need to show that their joint conduct meets four conditions: it must 1) contribute to “improving the production or distribution of goods or to promoting technical or economic progress,” 2) allow “consumers a fair share of the resulting benefit,” 3) not impose “on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,” and 4) not afford them “the possibility of eliminating competition in respect of a substantial part of the products.”¹⁷⁸ As Or Brook has noted, these four conditions provide competition authorities “a wide margin of discretion to decide *if* to take non-competition interests into account, *what types of benefits* to take into account, and *how*.”¹⁷⁹

The EU Horizontal Cooperation Guidelines suggest that 101(3) TFEU can only be successfully used to defend an otherwise prohibited arrangement in cases in which the outcome is efficient and, therefore, in line with antitrust’s broad ambit. To meet the first condition of Article 101(3), companies must demonstrate “objective, concrete, and verifiable” sustainability benefits.¹⁸⁰ They must also

174. *Id.* ¶ 538.

175. *Id.* ¶ 549.

176. *Id.*

177. TFEU art. 101(3), *supra* note 40.

178. *Id.*

179. Brook, *supra* note 7, at 93 (emphasis on original).

180. EU Horizontal Cooperation Guidelines ¶ 559. This is consistent with the case law of the EU Court of Justice. *See, e.g.,* Case T-528/93 Métropole Télévision SA v. Eur. Comm’n, ECLI:EU:T:1996:99, ¶ 118 (July 11, 1996); Case T-168/01, GlaxoSmithKline Servs. Unlimited v. Eur. Comm’n, ECLI:EU:T:2006:265 ¶ 244 (Sept. 27, 2006). For a discussion, see Christopher

show that the restrictions are “reasonably necessary for the claimed sustainability benefits to materialise, and that there are no other economically practicable and less restrictive means of achieving” them—thereby complying with the indispensability requirement (third condition).¹⁸¹ Some leeway is afforded for arrangements designed to overcome first mover disadvantage,¹⁸² acknowledging that restrictions might be necessary “to cover the fixed costs of setting up, operating and monitoring” the initiative to “ensure that [the parties] concentrate their efforts on the implementation of the agreement”¹⁸³ or to deal with situations where consumers are not appreciative of future benefits.¹⁸⁴ However, the Commission previously stated that it would prefer companies to “offer [more expensive but sustainable] products independently rather than by cooperating.”¹⁸⁵ Competition will not be considered to have been eliminated (fourth condition) if the parties continue to compete vigorously “on at least one important parameter,” such as price or quality.¹⁸⁶

The main piece of contention when it comes to accepting otherwise prohibited conduct is calculating whether consumers get a “fair share” of the returns—the second condition of Article 101(3) TFEU. It is the European Commission’s long-held view, reflected in the 2004 Guidelines on the Application of Article 101(3) TFEU (“101(3) Guidelines”), that those benefits must be generated either in the relevant market suffering the anticompetitive consequences of the conduct or in a related market affecting the same group of consumers.¹⁸⁷ Moreover, those consumers may be present or future consumers and ought to be, on average, fully compensated for the harm suffered.¹⁸⁸ The calculation of future gains must also take into account factors such as inflation and lost interest.¹⁸⁹

In its 2000 *CECED* decision the Commission appeared to open the door to wider social considerations.¹⁹⁰ It exempted an agreement between washing machine producers, permitting them to make more expensive, energy-efficient appliances and remove their cheaper alternatives from the market.¹⁹¹ The advantages for society, measured in terms of the reduced damage from carbon emissions, were estimated to be “more than seven times greater than the increased

Townley, *The Relevant Market: An Acceptable Limit to Competition Analysis?*, 10 EUR. COMPETITION L. REV. 490, 491 (2011).

181. EU Horizontal Cooperation Guidelines, ¶ 561.

182. *See supra* II.A.1.

183. EU Horizontal Cooperation Guidelines, ¶ 567.

184. *Id.* ¶ 586.

185. Competition Policy Brief, *supra* note 67, at 6.

186. EU Horizontal Cooperation Guidelines, ¶ 593.

187. 101(3) Guidelines, ¶ 43.

188. *Id.* ¶ 85.

189. *Id.* ¶ 88.

190. *CECED*, *supra* note 121.

191. 101(3) Guidelines, ¶ 48.

purchase costs of more energy-efficient washing machines,”¹⁹² which for the Commission would “allow consumers a fair share of the benefits *even if no benefits accrued to individual purchasers of machines.*”¹⁹³ Nonetheless, consumers would also be compensated since energy bill savings would result in recovery of the increased costs “within nine to 40 months.”¹⁹⁴ Therefore, the decision ultimately adhered to the principles of the 101(3) Guidelines.

There has been a recent push to deviate from the requirement of full compensation of the consumers in the relevant market, provided that others benefit as a consequence of the conduct. The draft Sustainability Agreements Guidelines published by the Netherlands Authority for Consumers and Markets (“ACM”)—which were not finally adopted—contemplated situations in which it would not be necessary to quantify the benefits of sustainability agreements.¹⁹⁵ However, in practice, the ACM has struggled to accept exceptions in practice. In its assessment of the *Chicken of Tomorrow* initiative in 2014, the agency found that an industry-wide, government-supported attempt to develop healthier, more sustainable chicken meat, improving animal welfare standards, was anti-competitive and could not be justified.¹⁹⁶ The investigation revealed that consumers were not willing to pay the significant price increase the measures entailed.¹⁹⁷ The strict monetization of non-economic benefits has been subject to criticism.¹⁹⁸ At the same time, expert studies indicated that any animal well-being enhancements derived from the scheme would be minimal.¹⁹⁹ Similarly, an agreement for the early closure of five coal plants in the Netherlands was deemed contrary to competition law and unredeemable based on efficiency considerations.²⁰⁰ Since CO₂ emissions were relocated rather than eliminated they

192. *Id.* ¶ 56.

193. *Id.* (emphasis added).

194. *Id.* ¶ 52

195. ACM, *Guidelines Sustainability Agreements: Opportunities within Competition Law*, ¶¶ 53–63 (Jan. 26, 2021) <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf> (requiring that either the parties’ combined market share be below 30% (¶¶ 54–55) or that the harm to competition be “evidently smaller” than the benefits “on a rough estimate” (¶¶ 54)).

196. ACM, *ACM’s Analysis of the Sustainability Arrangements Concerning the “Chicken of Tomorrow,”* ACM/DM/2014/206028 (2014).

https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf [hereinafter *Chicken of Tomorrow decision*] (this case has attracted significant scholarly attention). See, e.g., Jacqueline M. Bos et al., *Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow*, 8 ANIMAL FRONTIERS 20 (2018); Giorgio Monti and Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Sustainability Initiatives*, 42 EUR. L. REV. 635, 639–641 (2017); María Campo Comba, *EU Competition Law and Sustainability*, ERASMUS L. REV. 190 (2022).

197. *Chicken of Tomorrow decision*, *supra* note 196.

198. Anna Gerbrandy, *Solving a Sustainability-Deficit in European Competition Law*, 40 WORLD COMPETITION 539 (2017).

199. *Chicken of Tomorrow decision*, *supra* note 196.

200. ACM, *Analysis of the Planned Agreement on Closing Down Coal Power Plants from the 1980s as Part of the Social and Economic Council of the Netherlands’ SER Energieakkoord* (2013).

could not be computed, and savings stemming from reducing other emissions were a fraction of the increased electricity costs for consumers.²⁰¹

In both of the above cases, the fact that individual consumers were not fully compensated truncated the legality of the arrangements. By contrast, an agreement between competitors Shell and TotalEnergies to store CO₂ in offshore abandoned gas fields that included setting a joint price and adopting a joint marketing strategy was greenlighted by the ACM in 2022.²⁰² Here, the findings suggested that consumers (CO₂ emitters) would not see an increase in price nor a reduction of choice. This would suffice to meet the second requirement of Article 101(3) TFEU. But the ACM insisted on considering the benefits of cleaner air, saying that even if emitters had been worse off by the deal, the social gains would have likely been compensatory.²⁰³ The inclusion of this speculative statement is quite baffling. It suggests that the ACM only begrudgingly accepts the European Commission's orthodox understanding of the fair share requirement. The ACM remains willing, it seems, to adopt a more social justice-inspired approach that considers general benefits as a redeeming feature even when there is a cost for the affected consumers.

In the new EU Horizontal Cooperation Guidelines, the European Commission remains reluctant to abandon the contentious full compensation requirement but acknowledges the need for certain concessions. As a general rule, any sustainability improvements “must accrue to the consumers of the products covered by the agreement.”²⁰⁴ This would include not only direct benefits for the consumers bearing the cost of the restrictive deal (individual use value benefits), but also benefits for others, provided that the affected consumers appreciate them and accept the cost (individual non-use value benefits).²⁰⁵ The latter may be determined by examining consumers' willingness to pay—similar to the ACM's *Chicken of Tomorrow* investigation—by *inter alia* conducting surveys.²⁰⁶ One of the main reasons for the reticence to adopt greater flexibility is the risk that even well-intentioned joint initiatives might eventually turn into collusive behavior. In 2011, in the course of implementing a joint scheme to reduce heavy-duty detergent and packaging material, three major laundry powder producers ended up agreeing to fix prices and reduce competition between them.²⁰⁷ These measures were neither related to nor required to execute the original cooperation,

https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf.

201. *Id.* at 5.

202. Press Release, ACM, Shell and TotalEnergies Can Cooperate in the Storage of CO₂ in Empty North Sea Gas Fields, (June 27, 2022) <https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields>.

203. *Id.*

204. EU Horizontal Cooperation Guidelines, ¶ 569.

205. *Id.* ¶¶ 571–81.

206. *Id.* ¶ 578.

207. Case COMP/39.579—Consumer Detergents, Eur. Comm'n Decision ¶¶ 24–26, 2011 O.J. (C 193/14).

and consequently, the European Commission fined the companies for breaching Article 101 TFEU.²⁰⁸

A thornier issue is what happens when consumers simply do not wish to pay for what could be important sustainability gains only achievable through a restrictive agreement. These are termed "collective benefits" in the EU Horizontal Cooperation Guidelines, defined as occurring "irrespective of the consumers' individual appreciation of the product" and accruing "to a wider section of society than just consumers in the relevant market."²⁰⁹ The European Commission had previously accepted the merits of "sustainability benefits that accrue for the benefit of society as a whole," but had not outlined a path for assessing these.²¹⁰ The new Guidelines open the door, albeit ever so slightly, for the consideration of collective gains, "provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same."²¹¹ This would require a significant overlap between the consumers paying for the efficiencies and those benefiting from them. This could occur, for example, if competing producers agreed to use more expensive but less polluting energy, and a large part of the consumers of their products were among those breathing the improved air.²¹² Said overlap could be determined with relative ease, but the new Guidelines also require that 1) the gains are enough to *compensate* these consumers for the harms suffered,²¹³ and 2) the positive impact on consumers is "clearly identifiable."²¹⁴ There is therefore a high burden of proof placed on parties to agreements wishing to claim this exception.

The EU Horizontal Cooperation Guidelines' attempts to find a route for the viability of restrictive sustainability-guided initiatives within the confines of the consumer welfare standard are a juggling act and suggest that the European Commission's defense of the EU's sturdy antitrust system remains hermetic. The contentious interpretation of the consumer compensation requirement has not been fundamentally altered. However, now it is possible to compute benefits for others, provided that the consumers are willing to foot the bill. Even general benefits that consumers do not want to pay for can be considered, if they ultimately benefit those consumers. These principles stem from the traditional interpretation of the conditions of Article 101(3) TFEU, which does not leave many other options when it comes to considering collective gains. Yet, leaving societal benefits up to the preferences of individual consumers may be problematic. Studies suggest that some are willing to accept the added costs of sustainable alternatives, and it is probable that consumers' appreciation of

208. *Id.*

209. EU Horizontal Cooperation Guidelines, ¶ 582.

210. Competition Policy Brief 2021-01, *supra* note 67, at 6.

211. EU Horizontal Cooperation Guidelines, ¶ 583.

212. *Id.* ¶ 585.

213. *Id.* ¶ 584.

214. *Id.* ¶ 589.

sustainability will improve in the years to come.²¹⁵ As things stand, however, consumer behavior towards sustainable products is often not as positive as one would hope.²¹⁶ Significant barriers hamper sustainable consumption, including incomplete knowledge and the difficulty for low-income consumers to afford more expensive sustainable options.²¹⁷ Crucially, an unfortunate ethically questionable consequence of the focus on consumer compensation and willingness to pay is the impossibility of saving green agreements if affected consumers do not want to pay for improvements they will not themselves enjoy. An example would be cleaner air thousands of miles away in the developing countries housing the factories that produce their goods.

There could be a way, within the current EU legal framework, to circumvent the strict requirements of Article 101(3) TFEU. In some cases, the primacy of non-economic aims over competition law objectives has been recognized by the EU courts. This has led to the introduction of certain derogations in the application of Article 101(1) TFEU, purely because “other things matter more than competitive markets.”²¹⁸ The classic example is *Wouters*, where the Dutch Bar Association’s restrictions on partnerships between members of the Bar and accountants was held to be anticompetitive but “necessary for the proper practice of the legal profession” and therefore outside the scope of Article 101.²¹⁹ Building on this premise, in *Meca-Medina* the Court of Justice suggested that competition law can be set aside if 1) an arrangement has a legitimate (non-economic) objective; 2) the restrictive effects on competition are inherent to that objective; and 2) the proportionality test is respected.²²⁰ This case concerned a doping ban in sport competitions to ensure that they were “conducted fairly” and

215. Piet Eichholtz, Nils Kok & John M. Quigley, *Doing Well by Doing Good? Green Office Buildings*, 100 AMERICAN ECONOMIC REVIEW 2492 (2010); Ramón Casadesus-Masanell, Michael Crooke, Forest Reinhardt, and Vishal Vasishth, *Households’ Willingness to Pay for “Green” Goods: Evidence from Patagonia’s Introduction of Organic Cotton Sportswear*, 18 J. ECON. & MANAG. STRATEGY 203 (2009); Christoph Herrmann, Sebastian Rhein & Katharina Friederike Sträter, *Consumers’ Sustainability-related Perception of and Willingness-to-Pay for Food Packaging Alternatives*, 181 RESOURCES, CONSERVATION & RECYCLING 106219 (2022).

216. See, e.g., Fiona Harris, Helen Roby & Sally Dibb, *Sustainable Clothing: Challenges, Barriers and Interventions for Encouraging More Sustainable Consumer Behaviour*, 40 INT. J. OF CONSUM. STUD. 309 (2016); William Young, Kumju Hwang, Seonaidh McDonald & Caroline J. Oates, *Sustainable Consumption: Green Consumer Behaviour When Purchasing Products*, 18 SUSTAINABLE DEVELOPMENT 20 (2010); Ninh Nguyen & Lester W. Johnson, *Consumer Behaviour and Environmental Sustainability*, 19 J. CONSUMER BEHAV. 539 (2020).

217. Katherine White, David J. Hardisty & Rishab Habib, *The Elusive Green Consumer*, 97 HARV. BUS. REV. 124 (2019).

218. Giorgio Monti, *Four Options for a Greener Competition Law*, 11 J. OF EUR. COMPETITION L. & PRAC. 124, 129 (2020).

219. Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98 ¶ 110 (CJ, Feb. 19, 2002).

220. Case C-519/04, *David Meca-Medina and Igor Majcen v. Eur. Comm’n* ECLI:EU:C:2006:492 ¶ 42 (CJ, July 18, 2006).

protected "equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport."²²¹

Scholars, including Gerbrandy and Monti, have defended the potential applicability of the *Wouters* doctrine to other non-economic benefits, particularly environmental issues.²²² This prospect would be supported by a "holistic reading of the Treaty," according to Monti.²²³ At the same time, these scholars concede that important limitations exist. The existing case law suggests that a public authority needs to be involved in the agreement,²²⁴ and the EU courts have trodden with extreme caution when developing derogations.²²⁵ For instance, in December 2023, the Court of Justice clarified in the much-anticipated *European Superleague* case that FIFA and UEFA's prior approval requirement for new football competitions is anti-competitive.²²⁶ Their powers, the Court found, lack "a framework of substantive criteria and detailed procedural rules which are suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, so as to limit the discretionary powers of FIFA and UEFA."²²⁷ Moreover, in the *Royal Antwerp* judgment—handed down on the same day as *European Superleague*—the Court of Justice found that restrictions of competition by object could not benefit from the *Wouters* rule.²²⁸ The only way to exclude the application of Article 101(1) TFEU would be the Article 101(3) exception.

The European Commission seems equally reluctant to accept the *Wouters* path for environmental causes. In the draft of the EU Horizontal Cooperation Guidelines, a clarification was included stating that anticompetitive agreements could not be defended solely because "they are necessary for the pursuit of a sustainability objective."²²⁹ This sentence does not appear in the final version of the Guidelines, most likely because the European Commission realized that this would ultimately be something for the judiciary to decide.

221. *Id.* ¶ 43.

222. Holmes, *supra* note 17, at 371 (seeing "no reason why [the *Wouters*] approach should not be taken in the case of sustainability agreements"); Gerbrandy, *supra* note 198, at 556 (considering this a "promising" option).

223. Monti, *supra* note 218, at 129–30.

224. Gerbrandy, *supra* note 198, at 556.

225. Monti, *supra* note 218, at 129–30.

226. Case C-333/21 Eur. Superleague Company, SL v. UEFA and FIFA, ECLI:EU:C:2023:1101 ¶ 39 (CJ, Dec. 21, 2023).

227. *Id.*

228. Case C-680/21 SA Royal Antwerp Football Club v. Union Royale Belge des Sociétés de Football Associations ASBL (URBSFA), ECLI:EU:C:2023:1010 ¶¶ 113–117 (CJ, Dec. 21, 2023).

229. Eur. Comm'n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (draft), ¶ 548 (Mar. 1, 2022) https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en [https://perma.cc/4VCJ-BRYK].

B. The “Sword”: The Effect of Antitrust Enforcement on Non-Economic Goals

1. Origins and logic

In a study on the link between antitrust and inequality, Ariel Ezrachi, Amit Zac, and Christopher Decker refer to the “external effects” of competition law enforcement.²³⁰ These occur when an unrelated favorable outcome is achieved by promoting greater competitiveness. When additional benefits ensue in the pursuit of conventionally accepted goals of antitrust, enforcing the law would be the “sword” slashing behavior that threatens non-competition values, and could be seen as a means to promote these objectives. This strategy requires that there be no conflict between efficiency and societal purposes: the protection of the latter would be a desirable by-product of safeguarding the former. It presupposes that there is some form of anticompetitive harm stemming from the conduct. Otherwise, antitrust intervention would not be justified. In the presence of such harm, it could be possible to make a case for invigorating the application of antitrust or redirecting enforcement efforts to prioritize acts that carry some form of social detriment.²³¹

Unlike in other jurisdictions,²³² there is no express duty under US antitrust or EU competition law to give weight to environmental or equality considerations. Yet the TFEU’s goals weigh heavily upon antitrust policy development.²³³ Crucially, Article 11 TFEU contains an obligation to integrate “[e]nvironmental protection requirements ... into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”²³⁴ This naturally applies to EU competition policy but does not require the introduction of derogations or exceptions to the general rules. Sustainability would not take precedence over the goals of competition law.²³⁵ Rather, the wording of Article 11 simply suggests that the law ought to be “interpreted in a way that renders it consistent with environmental protection

230. Ezrachi et al., *supra* note 14, at 53.

231. Monti, *supra* note 218, at 132.

232. China’s Anti-Monopoly Law contains an exemption for environmental agreements. Anti-Monopoly Law of the People’s Republic of China (中國人民共和國反壟斷法) (in force Aug. 1, 2008, revised June 6, 2022, in force Aug. 1, 2022). Austria recently introduced a similar exemption (Ministerialentwurf betreffend Bundesgesetz, mit dem das Kartellgesetz 2005 und das Wettbewerbsgesetz geändert werden, 114/ME (Apr. 23, 2021)). See Viktoria H.S.E. Robertson, *Sustainability: A World-First Green Exemption in Austrian Competition Law*, 13 J. EUR. COMPETITION L. & PRAC. 426 (2022). The South African competition legislation, on its part, promotes “greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons”. Competition Act 1998 (as amended), chap 1, s 2(f).

233. See *supra*, section I.B.

234. TFEU, art. 11., *supra* note 40.

235. JULIAN NOWAG, ENVIRONMENTAL INTEGRATION IN COMPETITION AND FREE-MOVEMENT LAWS 48 (2016).

requirements.”²³⁶ According to Julian Nowag, in cases of conflict, the Treaties can be interpreted as mandating a balancing exercise between environmental protection and competition interests, done “on equal footing.”²³⁷

When assessing the positive externalities of antitrust enforcement, the impact of the application of the laws on wealth inequality presents a particularly useful example, given the extensively documented impact of market power on the (growing) wealth gap.²³⁸ At its most basic, the logic would be that powerful companies may collude, merge or exclude rivals to “extract greater wealth from the public than would be possible were they subject to stronger competitive forces.”²³⁹ Market power has the potential to increase inequality, indicating another reason, according to Joseph Stiglitz, to use antitrust policy to attack it.²⁴⁰

But what exactly can antitrust do to help? Studies suggest the law can improve equality “of income, consumption, and wealth,” both directly and indirectly.²⁴¹ Directly, because 1) better prices and increased choice would increase the wealth of consumers and 2) well-functioning markets can “slow the decline of living standards and opportunities of those on the lowest incomes and, at the same time promote social mobility which enlarges the size of the middle-income groups.”²⁴² Indirect effects include the promotion of the transfer of wealth from producers to consumers due to competitive pressure and the prevention of the transfer of income from employees to employers by tackling monopsony market power.²⁴³

It would be equally feasible to enhance environmental aims, provided that they are complementary to the goals of antitrust.²⁴⁴ This could be done by paying particular attention to schemes that “harm the competitive process in a manner that [additionally] harms sustainability or frustrates initiatives to promote sustainability.”²⁴⁵ The new EU Horizontal Cooperation Guidelines highlight that competition law promotes sustainable development “by ensuring effective competition, which spurs innovation, increases the quality and choice of products,

236. Martin Wasmeier, *The Integration of Environmental Protection as a General Rule for Interpreting Community Law*, 38 COMMON MKT. L. REV. 159, 161-62 (2001).

237. Nowag, *supra* note 235, at 30.

238. See sources *supra* note 14.

239. Khan & Vaheesan, *supra* note 14, at 246.

240. Stiglitz, *Towards a Broader View...*, *supra* note 14.

241. Ezrachi et al., *supra* note 14, at 53.

242. *Id.* at 55.

243. *Id.* at 55–56.

244. Note by the Delegation of the United States, Roundtable on Horizontal Agreements in the Environmental Context, OECD Directorate for Financial and Enterprise Affairs, Competition Committee (Oct. 21, 2010) DAF/COMP/WD (2010) 96. See also Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 175 (2019) (describing the DOJ's lawsuit against carmakers in the 1960s (*supra* note 150) and the European Commission's *Consumer Detergents* decision (*supra* note 206) as examples of antitrust law serving “as a mandate to promote environmental goals”).

245. Monti, *supra* note 218, at 126.

ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.”²⁴⁶

As a consequence of the above, healthy enforcement, even when limited to pursuing consumer welfare, is likely to spontaneously reap some social benefits. To boost this positive impact, enforcers should make adequate use of all the tools at their disposal and tackle anti-competitive joint conduct, abuses of dominance, and harmful mergers. Social positive externalities may arise from any investigation, but certain sectors naturally bear a marked impact on specific goals. For instance, the automobile industry²⁴⁷ and energy systems²⁴⁸ have significant environmental footprints, while healthcare,²⁴⁹ pharma,²⁵⁰ and telecom²⁵¹ are particularly important from a wealth inequality perspective. Adequate enforcement in these industries could contribute to the attainment of additional pursuits. This section scrutinizes the extent to which current US and EU policies maximize their social potential, while the following section proposes tactics to expand antitrust’s ripple effect.

2. *Social Antitrust Enforcement in the US (or Lack Thereof)*

The present-day policy in the United States, as explained above,²⁵² is to rarely look past issues of pricing, output and consumer choice in antitrust cases. This position does not entirely preclude the attainment of non-competition benefits. An example of a direct impact on societal goals is the Section 1 lawsuit

246. EU Horizontal Cooperation Guidelines, ¶ 544.

247. *The Environmental Impact of Cars, Explained*, NATIONAL GEOGRAPHIC (Sept. 4, 2019), <https://www.nationalgeographic.com/environment/article/environmental-impact> (highlighting the environmental footprint of producing a car, extracting the fuels it consumes, the emissions it generates, the junk left behind once it is taken out of circulation, and the infrastructure needed for its use).

248. See, e.g., *About the Electricity System and Its Impact on the Environment*, EPA <https://www.epa.gov/energy/about-us-electricity-system-and-its-impact-environment> (last visited Dec. 15, 2024) (citing environmental effects such as greenhouse emissions, water use and pollution, solid waste, and land use).

249. National health expenditure in 2021 accounted for 18.3% of GDP, costing USD 12,914 per person. *NHE Fact Sheet*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet>.

250. Pharmaceutical costs in the US totaled US \$633 billion in 2022. See Eric M. Tichy et al., *National Trends in Prescription Drug Expenditures and Projections for 2023*, 80 AMERICAN JOURNAL OF HEALTH-SYSTEM PHARMACY 899 (2023). Actions in this sector, therefore, will have “significant distributive effects” (Khan & Vaheesan, *supra* note 14, at 248).

251. According to data published in 2023, monthly Internet access costs anything between US \$20 and \$300 per month, while monthly cellphone plans cost an average of US \$114. See Timothy Moore, *How Much Does Internet Cost Per Month?*, FORBES (Aug. 21, 2023) <https://www.forbes.com/home-improvement/internet/internet-cost-per-month/>; Robin Layton, *Cellphone Costs: Average Cost of a U.S. Mobile Plan is \$144*, ALL CONNECT (Aug. 8, 2023) <https://www.allconnect.com/blog/average-cost-of-cellphone-plan>. They are a “significant and growing part of the consumer economy” (Khan & Vaheesan, *supra* note 14, at 256).

252. See *supra* section I.A.

filed against automakers in 1969, previously discussed,²⁵³ for conspiring to eliminate competition in the research, development and manufacturing of equipment to reduce air pollution.²⁵⁴ Encouraging companies to innovate to reduce emissions could improve environmental standards and since the conduct at stake affects prices, such a case could be brought under the current policy. Nonetheless, this investigation took place before the triumph of the consumer welfare standard.

In recent years, a string of judgments from the Supreme Court and other branches of the judiciary have missed the mark, squandering unique opportunities to promote both competition and non-competition goals. The focus here is on three illustrative cases. In the first, *FTC v. Actavis, Inc.* ("*Actavis*"), the Supreme Court had to rule on the legality of reverse payments in the pharma sector.²⁵⁵ Reverse payments are arrangements between a drug originator holding a valid patent and manufacturers of the generic version of the drug where the former pays the latter a sum to settle litigation challenging the validity of the patent. They tend to include a "pay-for-delay" clause, with the generics producers agreeing not to enter the market for some time—sometimes even after the patent expires—thereby extending the branded drug's monopoly and preventing price competition. The case in question relates to the lucrative hormone medication AndroGel, produced by Solvay Pharmaceuticals.²⁵⁶ Generic producers filed motions to have the patent annulled and were on course for victory. Faced with the prospect of losing about \$125 million per year in profits, Solvay agreed to make annual payments to the patent challengers ranging between \$10 and \$30 million.²⁵⁷ According to the FTC, this ensured that generic versions would not enter the market until 2015 (Solvay's patent was due to expire in 2020),²⁵⁸ and amounted to an unreasonable restraint of trade contrary to Section 1 of the Sherman Act.²⁵⁹

The Supreme Court rejected the argument sanctioned by some of the lower courts that, since the anticompetitive effects fell within the scope of the patent, the agreement was immune from antitrust law.²⁶⁰ The monopoly granted by the patent was under litigation and this put its lawfulness into question.²⁶¹ However, the Court did not find pay-for-delay arrangements to be per se illegal.²⁶² This is a regrettable stance on a practice that, according to the FTC, costs consumers \$3.5

253. See *supra* section II.A.2.

254. Complaint at 5-8, *United States v. Automobile Mfrs. Ass'n, Inc.*, 307 F. Supp. 617 (C.D. Cal. 1970) (No. 69-75-JWC).

255. 1223 S. Ct. 2223 (2013).

256. Between 2000 and 2007, Androgel's sales were around USD 1.8 billion. *In re Androgel Antitrust Litig.* (No. II), 687 F. Supp. 2d at 1371, 1373.

257. *Id.* at 1305.

258. *Id.*

259. *In re Androgel Antitrust Litig.* (No. II), 687 F. Supp. 2d 1371, 1375-76 (N.D. Ga. 2010).

260. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231 (2013).

261. *Id.*

262. *Id.* at 2237.

billion a year²⁶³ and denies them generic versions of drugs for years.²⁶⁴ Delaying the benefits typically derived from competition, including lower prices and greater choice, appears to be at odds with the orthodox goals of antitrust.²⁶⁵ Declaring pay-for-delay agreements presumptively harmful would have helped to advance competition and non-competition aims.

The second significant case is *Ohio v. American Express Co.* (“Amex”).²⁶⁶ Here, the issue at stake was a practice known as “steering,” described by Herbert Hovenkamp as being “fundamental to competition of any kind.”²⁶⁷ Steering happens when merchants tell their customers to use cards with lower fees, possibly offering them a discount or gift when using these recommended alternatives. Amex precluded merchants from steering customers toward cheaper payment methods, and the DOJ filed a lawsuit for breach of Section 1 of the Sherman Act.²⁶⁸ When the case reached the Supreme Court however, it ruled that the conduct was lawful because there was no direct evidence of “reduced output, increased prices or decreased quality in the relevant market.”²⁶⁹ This conclusion was based on the DOJ’s failure to define the relevant market or show the existence of market power in that market. But this approach is hard to reconcile with judicial precedent.²⁷⁰ As Justice Breyer noted in his dissent, “proof of actual adverse effects on competition is, *a fortiori*, proof of market power.”²⁷¹ Amex “had enough power in that market to cause that harm,” and therefore there should be “no reason to require a separate showing of market definition and market power under such circumstances.”²⁷²

The Amex “regressive, anti-economic” judgment is hard to justify on any grounds.²⁷³ It has faced severe scholarly criticism, including from those

263. Jon Leibowitz, “Pay-for-Delay” Settlements in the Pharmaceutical Industry: How Congress Can Stop Anticompetitive Conduct, Protect Consumers’ Wallets, and Help Pay for Healthcare Reform (*The \$35 Billion Solution*), Fed. Trade Comm’n 8 (2009), https://www.ftc.gov/sites/default/files/documents/public_statements/pay-delay-settlements-pharmaceutical-industry-how-congress-can-stop-anticompetitive-conduct-protect/090623payfordelayspeech.pdf. For critical takes on the judgment, see Michael L. Fialkoff, *Pay-for-Delay Settlements in the Wake of Actavis*, 20 MICH. TELECOMM. & TECH. L. REV. 523, 546 (2014); Susan Schipper, *Bad Medicine: FTC v. Actavis, Inc. and the Missed Opportunity to Resolve the Pay-for-Delay Problem*, 73 MD. L. REV. 1240 (2014); Khan & Vaheesan, *supra* note 14, at 250–52.

264. Fialkoff, *supra* note 262, at 546.

265. Sandra Marco Colino et al., *The Lundbeck Case and the Concept of Potential Competition*, CONCURRENTS REV. 18 (2017).

266. 138 S. Ct. 2274 (2018).

267. Herbert J. Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 88 (2019).

268. 138 S. Ct. 2274 (2018).

269. *Id.* at 2284.

270. Steven Salop et al., *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express*, 84 ANTITRUST L.J. 883 (2022).

271. 138 S. Ct. at 2297 (Breyer, J., dissenting).

272. *Id.*

273. Hovenkamp, *supra* note 267, at 46.

defending the consumer welfare standard,²⁷⁴ and has been described as possibly “the worst antitrust decision in many decades.”²⁷⁵ Steering is beneficial for competition, as it can improve quality and lower prices.²⁷⁶ Simultaneously, Amex’s payment system has been described as rewarding “the wealthy while penalizing the poor.”²⁷⁷ This is because those who have access to more expensive cards get (untaxed) rewards such as cash back or hotel/flying points, while lower-income households do not have access to these perks and will bear some of the costs merchants incur when wealthy customers use costlier cards.²⁷⁸ In support of its conclusion, the Court extensively cites the work of scholars who have acted as consultants for financial services corporations offering payment cards.²⁷⁹ This begs the question of whether the Court may have been swayed by lobbying efforts masqueraded as independent research,²⁸⁰ or at the very least by a philosophy based on personal experiences that could affect the impartiality of the arguments relied on.²⁸¹

The third case is *United States v. UnitedHealth Group, Inc. and Change Healthcare, Inc.*, relating to one of the latest mergers in a string of consolidation deals affecting the healthcare industry.²⁸² In February 2022, the DOJ filed a lawsuit to prevent healthcare giant and insurance provider UnitedHealth from purchasing Change, a supplier of technology to process health insurance

274. See, e.g., Nancy L. Rose & Jonathan Sallet, *Ohio v. American Express: The Exception that Should not Become the Rule*, 36 Antitrust 76, 76 (2022) (noting that AmEx is “destined to be considered bad law”); Tim Wu, *The American Express Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENF’T. 117, 118 (2019) (stating that courts are “willing to disregard evidence of anticompetitive harm in favour of abstract theory—in favour of the defendant.”); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2085 (2020) (finding that “the Court adopted a sweeping legal rule and based that rule on its highly imperfect understanding of the economic literature”).

275. Salop et al., *supra* note 270, at 883.

276. Hovenkamp, *supra* note 267, at 91.

277. Aaron Klein, *Why the Supreme Court’s Decision in Ohio v. AmEx Will Fatten the Wealthy’s Wallet (at the Expense of the Middle Class)*, BROOKINGS (June 25, 2018) <https://www.brookings.edu/research/ohio-v-amex/>.

278. 138 S. Ct. at 2297 (Breyer, J., dissenting).

279. David Evans, whose work is cited 30 times, thanks Visa for “financial support” in his article *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 324 (2003). In an article cited 15 times in the judgment, the authors acknowledge that they have “served at various times as consultants to Visa”. See Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L. J. 571 (2003).

280. See *supra* section I.C.

281. This point is made by Kovacic in relation to Justice Lewis Powell. Powell came from private practice, and according to Kovacic “Chicago School literature probably did not make him a market-oriented, antitrust skeptic” but rather he “quite possibly acquired his doubts about antitrust and other forms of economic regulation independently before he joined the bench.” Kovacic, *supra* note 31, at 469–70.

282. *United States v. UnitedHealth Group, Inc.*, No. 1:22-cv-00481 (D.D.C. Sep. 19, 2022).

claims.²⁸³ Since rivals of UnitedHealth also used Change's system, the DOJ worried that the former could gain access to competitors' sensitive data, enabling it "to co-opt its rival insurers' innovations and their competitive strategies and reduce their incentives to pursue those innovations and strategies in the first place."²⁸⁴ Moreover, owning Change could allow UnitedHealth to raise rivals' costs and prevent them from accessing Change's products.²⁸⁵ This could affect consumer welfare through "higher cost, lower quality, and less innovative commercial health insurance for employers, employees, and their families."²⁸⁶ It could also have a negative impact on equality, as insurers' thirst for health data—often the driver of these acquisitions—could be worrying for high-risk consumers. Theodosia Stavroulaki's research into healthcare mergers has revealed that those with bad diet and lifestyle habits might struggle to be offered a good deal on their health insurance, potentially facing a barrier to entry.²⁸⁷ Unfortunately, those living in poverty statistically have more health issues, so they would be most affected.²⁸⁸

Following a two-week trial, the district court threw out the DOJ's claims and allowed the merger to go ahead.²⁸⁹ The judge required divestiture of UnitedHealth's own claims processing technology, but apart from this remedy aimed at resolving horizontal issues, no other conditions were imposed.²⁹⁰ The judge did not believe that the misuse of data would materialize, thanks to the existence of firewalls and contractually-afforded consumer protection.²⁹¹ Additionally, in the judge's view, the DOJ did not provide sufficient proof of the innovation-stifling, exclusionary potential of the deal.²⁹² Stavroulaki lamented the court's overestimation of the reputational damage of breaching firewalls and underestimation of the huge gains UnitedHealth would stand to make from such breaches.²⁹³

283. Complaint, *United States v. UnitedHealth Group, Inc.*, No. 1:22-cv-00481 (D.D.C. Feb. 24, 2022).

284. *Id.* at 2.

285. *Id.*

286. *Id.* at 3.

287. Theodosia Stavroulaki, *Mergers That Harm Our Health*, 19 BERKELEY BUS. L.J. 89 (2022). See also Matt Stoller & Matt Seiler, *Big Health Care is Already Too Big*, THE AMERICAN PROSPECT (Sept. 1, 2022), <https://prospect.org/health/big-health-care-is-already-too-big/>.

288. See Lillian Witting, *Limited Access: Poverty and Barriers to Accessible Health Care*, National Health Council (Jan. 20, 2023), <https://nationalhealthcouncil.org/blog/limited-access-poverty-and-barriers-to-accessible-health-care/#:~:text=People%20who%20live%20in%20poverty,liver%20disease%2C%20and%20kidney%20disease.>

289. *United States v. UnitedHealth Group, Inc.*, No. 1:22-cv-00481 (D.D.C. Sep. 19, 2022).

290. *Id.*

291. *Id.*

292. *Id.*

293. Theodosia Stavroulaki, *How the Wrong Presumptions Led to the Wrong Conclusions in the United/Change Healthcare Merger*, PROMARKET (Nov. 11, 2022), <https://www.promarket.org/2022/11/11/how-the-wrong-presumptions-led-to-the-wrong-conclusions-in-the-united-change-healthcare-merger/>.

The above may be punctual developments, but the big picture is somewhat disheartening. Until recently, the FTC had only attempted to enforce the Robinson-Patman Act (which prohibits price discrimination) twice since the 1980s, and as of April 2025 it has not brought any vertical price restraint cases in more than two decades.²⁹⁴ Section 2 of the Sherman Act, which prohibits monopolization and is fundamental to combat misuses of market power, was similarly dormant.²⁹⁵ To make matters worse, a study by Michael Carrier found that in 97 percent of the cases where the rule of reason applies, the plaintiff fails to demonstrate the existence of an anticompetitive effect.²⁹⁶ The many voices decrying underenforcement may have a valid point.²⁹⁷

In recent years, there have been invigoration attempts, particularly (but not exclusively) under the Neo-Brandeisian leadership of the federal agencies.²⁹⁸ In October 2022, the DOJ announced a conviction under Section 2 of the Sherman Act—the first in 40 years.²⁹⁹ The government also sued Google—and won—for monopolizing digital advertising technologies.³⁰⁰ The case has been described as being “about the future of the Internet.”³⁰¹ Between 2021 and 2023, the FTC prevented three horizontal mergers in court and 13 transactions (including two non-horizontal mergers) were abandoned.³⁰² In December 2023, the DOJ and the FTC adopted revised Merger Guidelines aimed at energizing the scrutiny of such deals.³⁰³ There was also an attempt to revive the possibility of challenging mergers before an administrative court.³⁰⁴ In the final days of the Biden

294. 15 U.S.C. §§ 13-13a.

295. Kovacic, *supra* note 12, at 688.

296. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009).

297. Despite the federal impasse, some states’ attorneys general have been quite active in pursuing antitrust violations even when little was done at the federal level. See Theodore Bolema & Eric Peterson, *The Proper Role for States in Antitrust Lawsuits*, PELICAN INSTITUTE FOR PUBLIC POLICY (Dec. 2, 2021) <https://iseg.wichita.edu/publications/the-proper-role-for-states-in-antitrust-lawsuits/>.

298. See *supra* section I.C.

299. *United States v. Zito*, CR 22-113-BLG-SPW (D. Mont. Oct. 31, 2022).

300. See *United States v. Google LLC*, 747 F. Supp. 3d 1, 2024 WL 3647498, at *134 (D.D.C. Aug. 5, 2024).

301. Natalie Sherman & Brandon Denon, *Google Antitrust Trial: Tech Giant Denies Abusing Power to Gain Monopoly*, BBC NEWS (Sept. 13, 2023) <https://www.bbc.com/news/business-66790608>.

302. Jon B. Dubrow, *Assessing the State of Affairs in FTC/DOJ Merger Enforcement*, REUTERS (July 11, 2023) <https://www.reuters.com/legal/transactional/assessing-state-affairs-ftcdoj-merger-enforcement-2023-07-10/>. See also Calvani & Ensign, *supra* note 98, at 169 (describing the FTC’s policy as “successful in making mergers more difficult and costly”).

303. U.S. Dep’t of Justice & Fed. Trade Comm’n, *Merger Guidelines* (Dec. 2023) <https://www.justice.gov/atr/2023-merger-guidelines>.

304. Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, *On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*, FED. TRADE COMM’N (Nov. 10, 2022) <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-of-chair-khan-commissioners-slaughter-bedoya-on-policy-statement-regarding-section-5>. Press Release,

administration, the FTC brought the two cases under the Robinson-Patman Act.³⁰⁵

This strategy has not been exempt from criticism. Opponents of Neo-Brandeisian policies accused Khan of politicizing antitrust to wage a war against Big Tech and corporate America.³⁰⁶ Regardless of where one stands on the discussion, the revitalization of the law is a much-needed step not just for the prospective protection of non-competition goals but also for a system that adequately protects antitrust's traditional objectives. In fact, the second Trump administration has thus far echoed the sentiment that strong enforcement is fundamental.³⁰⁷ Whether the mood will translate into effective, lasting changes is uncertain. Agency initiatives will often be scrutinized by a bench captured by "neo-liberal ideology"³⁰⁸ and a conservative Supreme Court that, without legal reform, will likely not tamper with the late Justice Antonin Scalia's antitrust legacy.³⁰⁹

3. *The Social Dimension of EU Competition Law Enforcement*

In the EU context, a holistic reading of the TFEU, the Treaty in which the main competition law provisions are embedded, would suggest that taking other objectives into account is compulsory in antitrust policy development.³¹⁰ This could lend support to a doctrine akin to the principle of indirect effect of EU law when applying Articles 101 and 102 TFEU.³¹¹ According to this principle, national courts must try to interpret national law "as far as possible, in the light of the wording and purpose" of EU law rules that lack direct effect and cannot be

Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail, FED. TRADE COMM'N (Sept. 12, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illumina-proposed-acquisition-cancer-detection>.

305. Ryan Quillian, Ross Demain, Terrell McSweeney & Alezeh Rauf, *FTC Brings First Robinson-Patman Act Case in More than Two Decades*, GLOBAL POLICY WATCH (Jan. 10, 2025) <https://www.globalpolicywatch.com/2025/01/ftc-brings-first-robinson-patman-act-case-in-more-than-two-decades/>; Julia Schiller, Anna T. Pletcher, Patrick J. Jones, Josh Cayetano, Courtney Dyer & Mark A. Racanelli, *FTC Files First Two Robinson-Patman Act Suits in Over a Generation*, O'MELVENY (Jan. 30, 2025) <https://www.omm.com/insights/alerts-publications/ftc-files-first-two-robinson-patman-act-suits-in-over-a-generation/>.

306. Mary Yang, *Republicans attack FTC Chair and Big Tech Critic Lina Khan at House Hearing*, GUARDIAN (Jul. 13, 2023).

307. Marcia Brown, *Trump's Unexpected Antitrust Approach*, POLITICO (Jan. 15, 2025).

308. Fox, *supra* note 78, at 180.

309. *Id.* at 184.

310. See *supra* section I.B. See also Marios C. Iacovides & Christos Vrettos, *Falling Through the Cracks No More? Article 102 TFEU and Sustainability: The Relation Between Dominance, Environmental Degradation, and Social Injustice*, 10 J. ANTITRUST ENF'T. 32, 34 (2022) (arguing for the consideration of environmental degradation and social injustice as abuses of dominant position contrary to Article 102 TFEU).

311. Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentación SA*, ECLI:EU:C:1990:395 (CJ, Nov. 13, 1990), based on Case 14/83 *Sabine von Colson v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153 (CJ, Apr. 10, 1984).

invoked by individuals.³¹² Transposing this logic into the context of antitrust, antitrust enforcers could be compelled, where possible, to interpret the TFEU's competition law provisions in a way that is coherent with other Treaty obligations, including environmental protection and equality-inducing purposes such as social cohesion and the promotion of employment or education.

It is easy to find examples of socially beneficial competition law enforcement in Europe. Relying on Article 101(1) TFEU, the European Commission targeted anticompetitive practices that had an environmental angle. In 2021, the European Commission imposed fines totaling €875 million on car manufacturers Daimler, BMW, and the Volkswagen group.³¹³ In the course of a lawful cooperation to curb nitrogen oxide exhaust emissions, automobile companies agreed not to compete to clean the air beyond legal requirements despite having the technology to go further.³¹⁴ In 2016 and 2017, record fines adding up to more than €3 billion were slapped on truck producers for using low emissions regulations to collude on prices and pass on to consumers the costs of complying with the law.³¹⁵ Recent examples of enforcement with "green" repercussions include the penalties imposed on two cartels: one between companies involved in the treatment of end-of-life cars considered waste³¹⁶ and an ethanol market cartel (a biofuel with beneficial environmental impact).³¹⁷ Regarding the latter, Vestager emphasized the importance of pursuing collusion "relevant for the Green Transition."³¹⁸

Enforcement levels in the European Union are generally more encouraging than in the United States.³¹⁹ For comparison, whereas pay-for-delay agreements are subject to the rule of reason in the United States,³²⁰ the European Commission's position is that they constitute a restriction of competition by object.³²¹ In addition, the European Commission regularly brings abuse of dominance cases under Article 102 TFEU, which is the equivalent of Section 2 of

312. Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA*, ¶ 8. On indirect effect, see, e.g., M. Elvira Méndez-Pinedo, *The Principle of Effectiveness of EU Law: A Difficult Concept in Legal Scholarship*, 11 JURID. TRIB 5 (2021); Asif Hameed, *UK Withdrawal from the EU: Supremacy, Indirect Effect and Retained EU Law*, 85 MOD. L. REV. 726 (2022); Federico Casolari, *Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation*, in INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION 395 (Enzo Cannizzaro et al. eds., 2011).

313. Press Release, Eur. Comm'n, *supra* note 19.

314. *Id.*

315. Case AT.39824 *Trucks*, Eur. Comm'n Decision, 2017 O.J. (C 108) 5 [2016] OJ C 108/6.

316. Press Release, Eur. Comm'n, Antitrust: Commission Fines Car Manufacturers and Association €458 Million over End-of-life Vehicles Recycling Cartel (Apr. 1, 2025) (IP/25/881).

317. Press Release, Eur. Comm'n, Antitrust: Commission Fines Former Ethanol Producer Abengoa €20 Million in Cartel Settlement (Dec. 10, 2021) (IP/21/6769).

318. *Id.*

319. See *supra* section II.B.2.

320. See *supra* section II.A.2.

321. Case C-591/16 P, *H. Lundbeck A/S v. Eur. Comm'n*, ECLI:EU:C:2021:243 (CJ, Mar. 25, 2021).

the US Sherman Act. A US lawsuit against Google was only launched in 2023,³²² but in Europe the company had already been hit with three major fines, including a record €4.34 billion for abuses related to its Android operating system.³²³ Google is being further investigated for favoring its own online advertising technology.³²⁴ There have been EU inquiries relating to vertical restraints. In 2018, the European Commission fined four electronics manufacturers for imposing minimum resale prices via, *inter alia*, pricing algorithms.³²⁵ The Court of Justice also confirmed in 2011 that banning the resale of luxury products on the Internet would be anticompetitive by object.³²⁶

The EU enforcement system comes with its own problems, however. For instance, the European Commission's merger control policy needs to be examined on its own merits.³²⁷ From a sustainable development perspective, the inability to block two recent agrochemical mergers (Dow/Dupont and Bayer/Monsanto) was rather unfortunate.³²⁸ Critics pointed out how the consolidation of the sector leaves farmers at the mercy of global conglomerates and could negatively impact "environmental protection, food safety, food security, biodiversity, and marginalize more sustainable models of agriculture."³²⁹ Elias Deutscher and Stavros Makris have proposed changes to merger analysis so that, beyond considering the status quo, the European Commission would also take into account the future, particularly the impact of the concentration on "diversity, quality, and direction of innovation paths."³³⁰

Another problem is the evidentiary burden imposed on enforcers following the more economic approach of the last two decades. Even when companies possess significant market power and/or the conduct at stake is highly likely to be harmful, agencies and plaintiffs often have to prove negative effects to an

322. See *supra* section II.B.2.

323. Case AT.40099 - Google Android, Eur. Comm'n Decision, 2019 O.J. (C 402) 2019.

324. Press Release, Eur. Comm'n, Antitrust: Commission Sends Statement of Objections to Google over Abusive Practices in Online Advertising Technology (June 14, 2023) (IP/23/3207).

325. Case AT.40465 - Asus, Eur. Comm'n Decision, 2018 O.J. (C 338) 13; Case AT.40469 - Denon & Marantz, Eur. Comm'n Decision, 2018 O.J. (C 335) 5; Case AT.40181 - Philips, Eur. Comm'n Decision, 2018 O.J. (C 340) 10; Case AT.40182 - Pioneer, Eur. Comm'n Decision, 2018 O.J. (C 338) 19.

326. *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence*, *supra* note 170. See also case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941 (allowing the prevention of Internet sales on third-party websites for luxury cosmetics).

327. On the shortcomings of EU merger control, see Emanuela Lecchi, *Sustainability and EU Merger Control*, 44 EUR. COMPETITION L. REV. 70 (2023); Elias Deutscher & Stavros Makris, *Sustainability Concerns in EU Merger Control: from Output-Maximising to Polycentric Innovation Competition*, 11 J. ANTITRUST ENF'T. 350 (2023); John E. Kwoka & Tommaso M. Valletti, *Unscrambling the Eggs: Breaking Up Consummated Mergers of Dominant Firms*, 30 INDUS. & CORP. CHANGE 1286 (2021).

328. Case M.7932 - Dow/DuPont, Eur. Comm'n Decision, 2017 O.J. (C 353) 9; Case M.8084 - Bayer/Monsanto, Eur. Comm'n Decision, 2018 O.J. (C 456) 10.

329. Deutscher & Makris, *supra* note 327.

330. *Id.*

impossibly high standard.³³¹ As a result, the European Commission is losing key cases, and some of the bigger abuses of dominance investigations take decades (and substantial resources) to be resolved.³³² In cases where the facts point to a likely violation, there have been calls for speeding up the shift of the burden of proof to the companies to justify their behavior³³³ and imposing limits on judicial review.³³⁴ While understandable, these proposals may be difficult to reconcile with due process requirements and the rule of law.

III. PROPOSALS FOR A COHERENT, SOCIALLY CONSCIOUS POLICY

In a speech delivered in October 2020, Judge Douglas Ginsburg listed a number of “other goals” of antitrust embraced by recent scholarship, warning his audience to hold their laughter.³³⁵ Among those goals were “countering income inequality” and “safeguarding the environment.”³³⁶ The vertiginous pace of developments since 2020 suggests Ginsburg’s remarks have been overtaken by recent events. Since the speech, antitrust agencies in the Netherlands, the United Kingdom, Austria, and Singapore, among other countries, have all published guidance on sustainable cooperation.³³⁷ The new EU Horizontal Cooperation Guidelines devote twenty-five pages to sustainability agreements,³³⁸ and new guidelines for sustainability-oriented cooperation between agricultural producers

331. See, e.g., Case C-67/13, *Groupement des Cartes Bancaires v. Comm’n*, ECLI:EU:C:2014:2204 (CJ, Sept. 11, 2014); Case C-345/14, *SIA ‘Maxima Latvija’ v. Konkurrences Padome*, ECLI:EU:C:2015:784 (CJ, Nov. 26, 2015).

332. As an illustrative example of lengthy proceedings, a case against *Intel* which took off in 2006 still remains unresolved as of August 2023. The latest appeal is pending before the Court of Justice. See Case C-240/22 P, *Eur. Comm’n v. Intel Corp.* (Jan. 26, 2022).

333. Kwoka & Valletti, *supra* note 327.

334. Jason Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, HM TREASURY (Mar. 2019), https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf.

335. Ginsburg, *supra* note 11.

336. *Id.*

337. See generally ACM, *Beleidsregel Toezicht ACM op duurzaamheidsafspraken* [Policy Rule on ACM’s Oversight of Sustainability Agreements], Document No. ACM/UIT/596876 (Oct. 4, 2023) (Neth.), https://www.acm.nl/system/files/documents/beleidsregel-toezicht-acm-duurzaamheidsafspraken_0.pdf [<https://perma.cc/6GFX-QZAT>], translated in *ACM’s website* <https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf> [<https://perma.cc/QK33-CD4J>]; UK Competition & Markets Authority, *Green Agreements Guidance: Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements*, CMA 185 (Oct. 12, 2023); Austrian Federal Competition Authority, *Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)* (Sept. 2022); Competition & Consumer Commission Singapore, *Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives* (Mar. 1, 2024).

338. EU Horizontal Cooperation Guidelines, chapter 9.

have been adopted.³³⁹ Austria's competition law now includes a sustainability exemption for agreements promoting cooperation with genuine environmental purposes.³⁴⁰

These developments show that discussion of the impact of environmental and equality goals on antitrust is being taken much more seriously than Ginsburg's remarks suggest. This section embraces the importance of these concerns and expounds the optimal route to coherent, socially aware antitrust policymaking.

A. Antitrust's Supporting Role in the Protection of Social Goals

Despite the fervor of the antitrust goals dispute, there is consensus that the main role of the discipline is not the pursuit of a social agenda.³⁴¹ The European Commission has been unambiguous in that "[t]here are better, much more effective ways" to strive for sustainable development.³⁴² Taxation, sector-specific rules, investment, and other government-led initiatives constitute far superior routes, because the protection of these objectives is much too important to be left in the hands of the corporate world.³⁴³ This idea fundamentally underlies the conception of the welfare state: that it would do "things that markets would do badly or not at all."³⁴⁴

The view that corporations may act as "powerful voices for social and political change, flexing lobbying muscle and changing their own behaviors to create policy impact on issues like . . . climate change"³⁴⁵ might be appealing, but it overlooks how they are inherently profit driven. As Adam Smith put it, "[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."³⁴⁶ The benefits of corporate social responsibility have been questioned since the 1970s, when economist Milton Friedman famously asserted that businesses' only duty is to

339. Eur. Comm'n, Commission Guidelines on the Exclusion from Article 101 of the [TFEU] for Sustainability Agreements of Agricultural Producers Pursuant to Article 210(a) of Regulation (EU) 1308/2013 [2023] OJ C/2023/1446.

340. *See supra* note 230.

341. *See supra* section I.A.

342. European Commission, *Competition Policy Supporting the EU Green Deal* https://web.archive.org/web/20231106162321/https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf#expand (last visited Aug. 23, 2023).

343. The European Commission acknowledges that at times "existing (environmental) regulation already incentivises companies to produce in a sustainable manner and therefore obviates the need for cooperation". *See Competition Policy Brief, supra* note 67, at 6.

344. NICHOLAS BARR, *THE ECONOMICS OF THE WELFARE STATE* (6th ed., 2020). *See generally* Maarten Pieter Schinkel & Yossi Spiegel, *Can Collusion Promote Sustainable Consumption and Production?* 53 INT'L J. IND. ORG. 371 (2017) (questioning that companies can achieve public interest goals).

345. Balmer, *supra* note 17, at 219.

346. ADAM SMITH, *WEALTH OF THE NATIONS* I.II.2 (1776).

maximize shareholders' returns.³⁴⁷ More recently, it has been suggested that corporate attempts to solve societal problems typically backfire because "evidence suggests that corporations will simply use such political engagement as an opportunity to extract more profit."³⁴⁸ From this perspective, competition authorities' reluctance to accept green corporate initiatives without thorough scrutiny is entirely justified. Enforcers cannot take purported non-economic benefits for granted when an initiative may also lead to anticompetitive harm. Otherwise, businesses will have a clear escape route from antitrust liability.

Thus, three detrimental consequences stem from overemphasizing the role of the business community in the attainment of social goals. First, the firms allegedly acting for the common good might flout the social goals at issue. Second, placing the onus on the corporate world could give governments an excuse "to shun their responsibility for designing proper regulation."³⁴⁹ Third, the resulting antitrust policy would be almost unanimously unpalatable.³⁵⁰ Excessive subjectivity and legal uncertainty would translate into unduly powerful enforcers and a policy too broad to be implementable.

B. *The Weak Case for Less Enforcement*

The voices calling for laxer antitrust policy to defend otherwise prohibited horizontal cooperation in the name of sustainable development are struggling to find empirical support for their arguments, even more so at times of blatant antitrust underenforcement. This article has shown that, despite claims to the contrary, there is no significant evidence that competition law has prevented genuinely beneficial initiatives.³⁵¹ As Schinkel has asserted, "[t]he rare genuine sustainability agreement cannot justify relaxing general competition rules."³⁵² Even Simon Holmes, who has advocated for radical changes—including TFEU reform—³⁵³ admits that in practice, "very few cases [have] been brought against environmental or sustainability agreements."³⁵⁴ Moreover, recent studies suggest that the first-mover disadvantage is a rare phenomenon, and its occurrence may have been grossly exaggerated.³⁵⁵ For example, a follow-up study of the *Chicken of Tomorrow* ACM decision³⁵⁶ revealed that the benefits of the project had been

347. See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970) (suggesting that corporations should *not* have social responsibility, only responsibility to shareholders).

348. Karthik Ramanna, *Friedman at 50: Is It Still the Social Responsibility of Businesses to Increase Profits?*, 62 CAL. MANAG. REV. 28, 29 (2020).

349. Schinkel & Treuren, *supra* note 110, at 6.

350. Ezrachi et al., *supra* note 14, at 54.

351. See *supra* sections II.A.2 and 3.

352. Schinkel & Treuren, *supra* note 110 at 6.

353. Holmes, *supra* note 17, at 405.

354. *Id.* at 402.

355. Schinkel & Treuren, *supra* note 110, at 12–13.

356. See *supra* section II.A.3.

attained without coordination, and instead came with the competitors acting independently.³⁵⁷

Although supporters of looser enforcement claim that current policy leaves no room for social considerations, *some* leeway exists for considering the legality of genuinely beneficial social cooperation even when it carries negative externalities on competition. When the conduct at stake is considered inherently harmful, admittedly it will be very difficult to defend, particularly under the *per se* illegality in the United States. Antitrust tools are struggling to provide an adequate yardstick to measure benefits when they do not coincide in space and time with the affected markets. This is a limitation we may have to come to accept, and it is not necessarily an undesirable one. There is a great risk of benevolent collaborations turning into hardcore collusion, as exemplified *inter alia* by the *Consumer Detergents* investigation.³⁵⁸ Even Aquinas envisaged important limits to the principle of double effect.³⁵⁹ It is doubtful that the kinds of arrangements that fall foul of antitrust rules while trying to pursue environmental aims could be justified in light of the limitations Aquinas foresaw. Edith Loozen has rightly summed up the contradiction in the arguments defending lax enforcement by questioning the extent to which “antitrust can be used to correct one market failure, a negative externality, by accommodating the very market failure that competition law is tasked to protect against—market power.”³⁶⁰

The recent wave of sustainability guidelines is welcome, given the need for clarity on the potential clash between sustainability and competition objectives. In the European Union, the new Horizontal Cooperation Guidelines reiterate that antitrust will not bend over backward to accommodate certain forms of potentially detrimental cooperation.³⁶¹ The European Commission is willing to be receptive to possible sustainability benefits but without treading over red lines.³⁶² This position is laudable since it is necessary to ensure the effectiveness of the antitrust system. However, the efforts to respect those limits combined with the emphasis on willingness to pay has led to the unfortunate exclusion of some important benefits paid for by (unwilling) consumers in the European Union but enjoyed by those far away and possibly in greater need of benefits.³⁶³ This is something that calls for further reflection. Ultimately, one would hope that EU consumers would be prepared to bear the cost of such improvements—in which case the new Guidelines show a willingness to accept the computability of the benefits.

If all else fails, and a significantly beneficial practice cannot escape antitrust liability, then it should be up to the legislator, not the agencies, to redeem it via

357. ACM, *Welfare of Today’s Chicken and that of the “Chicken of Tomorrow”* (Sep. 1, 2020) <https://www.acm.nl/en/publications/welfare-todays-chicken-and-chicken-tomorrow>.

358. See *supra* section II.A.3.

359. Aquinas, *supra* note 113.

360. Loozen, *supra* note 111.

361. EU Horizontal Cooperation Guidelines.

362. *Id.*

363. See *supra* section II.A.3.

regulation. It is a fundamental tenet of democracy that these matters should be decided by elected officials, not bureaucrats.³⁶⁴

C. Boosting Antitrust's Social Potential: More Antitrust?

In the previous section, the impact of effective antitrust enforcement on environmental protection and equality was assessed.³⁶⁵ Direct and indirect benefits may arise, provided that there is no clash between competition and non-competition objectives. This condition is met in most cases, suggesting antitrust enforcement may inadvertently boost objectives beyond efficiency. If this is the case, it begs the question of whether it is possible to go one step further and find ways to purposefully boost the social effect of competition enforcement within the current policy framework.

A popular suggestion is to adjust enforcement priorities so as to give precedence to cases with ecological or egalitarian consequences.³⁶⁶ Since the adoption of the Green Deal, the European Commission is already prioritizing investigations with environmental implications.³⁶⁷ Another possibility is that, when punishing a company, a regulator could consider social harm as an aggravating circumstance to increase the severity of the penalties imposed and ultimately make social harm costlier. A complex but helpful approach would be to chisel more elaborate theories of harm that allow enforcers to consider a wider range of externalities in the assessment of conduct and mergers.³⁶⁸ This appears necessary not just to boost the protection of social goals but also to address the underenforcement problem. In the European context, the principle of indirect effect of EU law could be mimicked to ensure enforcers apply competition law in the most sustainable manner possible to comply with the wider TFEU objectives.

The above proposals are relatively straightforward to implement. There are, however, other important issues that stand in the way of reaping the full social potential of antitrust. They may require deeper systemic reform. In the European Union, it has been suggested that it might be necessary to rethink the burden of proof to address the difficulties agencies face in their investigations. The onus should be on the companies with market power to justify their harmful

364. This point is made, *inter alia*, by: Ezrachi et al., *supra* note 14, at 54; Loozen, *supra* note 111 (arguing that in "market democracies like the EU and its Member States, only the legislature is democratically legitimized to define and redefine the scope for voluntary exchange"); Martijn Snoep, *Keynote on competition and sustainability*, IBA 24th Annual Competition Conference (Sept. 9, 2020) (stating that the ACM is "very reluctant to allow agreements ... that lead to redistribution between users and non-users" since "it is up to the democratically elected legislature to determine who contributes to what extent to the achievement of public interest goals").

365. See *supra* section II.B.1.

366. Ezrachi et al., *supra* note 14, at 68.

367. See *supra* II.B.3.

368. See generally Deutscher & Makris, *supra* note 327; Iacovides & Vrettos, *supra* note 310.

behavior.³⁶⁹ Nonetheless, this prospect is improbable as it is controversial. At least recent cases, including the Apple state aid saga,³⁷⁰ suggest that the Court of Justice is willing to accept a realistic standard of proof. More complicated is the issue of the lengthy proceedings that result from the appeals process. It is a consequence of the strong procedural guarantees in place, and therefore it is unlikely to change despite the impossibility of resolving issues requiring an immediate solution. In the United States, the role politics and ideology play in appointing judges can affect the effectiveness of enforcement. This can neither be easily nor steadily fixed. Federal agencies have shown a commitment to revive antitrust. Yet their efforts have not translated into meaningful law reform, so it is unclear whether the “antitrust resurgence” will endure.

CONCLUSION

Climate change and wealth inequality are among the greatest global challenges of our time and ones that antitrust cannot turn its back on. Nonetheless, the less antitrust/more antitrust doctrinal dichotomy spawned by these concerns is proof that an overly ambitious policy could be fraught with contradictions. There is also a danger that the debate becomes compromised by corporate interests. Companies and their representatives are quick to cry foul when the pursuit of non-economic objectives gives enforcers greater muscle to quash their behavior but are simultaneously delighted to jump on the “green antitrust” bandwagon if it provides them with a get-out-of-jail-free card for lucrative, harmful conduct.

The idea that competition law enforcement hampers social objectives is both misguided and unrealistic. It is misguided because it is oblivious to the beneficial social impact of healthy markets. And it is unrealistic because practice shows non-economic objectives are often de facto weighed into antitrust decisions—even in efficiency-fixated systems. In the United States, antitrust has been making a comeback both in terms of invigorated enforcement and political salience. Calls for a laxer policy are out of sync with these developments. They overstate the need for flexibility based on purely hypothetical situations and make the mistake of shifting the onus of the protection of the environment from the legislature to the private sector—those who stand to gain the most from weakened law enforcement. The European Union’s environmental agenda has put pressure on competition agencies of its Member States to provide clarity as to how they will assess environmental initiatives. While their responses suggest assorted levels of permissibility, the European Commission’s position in the new EU Horizontal Cooperation Guidelines shows a determination to protect the effectiveness of the Union’s competition laws.

369. See Tommaso Valletti, *How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews*, PROMARKET (June 28, 2021) <https://www.promarket.org/2021/06/28/tech-block-merger-review-enforcement-regulators/>.

370. Case C-465/20 P, *Comm’n v. Ireland and Others*, ECLI:EU:C:2024:724 (CJ, Sept. 10, 2024).

Antitrust was not designed to save the planet and should not be sacrificed because it cannot achieve a purpose that it was not meant to serve. Diluting antitrust for the "greater good" could entail losing out on the positive social impact of well-functioning markets, as well as the distributive advantages of laws that can neutralize the harms associated with excessive market power. Instead, a healthy antitrust system is much better equipped to reap direct and indirect social gains. Enforcers may use the discretion they have been afforded under the existing legal framework to channel their efforts towards investigations and initiatives that will boost both competition and non-competition goals. Beyond that, the pursuit of social goals exceeds the role and purpose of antitrust legislation.

Banksy ‘Walled Off’: A Human Rights Perspective to Graffiti and Street Art

Dr. Eleni Polymenopoulou*

This Article explores the question of graffiti and street art through the lens of international human rights law. After discussing its sui generis nature as a phenomenon oscillating between legality and illegality, the Article examines the protection afforded to graffiti and street art under key human rights treaties. It argues that the blanket criminalization of graffiti and street art prevents judicial bodies from balancing the rights and interests at stake, therefore amounting to an illegitimate restriction not only to individual artistic freedom but also to the public’s right to access cultural life. The Article further examines the established “necessity” and “proportionality” tests that are commonly used by human rights bodies to assert the legitimacy of an infringement against graffiti and street artists’ rights. It suggests three possible contextual criteria that may be useful in the balancing exercise: firstly, the aesthetic value of the works; secondly, communities’ determination to preserve the work; thirdly, political graffiti as evidence of human rights activism. The Article suggests that from these criteria, only the last two are sustainable (popular works and activist works). It concludes that within these two scenarios, States should be liable for violations of communities’, artists’, human rights activists’, and human rights defenders’ cultural rights.

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INTRODUCTION

In May 2023, The Times reported that a couple paid over 200,000 USD to remove the *Seagull*, a giant graffiti stenciled by Banksy on their property's external wall in Suffolk, UK.¹ According to the couple, the *Seagull* was their “living nightmare.”² Why would anyone reject Banksy? Banksy's street art is clever, original, and satirical, as well as highly profitable. He was voted as the number one most loved artist of all time in the UK,³ while his work *Venice in Oil* made an entry to the 2019 Venice Biennale. Many of his works are present on the segregation wall and the Walled Off Hotel in Palestine,⁴ in Ukraine,⁵ and elsewhere in support of human rights causes.⁶ *Girl with Balloon*, a work sprayed

1. Ben Ellery, *Homeowners Spend £200,000 Removing Banksy's Seagull Mural*, TIMES (May 23, 2023), <https://www.thetimes.co.uk/article/homeowners-spend-200-000-removing-banksys-seagull-mural-f30j7zd7w>.

2. *Id.* According to the couple, the artwork needed to be removed because it was “targeted by vandals, thieves and council bureaucrats.”

3. Jonathan Jones, *Banksy Is the Brits' Favourite Painter of All Time - Is This Status Deserved?*, GUARDIAN (July 15, 2019), <https://www.theguardian.com/artanddesign/shortcuts/2019/jul/15/banksy-brits-favourite-painter-all-time-status-deserved-secreteive-stenciller-high-art-alienates>.

4. CAROL DIEHL, *BANKSY: COMPLETED*, 185–94 (The MIT Press, 2021); Ian Fisher, *Banksy Hotel in the West Bank: Small but Plenty of Wall Space*, NY TIMES (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/world/middleeast/banksy-hotel-bethlehem-west-bank-wall.html>; see also SABRINA DE TURK, *STREET ART IN THE MIDDLE EAST*, 69–88, (June 13, 2019) (on local and international street art on the separation barrier).

5. Victoria Bisset, *Banksy Unveils Mural of Gymnast on a Destroyed Building in Ukraine*, WASH. POST (Dec. 11, 2023), <https://www.washingtonpost.com/world/2022/11/12/banksy-ukraine-borodyanka-mural-gymnast-judo/>; See also, Teresa Nowakowski, *Ukraine Releases Banksy Postage Stamp on War's One-Year Anniversary*, SMITHSONIAN MAG. (Mar. 1, 2023), <https://www.smithsonianmag.com/smart-news/ukraine-banksy-postage-stamp-putin-180981719/>.

6. For a brief overview, see Anny Shaw, Comment, *Banksy's Activism is His Greatest Work: Funding a Refugee Rescue Boat is Just the Latest in a Long History of Politically Motivated Acts*, ART NEWSPAPER (Sept. 3, 2020), <https://www.theartnewspaper.com/2020/09/03/banksys-activism-is-his-greatest-work/>.

on paper, based on the graffiti, was sold at Sotheby's for over \$ 1 million USD. And although half-shredded, it was resold at an astronomical price.⁷ At the same time, many of his works reject capitalist values. An exemplary illustration is his temporary art project *Dismaland* (a sarcastic imitation of Disneyland) that was converted into shelters for migrants in Calais.⁸

The simple incident of the *Seagull*, however, is illustrative of a deep contrast. There is no absolute or uniform truth: beauty lies in the eye of the beholder—and eventually also, the property owner. Street art decorating the property of third parties is not free from legal consequences, whether on public or private property. In virtually all legal systems around the world, graffiti and street art are considered vandalism. Yet, at the same time, both are steadily evolving away from illegality,⁹ and increasingly, arguments are propagated in favor of their preservation.¹⁰ The more rapidly urban cultural tourism grows,¹¹ the more currency commissioned street art acquires. Banksy is arguably the ultimate expression of this oxymoron. His incongruous art is not just found on the *street*; it is also exhibited in the art market, including auction houses, galleries, and other cultural spaces.¹²

Research pertaining to graffiti and street art so far has focused primarily on intellectual property (IP) law.¹³ This is because of a side problem, namely, the

7. Jonathan Edwards, *Banksy Tried to Destroy His Art After It Sold for \$1.4 Million. The Shredded Version Just Went for \$25.4 Million*, WASH. POST (Oct. 15, 2021), <https://www.washingtonpost.com/nation/2021/10/15/shredded-banksy-painting/>.

8. DIEHL *supra* note 4, at 152.

9. See, e.g., Cameron McAuliffe & Kurt Iveson, *Art and Crime: Conceptualising Graffiti in the City*, 5 GEOGRAPHY COMPASS 128, 128–43 (2011); Al Roundtree, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L. J. 959, 986 (2013); Katya Assaf-Zakharov & Tim Schnetgok, *Reading the Illegible: Can Law Understand Graffiti?* 53 CONN. L. REV. 3, 10 (2020) (highlighting that "graffiti . . . is increasingly labelled as 'street art,' which marks a conceptual move from the context of vandalism into the world of 'high' culture").

10. See, e.g., Griffin Barnett, *Recognizing Stature: Protecting Street Art as Cultural Property*, 12 CHICAGO-KENT J. INTELL. PROP. 204, 205 (2013).

11. See, e.g., Montserrat Crespi-Vallbona & Oscar Mascarilla-Miró, *Street Art as a Sustainable Tool in Mature Tourist Destinations: A Case Study of Barcelona*, 27 INT'L J. CULTURAL POL. 422, 422–36 (2020); Alexandra Duncan, *From the Street to a Gallery*, in UNDERSTANDING GRAFFITI: MULTIDISCIPLINARY STUDIES FROM PREHISTORY TO THE PRESENT 126, 129 (Troy Lovata & Elizabeth Olton eds., 2nd ed. 2016). Cf. Matthew Ryan Smith, *Indigenous Graffiti and Street Art as Resistance*, in STREET ART OF RESISTANCE 251, 262 (Sara Awad & Brady Wagoner eds., 2018) (noting that "[s]treet art today has become a hot commodity").

12. Maia Morgan Wells, *Graffiti, Street Art, and the Evolution of the Art Market*, in ROUTLEDGE HANDBOOK OF GRAFFITI & STREET ART (Jeffrey Ian Ross ed., 2016).

13. Cf. Roundtree, *supra* note 9; Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. COPYRIGHT SOC'Y U.S.A., 257 (2008); Galley Luma Zayad, *Tagged: Graffiti's Advancements in Mainstream Culture Through Expanded Copyright Protection in Williams v. Cavalli*, 26 DEPAUL J. ART, TECH., & INTELL. PROP. L. 161 (2019); Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 NOTRE DAME L. REV. 54 (2017); Enrico Bonadio, *Graffiti, Street Art and Copyright*, 4 STREET ART & URB. CREATIVITY J. 75 (2018); Enrico Bonadio, *Street Art, Graffiti and the Moral Right of Integrity: Can Artists Oppose the Destruction and Removal of Their Works?* 1 NUART J. 17 (2018); Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 295 (2013).

fact that street artists are seldom able to claim copyright benefits from their work—either because of the illegality of the underlying act or because of the ephemeral nature of the works.¹⁴ The question has practical implications because the vast majority of street artists are prevented from enjoying reproduction and other exclusive rights associated with their works, which are increasingly appropriated by the fashion industry and other corporate interests.¹⁵ Copyright, however, is an important source of income for street and graffiti artists,¹⁶ given that, with the exception of Banksy and a few others, street artists are seldom able to ‘cut off’ from a wall and sell their original works. Such extraction is expensive, time consuming, and dangerous.¹⁷

Besides related IP rights, a small part of the scholarship has ventured to analyze the criminal dimension of street art,¹⁸ and its place in criminology discourse.¹⁹ The literature on the relationship between graffiti and property law is even more scarce.²⁰ Interestingly, a handful of articles emphasize the rationales underlying freedom of speech protection or community participation in decision making, including Jenny Carroll’s suggestions of defenses for graffiti against property damage,²¹ and Zakharov and Schnetgok’s proposals for a world whereby

14. Cf. McAuliffe & Iveson, *supra* note 9, at 129, 137–139 (describing “ephemeral” and “permanent” works).

15. Enrico Bonadio, *Banksy’s Copyright Battle with Guess – Anonymity Shouldn’t Compromise His Legal Rights*, CONVERSATION (Nov. 25, 2022), <https://theconversation.com/banksys-copyright-battle-with-guess-anonymity-shouldnt-compromise-his-legal-rights-195233> (referring also to other artists, such as “US artists Dash Snow, Ahol, Revok and Rime”); see also Eileen Kinsella, ‘Livid’ Graffiti Artists Sue Fashion Label Vince Camuto for Using Their Artwork in Ads, ARTNET (July 11, 2017), <https://news.artnet.com/art-world/graffiti-artists-sue-vince-camuto-1019147>.

16. Amelia K. Brankov, *Does Art Need Copyright After All?* 43 COLUM. J. L. & ARTS 367, 369 (2020).

17. *Mastermind of Kyiv Banksy Removal Could Face Years in Jail*, DEUTSCHE WELLE (Mar. 1, 2023) <https://www.dw.com/en/mastermind-of-banksy-removal-in-ukraine-could-face-years-in-jail/a-63974481>.

18. Ian Edwards, *Banksy’s Graffiti: A Not-so-simple Case of Criminal Damage?*, 73 J. CRIM. L. 345, 345 (2009) (arguing that “the work of artists such as Banksy forces a reappraisal of the precision and applicability of criminal damage”); Gabry Vanderveen & Gwen van Eijk, *Criminal but Beautiful: A Study on Graffiti and the Role of Value Judgments and Context in Perceiving Disorder*, 107 EUR. J. ON CRIM. POL. & RSCH. 125 (2016) (suggesting that “a more lenient policy may signify awareness to different views on what public space should look like”); see generally, CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI (Enrico Bonadio ed., 2019); MARTA ILJADICA, COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE (2016).

19. Andrew Millie, *Crimes of the Senses: Yarn Bombing and Aesthetic Criminology*, 59 BRIT. J. CRIMINOLOGY 1269, 1272–73 (2019).

20. Peter Salib, *The Law of Banksy: Who Owns Street Art?*, 83 U. CHI. L. REV. 2293, 2293–95 (2015); see also Bertrand Crettez & Régis Deloche, *On the Preservation of Illegal Street Art*, 19 REV. L. ECON. 185, 185–89 (2023) (extending Salib’s argument of “social fabric loss” and explaining split ownership from an economics perspective). Cf. Iljadica, *supra* note 18, at 81–102.

21. Jenny Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1287, 1347 (2020) (submitting that it is possible to “carve a protected space for graffiti in criminal law” in order to promote the values of the First Amendment); see generally Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (advancing the idea of the free speech value of “individual self-realization”); Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (discussing the scope of freedom of speech in the American cultural context).

the “boundaries of physical property are redefined” and graffiti is legitimized as “medium of visual expression creating a public forum.”²² Such arguments, essentially entrenched in a liberal rationale of freedom of speech, and using US law and the First Amendment as a point of departure, are valuable in light of the criminalization of graffiti and the removal of works from the public space.

This Article contributes to this discourse through a different lens, by adding to the existing literature the study of street art based on international human rights law. The human rights approach to graffiti is beneficial in informing policy and decision making for at least three distinct reasons. Firstly, it is not confined to one jurisdiction alone. Human rights are predicated on the idea of universality in defining the scope of rights and seeking cultural, political, and social legitimacy in various legal systems and traditions. Secondly, human rights law is the only regime that allows for a nuanced answer in relation to graffiti and street art, adapting solutions to a particular context. This is not only because established tests of human rights law (such as the “necessity” and “proportionality” tests) allow balancing between conflicting interests, but also because of human rights law’s appeal to liberal and democratic²³ values, such as pluralism, tolerance, and diversity.²⁴ Finally, human rights law is not confined to freedom of speech claims. An array of human rights is pertinent to graffiti and the street art phenomenon, including the right to participate in cultural life, authors’ rights, and creative freedom.

In terms of structure, the Article is divided into three sections with the first part addressing the protection of graffiti and street art through the various layers of international human rights law and State practice on the matter. Part two briefly comments on the definitions of the terms “graffiti” and “street art,” and examines their nature as phenomena oscillating between legality and illegality. This part also provides a short overview of their treatment under domestic laws and in a comparative perspective. Part three analyzes the international human rights law perspective on graffiti and street art, considering both individual freedoms and cultural rights. Part four discusses criteria that could be considered in the balancing exercise (between street artists’ rights and other private rights or public interests), including the aesthetic value of the works, their popularity, and their political function as evidence of activism. For example, States’ obligations relative to popular works could go as far as involving cultural policies and strategies that improve community participation and consultation with concerned neighborhoods.

22. Assaf-Zakharov & Schnetgok, *supra* note 9, at 153 (introducing “a novel perspective on graffiti regulation” and arguing that “an alternative vision of public space is possible”); *see generally* ALISON YOUNG, STREET ART, PUBLIC CITY: LAW, CRIME AND THE URBAN IMAGINATION (2014).

23. Compare European Convention on Human Rights, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 with International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

24. *See, e.g.*, John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1771 (2009).

I. BRIEF COMMENTS ON THE LEGAL STATUS OF GRAFFITI AND STREET ART

A. *The Sui Generis Nature of Graffiti and Street Art: Oscillating Between Legality and Illegality*

Graffiti boomed in Brooklyn, Manhattan, Los Angeles and other American cities in the 1960s and 1970s.²⁵ At the time, the public largely associated the practice with crews working in neighborhoods and suburban lifestyles—as well as with gangs.²⁶ More broadly, however, graffiti has always been associated with some level of illegality (and in fact, some anthropologists have gone as far as arguing that “graffiti . . . may revolve around . . . a *need* to break the law”).²⁷ Graffiti is also commonly associated with dangerous activities, as evidenced by a Greek case concerning the electrocution of a graffiti artist working on the roof of a train wagon.²⁸

It should be noted nonetheless that there is no accepted definition of either *vandalism* or *art* (at least in a manner that requires that it be protected, let alone copyrightable). This is also evident in the terminology related to graffiti “art.” Graffiti consists of “bomb spraying,” “tagging,” and “throw-ups” on surfaces located in public spaces.²⁹ Graffiti “art” and street art, on the contrary, although sometimes used interchangeably with graffiti, denotes the presence of at least some creative elements and implies content that is generally tolerated. Such artistic elements vary and may include not just spraying, but also stencil graffiti and posters.³⁰ The more elaborate techniques associated with a particular piece of graffiti, the more it is likely to be labeled graffiti “art.”³¹ Street art, in addition, has clearly more positive connotations and commonly denotes not only graffiti and graffiti art but also large murals (including “see-through murals made for wild optical illusions”),³² yarn bombing (i.e., colorful knitting), and other interventions in the public space, regardless of its legitimate or illicit nature.³³ Adding to the

25. See, e.g., Ronald Kramer, *Straight from the Underground: New York City's Legal Graffiti Writing Culture*, in ROUTLEDGE HANDBOOK, *supra* note 12.

26. Susan Philips, *Deconstructing Gang Graffiti*, in ROUTLEDGE HANDBOOK, *supra* note 12, at 48.

27. Amardo Rodriguez, *On the Origins of Anonymous Texts That Appear on Walls*, in UNDERSTANDING GRAFFITI, *supra* note 11, at 12.

28. Areios Pagos [A.P.] [Supreme Court] 892/2018 (Greece).

29. Jeffrey Ian Ross, *Introduction: Sorting It All Out*, in ROUTLEDGE HANDBOOK, *supra* note 12, at 2 (noting that mural graffiti is generally considered art, while graffiti tags are merely vandalism); see also Fernando Loureiro Bastos, *Legal Implications of Street Art as a 'Democratized'/'Open' Form of Art*, 18 REVISTA OPINIÃO JURÍDICA [REV. OPIN. JUR.] 210, 216 (2020) (Braz.).

30. RAFAEL SCHACTER & JOHN FEKNER, THE WORLD ATLAS OF STREET ART AND GRAFFITIS (2017); GARRY HUNTER, STREET ART FROM AROUND THE WORLD (2012).

31. *Id.*

32. Darcy Schild, *An Artist Uses Spray Paint to 'Carve' Through Walls, and the See-Through Murals Make for Wild Optical Illusions*, BUS. INSIDER (Sept. 17, 2019), www.insider.com/spray-paint-optical-illusions-2019-9.

33. See, e.g., Millie, *supra* note 19, at 1272–73.

complexity, street art, and especially its French equivalent, *arts de la rue*, generally refers to all artistic expressions in the public space, including performing, children's theatre, and music concerts. In other words, unlike graffiti, street art denotes forms of expression that are more likely to be both legal and acceptable.³⁴ This is also illustrated by the fact that tagging or spraying on street art is curiously also considered in and by itself vandalism.³⁵

In practice, however, graffiti and street art are highly conflated, as are the crews behind each. The latter cannot be reduced to a single identity, nor be stereotyped as outlaws or vandals. Most graffiti and street artists have received artistic training, and it is fairly common for top street artists to shift from the street to museums and galleries. It is instructive that Keith Haring's originally illicit interventions³⁶ in the New York subway are now taught in art education classes at the primary school level. Still, for each remarkable piece of street art, an appalling throw-up will serve as evidence that the slogan "graffiti is vandalism" still stands.

B. State Practice in Relation to Graffiti and Street Criminalization

Commissioned or otherwise, State-sanctioned art is growing. Graffiti artworks are increasingly displayed in exhibitions, museums, and festivals in New York, Los Angeles, and many European capitals,³⁷ while graffiti is also gradually visible in the Middle East, including in Gulf countries.³⁸ At the same time, any

34. Bastos, *supra* note 29, at 224–25 (referring to distinctions between "graffiti vandalism," "graffiti art," and "mural art" in the Toronto Municipal Code Ch. 485, amended by bylaw no. 1218-2011, Oct. 25, 2011).

35. Including even Banksy works. *See, e.g.,* Peter Stubley, *Banksy's Valentine's Day Mural in Bristol Vandalised Within 48 Hours*, INDEPENDENT (Feb. 15, 2020), <https://www.independent.co.uk/news/uk/home-news/banksy-new-mural-bristol-graffiti-vandalism-valentines-a9337551.html>; Hunter, *supra* note 30, at 16 (giving an example of a work by Banksy that was bomb-sprayed); *Cf.* Benedikt Feiten, *Answering Back: Banky's Street Art and the Power, in* CULTURE JAMMING: ACTIVISM AND THE ART OF CULTURAL RESISTANCE 218, 224 (Marilyn DeLaure & Moritz Fink eds., 2017) (noting that "illicit art in the public space 'runs the risk of being buffed out by graffiti removal, painted over by other artists, or gradually worn away by weather'").

36. Ulrich Blanché, *Keith Haring - a Street Artist?*, 2 STREET ART & URB. CREATIVITY 1, 13 (2016).

37. *See, e.g.,* MUSEUM FOR URBAN CONTEMPORARY ART, <https://urban-nation.com/> (last visited Apr. 5, 2024); ART42 | MUSÉE D'ART URBAIN, <http://www.art42.fr/en/home.html> (last visited Apr. 5, 2024); MUSÉE DES GRAFFITIS, <https://parisjetaime.com/eng/culture/musee-des-graffitis-p948> (last visited Apr. 5, 2024) ("invit[ing] graffiti artists to come and exert their talent on boards that are changed once a fortnight"); *see also* Andrew Wasserman, *Sites of Counter-Culture: The Move of the New Museum to the Bowery*, in MUSEUMS AND PUBLIC ART? 181, 185 (Cher Krause Knight & Harriet Senie eds., 2018).

38. Wasserman, *supra* note 37, at 187; De Turk, *supra* note 4, at 21–68 (on Egypt and Lebanon); *id.* at 137–54 (on Tunisia), 179–01 (on various Gulf countries); Nuha Alshurafa & Alia Aljoofi, *Walls Have Ears: A Critical Discourse Analysis of Graffiti in Jeddah, Saudi Arabia* 28 J. KING ABDULAZIZ UNIV.: ARTS & HUMANITIES 281, 282–3 (2020) (Saudi Arabia); *see also* *Saudis Bid to Beautify Their Cities with Street Art*, ARAB NEWS (Apr. 15, 2019), <https://www.arabnews.com/node/1482066/saudi-arabia>; Ismael David, *Colouring the Streets of Muscat: Oman's Graffiti Artists Leave Their Mark*,

unauthorized modification or use of either private or public property is tantamount to criminal damage and an illicit act in the legal systems of the world. It is also often punishable by domestic criminal law, or by laws concerning damage or defacement of property, but also by specifically targeted legal provisions or laws passed by local authorities. Some examples of the former are the UK Criminal Damage Act 1971, which contains provisions on “[d]estroying or damaging property” and punishes damage with incarceration and fines;³⁹ and the French Criminal Code, which distinguishes between “light” and serious damage, depending on parameters such as medium and surface.⁴⁰ An example of the latter are laws of various US states specifically addressing the defacement of property by graffiti;⁴¹ the Australian Anti-graffiti Act;⁴² laws adopted by the city of New York on the “defacement of property by means of aerosol” in the 1970s;⁴³ and the laws passed by Cape Town in 2010.⁴⁴ Such laws often encompass both graffiti and street art—including murals and other works that some believe are beautiful or otherwise worth preserving.⁴⁵

In this respect, it does seem that the proliferation of graffiti also entails the spread of anti-graffiti laws. This may well be the result of the deep divide between the “crucial where of graffiti” (i.e., the concept that graffiti as a phenomenon is not simply a type of “misplaced art” but rather, a behavior associated with deviance, resistance and transgression, and a general rejection of acceptable norms)⁴⁶ and the law as a set of rules that implies at least some sense of

NAT’L NEWS (Feb. 10, 2019), <https://www.thenationalnews.com/arts-culture/art/colouring-the-streets-of-muscat-oman-s-graffiti-artists-leave-their-mark-1.824026>.

39. Criminal Damage Act 1971, c. 48, § 1 (UK) (codifying penalties ranging from 1,500 to 30,000 euros).

40. Code pénal [C. pén.] [Penal Code] arts. 322-1 to 322-4-1 (Fr.) (most recently amended in February 2023).

41. See, e.g., CAL. PENAL CODE § 594 (providing that graffiti carries up a sentence to up to three years); D.C. CODE § 22-3312.01; LA. STAT. § 14:56.4.

42. See Graffiti Control Act of 2001 (amended by the additional Graffiti Control Regulation of 2013) (S.A.).

43. See, i.e., Edwards, *supra* note 18, at 345, 348.

44. *Graffiti By-Law*, W. CAPE PROVINCIAL GAZETTE 6767 (July 9, 2010).

45. See Chandra Morrison, *Graffiti vs. the “Beautiful City”: Urban Policy and Artistic Resistance in São Paulo*, LONDON SCHOOL OF ECONOMICS: LATIN AMERICA AND CARIBBEAN CENTRE (Apr. 20, 2017), <https://blogs.lse.ac.uk/latamcaribbean/2017/04/20/graffiti-vs-the-beautiful-city-urban-policy-and-artistic-resistance-in-sao-paulo/> (referring to a mural erased by state contractors); Clotilde Kullmann, *De l’exposition de la Tour Paris 13 au concept de musée à ciel ouvert* [From the Exhibition at the Tour Paris 13 to the Concept of an Open-Air Museum], 34 TÉOROS REVUE DE RECHERCHE EN TOURISME (2015), <https://journals.openedition.org/teoros/2776> (referring to the demolition of Tower 13 in Paris in 2013 “after having hosted the largest group exhibition of street art”).

46. See TIM CRESSWELL, IN PLACE/OUT OF PLACE GEOGRAPHY, IDEOLOGY, AND TRANSGRESSION 39–40 (1994) (Cresswell writing about the appearance of graffiti in the streets of New York in the late 1970s, explains that the latter was considered and labeled as “obscene,” and something “dirty.” According to Cresswell, this criticism is related to (1) appropriateness, rather than the content of graffiti per se, and (2) the fact that graffiti is not simply deviance from rules (the “crucial

formality.⁴⁷ As McAuliffe and Iveson write in relation to the framing of graffiti as a crime:

in seeking to justify the link between graffiti and criminality, politicians and media commentators frequently draw upon the so-called 'broken windows' theory of urban disorder and crime. In its most basic form, the broken windows theory states that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken; that by breaking the codes of order we invite further disorder to occur.⁴⁸

Moreover, punishment for damage to cultural property is inherently part of laws aiming at the preservation of monuments and cultural property. Graffiti-related damage may be expressly stated in such laws,⁴⁹ like in Chile's recent amendments to its 1970 National Monument Law.⁵⁰ In many other cases, laws can be extremely rigid and punitive, as is the case with some Asian States,⁵¹ but also States where international tourism revenue is high.⁵²

Punishment for graffiti-related damages on cultural property is equally common in the practice of courts in many States around the world, including even the Vatican.⁵³ In the unique case of France, a property owner was found "guilty"

'where' of graffiti"), but rather, "a permanent despoiling of whole sets of meanings — neighborliness, order, property, and so on.").

47. *Id.* at 25–26.

48. McAuliffe & Iveson, *supra* note 9, at 130. *Cf.* Stephen Block, *Challenging the Defense of Graffiti*, in *Defense of Graffiti* in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART 440, 440–41 (Jeffrey Ian Ross ed., 2016) (arguing that the easy conflation of the two distinct street-based subcultures [gang subculture and graffiti subculture] could not be more distorted).

49. *See generally* Sara Rosano Birgit Kurtz, *Tear Down This Wall?: The Destruction of Sanctioned Street Art Under U.S. and Italian Law*, 768 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 767 (2021); Anne Sophie Hulin, *Les lieux du droit et les objets culturels* [Places of Law and Cultural Objects], 51 REVUE DE DROIT DE L'UNIVERSITE DE SHERBROOKE 465 (2022) (Fr.); Guillermo Fernández & Pedro Guerra, *Daños a la propiedad con sistemas de marcaje o Graffiti: Análisis de legislación comparada* [Property Damage with by Systems of Drawing or Graffiti: A Comparative Legislation Analysis], BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE 1, 1–10 (2020), https://www.bcn.cl/obtienearchivo?id=repositorio/10221/28364/1/BCN_GF_Danos_con_sistemas_de_marcaje_o_GraffitiFINAL.pdf (Chile) (comparing various civil and common law systems, including Chile, Germany, Belgium, Spain, and France, as well as under common law systems, U.S. and Canada).

50. Law No. 17.288 art. 38, National Monuments Law, Feb. 4, 1970 (Chile) (and amendments to the Chilean Penal Code (*para tipificar como delito de daños las inscripciones, pinturas o dibujos hechos en propiedad ajena sin autorización*) (June 20, 2019), <https://www.camara.cl/verDoc.aspx?prmTipo=SIAL&prmlD=48998&formato=pdf>; (more recently the municipality of San Diego has passed additional by-laws).

51. *See* Rujun Shen, *Two Germans to Be Caned, Jailed for Singapore Train Graffiti*, REUTERS (Mar. 5, 2017), <https://www.reuters.com/article/world/two-germans-to-be-caned-jailed-for-singapore-train-graffiti-idUSKBN0M10DK/>.

52. The Balearic Islands, for example, maintains fines and penalties up to 500,000 euros (100 million pesetas) for "grave" attacks to cultural property, defined as "any action or omission that produces irreparable damage of this type of property." *See* del Patrimonio Histórico de las Illes Balears arts.101(2), 108 (B.O.E. 1999, 12) (Spain).

53. *See* Nicole Winfield, *Vatican Court Convicts Climate Activists for Damaging Statue, Fines Them More Than 28,000 Euros*, ABC NEWS (June 12, 2023),

of graffiti and street artworks on his *own* property, because his property was *facing* a classified monument. The case concerned the transformation of an 18th-century property in the French countryside, close to Lyon, into a contemporary *Abode of Chaos* that was covered with graffiti and street art.⁵⁴ Graffiti may also be incidentally addressed under other areas of legislation ranging from laws on criminal liability for public morality and “social behavior,”⁵⁵ to breaches of urban planning and environmental regulations.⁵⁶ Graffiti may also involve a variety of other offences in terms of content and freedom of speech limitations (obscenity, criminal defamation, hate speech, etc.), but also in terms of means (typically petty crimes and misdemeanors such as trespassing of private property).⁵⁷

II. GRAFFITI AND STREET ART PROTECTION UNDER KEY INTERNATIONAL HUMAN RIGHTS TREATIES

A. *Graffiti, Street Art, and Creative Freedom*

Artistic freedom is the first provision pertaining to street artists as right-holders. This right is based on freedom of speech, which is, in turn, proclaimed in Article 19 of the Universal Declaration of Human Rights (UDHR). A separate provision exists also in Article 15(4) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), emphasizing that “art is free.” Further, the two most relevant provisions in international human rights law instruments are Article 19 of the International Covenant on Civil and Political Rights (ICCPR) on freedom of expression and Article 15, paragraph 3 of the ICESCR. The latter provides that “the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.” Creative freedom is also protected by regional instruments, as part of both freedom of expression and cultural rights.⁵⁸

Nonetheless, artistic freedom is not a *carte blanche* right that allows infringement upon private and public interests. Safeguards to this right are mentioned in Article 19, paragraph 3 of the ICCPR, allowing restrictions to

<https://abcnews.go.com/International/wireStory/vatican-court-convicts-climate-activists-damaging-statue-fines-100014338>.

54. See *Grenoble Court of Appeal*, Dec. 16, 2008, cited in Ehrmann and *SCI VHI v. France*, App No. 2777/10, 2 (June 7, 2011), https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_2777-10 (referring to Article L. 621-31 of the French Heritage Code); see also ELENI POLYMEPOULOU, ARTISTIC FREEDOM IN INTERNATIONAL LAW 82, 146–49 (2023).

55. See Anti-social Behaviour, Crime and Policing Act 2014, c.12 (UK).

56. See Clean Neighbourhoods and Environment Act 2005 (UK); see also Bonadio, *supra* note 13; Millie, *supra* note 19.

57. See Lovata & Olton, *Introduction*, in UNDERSTANDING GRAFFITI, *supra* note 11 (on the association of graffiti with illegality). Cf. Paula Westerberger, *Copyright Protection of Illegal Street and Graffiti Artworks*, in CAMBRIDGE HANDBOOK, *supra* note 18, at 55, 58 (distinguishing between types of “illegality”); Millie, *supra* note 19.

58. See Org. Am. States, Protocol of San Salvador, art. 14, Nov. 17, 1988, O.A.S.T.S No. 69 (recognizing the right to take part in the artistic life of the community).

speech based on both private rights (the “rights of others,” such as property) and public interests (for example, “public order”).⁵⁹ Although, what is important is whether such limitations are acceptable under human rights law,⁶⁰ particularly in light of the established scrutiny tests of human rights bodies such as the legality, necessity, and proportionality tests. The UN Human Rights Committee (UNHRC) highlighted these limitations to speech in its first General Comment on the interpretation of Article 19, in 1983,⁶¹ as well as in its more recent one.⁶² These considerations have also been reiterated in the rich jurisprudence of the Committee.⁶³ Additionally, restrictions to all types of expression should be construed *narrowly* and taken in the most restrictive sense.⁶⁴ In numerous judgments, the European Court of Human Rights (ECtHR) flags that “freedom of expression . . . is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”⁶⁵ As such, restrictions incorporating an absolute necessity test should also be the yardstick in assessing the legality of interference with graffiti and street artists’ rights.

59. U.N. Hum. Rts. Comm. [hereinafter UNHRC], *General Comment No. 23 on the Rights of Minorities* (art. 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 3 (Apr. 8, 1994), <https://documents.un.org/doc/undoc/gen/g94/162/61/pdf/g9416261.pdf>; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

60. See U.N. Comm’n Hum. Rts., *Rep. to the Econ. & Soc. Council*, U.N. Docs. E/L371 and E/CN.4/350, at 34 (June 23, 1949) (noting that from the early stages of drafting of the ICCPR, the debate between State representatives focused on the extent of acceptable limitations to this right); see also MARC BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 373 (1987).

61. UNHRC, *General Comment No. 10 on Freedom of Expression* (art. 19), 2 (June 29, 1983), <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf>.

62. See e.g., UNHRC, *General Comment No. 34 on Freedoms of Opinion & Expression* (art. 19), U.N. Doc. CCPR/C/GC/34, at 5–13, ¶¶ 21–52 (Sept. 12, 2011), <https://www.ohchr.org/sites/default/files/english/bodies/hrc/docs/gc34.pdf>; see also Michael O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34*, 4 HUM. RTS. L. REV. 627, 627–654 (2012).

63. See UNHRC, Communication No. 1772/2008, *Belyazeka v. Belarus*, U.N. Doc. CCPR/C/104/D/1772/2008 (June 6, 2012), <https://digitallibrary.un.org/record/728758?v=pdf>; UNHRC, Communication No. 780/1997, *Laptsevich v. Belarus*, U.N. Doc. CCPR/C/68/D/780/1997, ¶ 8.1, (Mar. 20, 2000), <https://digitallibrary.un.org/record/420310?ln=en&v=pdf> (“[A]ny restriction on freedom of expression must not be overly broad in nature, that is, it must be the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest whose protection is sought.”).

64. See, e.g., UNHRC, Communication No. 2137/2012, *Bakhytzhon Toregozhina v. Kazakhstan*, U.N. Doc. CCPR/C/112/D/2137/2012 (Nov. 20, 2014), <https://digitallibrary.un.org/record/788588?ln=en&v=pdf> (in relation to an activist who was convicted for organizing an art-mob event at the monument of Mahatma Gandhi).

65. *The Sunday Times v. United Kingdom* (No. 1), App. No. 6538/74, Judgment, ¶ 50 (Apr. 26, 1979) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57584>; *Observer and Guardian v. the United Kingdom*, App. No. 13585/88, Judgment, ¶ 59 (Nov. 26, 1991) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57705>.

In addition, graffiti and street art are unlikely to be considered lawful when it comes to the deeply held normative value of property rights. The origins of this *de facto* hierarchy are found in the formation of Western legal systems. Both the civil and common legal traditions have evolved around the notions of individualism and liberty,⁶⁶ in which property ownership is quintessential. In the civil law tradition, property rights and freedom of contract play a quasi—sacred role.⁶⁷ The human rights movement itself was born not only out of struggles against injustice, but also out of the French *bourgeoisie*'s resolve to guarantee property against public authorities' interference, as the last article of the French Declaration of 1789 shows.⁶⁸

Human rights bodies have also maintained a *de facto* hierarchy in favoring property rights. The oldest and most relevant case to come before the European Court of Human Rights concerned a well-known Swiss graffiti artist who was held criminally liable for damages of property and public disorder. In 1983, the court ruled against the artist and found no violation of the “freedom of expression” provision of the European Convention,⁶⁹ even though the artist claimed that the value of the graffiti on private property outweighed the interests of its owner.⁷⁰

In contrast, the UNHRC has never had the chance to interpret the question of street art specifically. This is because the case law of the Committee has not been well developed. There have been few chances to consider creative expression. One exception is the case of a Korean painter whose work was censored.⁷¹ The only other relevant case is one against Chile concerning the takedown of a large installation of banners in the Mapocho River, a spot for street artists with remarkable graffiti artworks in the breakwaters.⁷² In that case, the UNHRC elaborated on the form that reparations could take when artistic freedom

66. Craig M. Lawson, *The Family Affinities of Common-Law and Civil-Law Legal Systems*, 6 HASTINGS INT'L & COMP. L. REV. 85, 110 (1982); see also PETER STEIN & JOHN SHAND, *LEGAL VALUES IN WESTERN SOCIETY* (1976).

67. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 65 (3rd ed. 2007) (noting that “private property and liberty of contract were treated as fundamental institutions that should be limited as little as possible”).

68. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 [Declaration of the Rights of Man and of the Citizen] art. 17 (banning expropriation on the grounds that “the right to Property is inviolable and sacred”).

69. *N. v. Switzerland*, App. No. 9870/82, Comm'n dec. Oct. 13, 1983, DR 34, <https://hudoc.echr.coe.int/eng?i=001-74714>.

70. See Eleni Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, 16 HUM. RTS. L. REV. 511, 521 (2016) (noting, however, that the then European Commission of Human Rights did appreciate that the question of protection of illicit works “remains open-ended”).

71. UNHRC, Communication No. 926/2000, *Hak-Chul Shin v. Republic of Korea*, U.N. Doc. CCPR/C/80/D/926/2000 (Mar. 16, 2004), <https://juris.ohchr.org/casedetails/1107/en-US> (concerning the punishment of a Korean painter who made a work allegedly in breach of domestic national security law and finding a violation of art. 19 of the ICCPR).

72. Palmer, *The Battle for Public Space Along the Mapocho River, Santiago de Chile, 1964–2014*, in ROUTLEDGE HANDBOOK, *supra* note 12, at 256–57.

is violated, addressing the question of an effective remedy.⁷³ In particular, the Committee found that Chile was under an obligation to provide full reparation under Article 2(3) of the ICCPR, including *inter alia* to locate the missing banners and make a public acknowledgement of the violation of artistic freedom.⁷⁴

Therefore, the question that naturally arises is whether, today, human rights bodies such as the ECtHR and the UNHRC could potentially find in favor of street art on the basis of freedom of expression provisions. A twofold argument can be made. Firstly, interference with creative freedom is only permissible under exceptional circumstances in accordance with the interpretation of these bodies' provisions, and in light of the well-established necessity and proportionality tests. Secondly, the interpretation of the term "necessity," in Article 19 of the ICCPR and Article 10 of the ECtHR considers values present in "democratic society" (in fact, Article 10 directly mentions the term "democratic society"). Such values would involve, for example, giving more weight to minority and dissenting views, and considering the particular context of certain cases. The European Court, in particular, has reiterated hundreds of times, especially in Article 8 and Article 10 cases, that values such as pluralism, tolerance, and broadmindedness are the "hallmarks" of a democratic society.⁷⁵ It follows that not just States, but also individuals should be limited in their actions from interfering with others' rights.⁷⁶ In this regard, values should also be maintained in considering actions by non-State actors, including private individuals.⁷⁷ The only way that this is possible is to ensure that all voices are heard in democratic societies. In the words of the ECtHR, "it is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society.'"⁷⁸ Accordingly, it is this balance that is the essence of a

73. UNHRC, Communication No. 2627/2015, Claudia Andrea Marchant Reyes et al. v. Chile, U.N. Doc. CCPR/C/121/D/2627/2015, ¶¶ 9–10 (Nov. 7, 2017) [hereinafter UNHRC, *Reyes v. Chile*] (concerning demolition of a large installation in Mapocho river in Santiago, Chile, by the Chilean carabineros); see also Polymenopoulou, *supra* note 54, at 103; Sarah Joseph, *Art and Human Rights Law* in RESEARCH HANDBOOK ON ART & LAW 389, 401 (2020).

74. UNHRC, *Reyes v. Chile*, *supra* note 73, at 10. This is because positive obligations for States for those whose rights have been violated are entitled to prompt and adequate reparation, including restitution, compensation, satisfaction, or guarantees of non-repetition.

75. See, e.g., *Handyside v. United Kingdom*, App. No. 5493/72, Judgment, ¶ 46 (Dec. 7, 1976) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57499>; *S.A.S. v. France* [GC], App. No. 43835/11, Eur. Ct. H.R. (2014), Judgment, ¶ 128 (July 1, 2014) [hereinafter *S.A.S.*], <https://hudoc.echr.coe.int/fre?i=002-9952>.

76. Cf. Frédéric Mégret, *Nature of Obligations*, in INTERNATIONAL HUMAN RIGHTS LAW 97, 97 (2nd ed. 2017); ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 832–33 (3rd ed. 2020).

77. See, e.g., ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).

78. *S.A.S. supra* note 75, at ¶ 128; *Chassagnou and Others v. France* [GC], App. Nos. 25088/94; 28331/95; & 28443/95 (1999), Judgment, § 113, (Apr. 29, 1999), <https://hudoc.echr.coe.int/eng?i=001-58288>. Cf. *Young, James and Webster v. United Kingdom*, App. Nos. 7601/76; 7806/77, Judgment, ¶ 63 (Aug. 13, 1981) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57604>; *United Communist Party of Turkey and Others v. Turkey* [GC], App. No. 19392/92, Eur. Ct. H.R. (1998), Judgment, ¶ 45 (Jan. 30, 1998), <https://hudoc.echr.coe.int/eng?i=001-58172> (noting that pluralism and dialogue "must also be based

democratic society, and not an assumption of one right's prevalence over another. Therefore, in scenarios where private entities (such as property owners or development companies) are liable for taking down illicit graffiti and street art, the balancing between the right to property on the one hand, and private interests, on the other should also be considered in light of these values.

B. Graffiti, Street Art, and the Right of Authors to Benefit from Economic and Moral Rights

Intellectual property rights are a solid part of international human rights law.⁷⁹ The rights of authors are recognized in the International Bill of Rights (including, Article 27 (2) of the Universal Declaration of Human Rights (UDHR)⁸⁰ and Article 15 (1)(c) of the ICESCR, which guarantees authors' rights, both moral and economic rights). This, however, does not mean that any graffiti work automatically benefits from copyright protection or gives rise to moral rights.⁸¹ The interpretation of these provisions is broad and substantially different from IP law. Under copyright law, for example, street artists' rights are *in principle* filtered through arguments of own illegality—such as illegal placement, or illegality of circumstances in which the work was created (the so-called 'unclean hands' doctrine under US copyright law).⁸² Human rights law does not distinguish between authors of commissioned and illicit works—the same degree of protection is offered to “all human beings.”⁸³ Both Article 15 of the ICESCR and Article 27 (2) should be read in conjunction with Article 27 (1) of the Universal Declaration of Human Rights (UDHR), which firmly incorporates cultural rights as human rights for everyone.⁸⁴ However, the aforementioned balancing exercise warranted under human rights law is more likely to consider the context of a particular case in a more decisive manner, including cultural rights. This is because State practice in relation to granting IP rights to graffiti and street art is still not consolidated.

on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society”).

79. See, e.g., Peter Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 SMU L. REV. 37–95 (2016) (discussing linkages). Cf. Farida Shaheed (Special Rapporteur) [S.R.], UNHRC Rep. of the S. R. in the Field of Cultural Rights, *The Right to Freedom of Artistic Expression & Creativity*, ¶¶ 6–8, U.N. Doc A/HRC/23/34, (Mar. 14, 2013); Farida Shaheed (Special Rapporteur), UNHRC Rep. of the S.R. in the Field of Cultural Rights, *Copyright Policy and the Right to Science and Culture*, U.N. Doc A/HRC/28/57 (Dec. 24, 2014).

80. UDHR, art. 27 ¶ 2 (proclaiming the protection of one's moral and material interests “resulting from any scientific, literary or artistic production of which he is the author”).

81. Berne Convention for the Protection of Literary and Artistic Works (as amended in 1979), art.6 bis; see also Cyrill Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L. J. 353, 355 (2006).

82. See, e.g., Cloon, *supra* note 13, at 61–62; Lerman, *supra* note 13, at 332; Rosano & Kurtz, *supra* note 49, at 776.

83. Cf. UDHR, art. 1: “All human beings are born free and equal in dignity and rights”.

84. UDHR, art. 27 (stating “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”).

It does seem in fact that both civil and common law jurisdictions are increasingly sympathetic to street art copyright claims.⁸⁵ In the United States, in particular, the question of moral rights protection of street artists has been extensively discussed as part of the Visual Artists Rights Act (VARA) litigation, which, albeit not relevant to illicit graffiti, provides an illustration of a gradual endorsement of street art as mainstream (the most famous case in this respect is arguably the *5Pointz* case, whereby a district New York Court found VARA protections applicable and awarded the plaintiffs over six million dollars-worth of damages for the irreparable harm they suffered).⁸⁶ However, moral rights protections for street artists, especially in civil law countries such as France⁸⁷ and Germany⁸⁸ remain minimal.

The UN Committee on Economic, Social and Cultural Rights (ESCR), has noted in respect of limitations against authors' rights that these "must be proportionate" and "compatible with the very nature of the rights protected in Article 15(1)(c), which lies in the protection of the personal link between the author and their creation."⁸⁹ In other words, under human rights law, the question raised is not whether graffiti and street art are copyrightable (which may be the case in some jurisdictions,⁹⁰ and more recently, Brazil),⁹¹ but rather whether the interference with a graffiti is justified under human rights standards. In this respect, one should consider not just the individual rights of the artists, but also those of the public, and communities' rights. The ESCR Committee, for example, has stipulated in its general comment on authors' rights, in its examination of Article

85. Bonadio, *supra* note 13, at 17. Cf. Marta Iljadica, *Works and Walls: Graffiti Writing and Street Art at the Intersection of Copyright and Land Law* in CAMBRIDGE HANDBOOK, *supra* note 18, at 81–82.

86. *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020) (affirming *Cohen v. G & M Realty (Aerosol Art Center inc.)*); Rosano & Kurtz, *supra* note 49, at 769–76 (discussing *5Pointz* in light of VARA); see also Polymenopoulou, *supra* note 54, at 149–52 (discussing the 'legacy of the *5Pointz*'). Cf. Hulin, *supra* note 49, at 505–06 (referring to Canadian courts, e.g., to *Vaillancourt v. Carbone*, [1999] R.J.Q. 490 (C.S.), (ruling that a property owner was obliged to pay 150,000 Canadian dollars in damages for destroying the sculptural *ensemble* of Armand Vaillancourt).

87. Cf. *Tribunal de Grande Instance de Paris*, 20/08482 (Jan. 21, 2021) (finding no protection when it comes to 'liberte de panorama,' concerning a street artist who had created a work entitled *La Marianne asiatique*).

88. Cf. Ines Duhanic, *Rip Me to Pieces! No Moral Copyright Protection for the Destruction of Site-Specific Art in Germany*, 69 GRUR INT'L, 1234, 1234–41 (2020) (regarding the installation 'Hhole').

89. U.N. Comm. on Econ., Soc., & Cultural Rts. [CESCR], *General Comment No. 17 on the Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author* (art. 15, ¶ 1(c)), U.N. Doc E/C.12/GC/17, ¶¶ 22–24 (Jan. 12, 2006), (discussing limitations).

90. *Re Pictures on the Berlin Wall* (Case I ZR 68/93) [1997] ECC 553; see, e.g., Iljadica, *supra* note 18, at 107–08; Marc Mimler, *Street Art, Graffiti and Copyright: A German Perspective*, in CAMBRIDGE HANDBOOK, *supra* note 18, at 188–206; Westenberger, *supra* note 57, at 60; Zayad, *supra* note 13, at 169–72; Lerman, *supra* note 13, at 332; See also Judgment of the Brazilian Super. Ct. Just., 25.08.2020, Special Appeal No. 1.746.739/SP (Aug. 10, 2021) (Braz.).

91. *Commercial Reproduction of Works Permanently Located in a Public Space*, 70 GRUR INT'L 889, 889–93 (Sept. 2021), (pointing to Brazilian Law No 706/07 (Aug. 10, 2021)).

15(1)(b) ICESCR, that the rights of authors cannot be ‘isolated’ from other socio-economic rights, including the rights of the public to access art.”⁹² Taken even further, obligations to preserve authors’ moral rights could also encompass minimizing vandalism, such as random graffiti tags (*i.e.*, graffiti without aesthetic value), in order to preserve authors’ moral rights, as well as to preserve the right of the public to access that art.

It should also be noted that the argument on street art’s perceived antithesis⁹³ to intellectual property norms is entirely misleading. Banksy, for example, has recently agreed to allow his legal team to initiate lawsuits “to stop unauthorised merchandising.”⁹⁴ and this, as Bonadio says, “despite saying copyright is for losers.”⁹⁵ Firstly, graffiti and street art, akin to other arts, is shaped through the practice of artists. Artists come before art and artworks, and it is up to them to oppose appropriation of their artworks, move them to galleries, sell or donate them for a good cause.⁹⁶ Secondly, a clear distinction should be made between in-circle appropriation and appropriation by outsiders. It is one thing for artists to copy each other in their artistic practice, but another to allow brands and fashion designers to appropriate their work.⁹⁷ The use and reuse of the similar motifs within the art world is not only legitimate and fairly common, but also an indispensable learning tool. Influences are quite common in all forms of art, as well as formal exchanges between art circles. This is especially true for successful street artists who spawn imitators of their individual styles. For example, as early as 1979, in one of the early graffiti stories in the United States, an artist named Taki 183 claimed that he had spawned “hundreds of imitators.”⁹⁸ This is also true of Banksy, who has countless imitators today. As *Wooster Collective*, an informal group which “spotlights street art around the world,” emphasizes, most artists “start by copying others before they develop their own style.”⁹⁹

92. CESCR, *General Comment No. 17*, *supra* note 89, at 35 (“In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration”).

93. Roundtree, *supra* note 9, at 967 (noting that many street artists “choose not to use the legal system for the IP controversies that arise in the industry” and that this “rebellious nature of graffiti” may also be the reason why street artists do not recur to legal means to vindicate copyright claims).

94. Enrico Bonadio, *Banksy Finally Goes to Court to Stop Unauthorised Merchandising, Despite Saying Copyright is for Losers*, CONVERSATION (Feb. 25, 2019), <https://theconversation.com/banksy-finally-goes-to-court-to-stop-unauthorised-merchandising-despite-saying-copyright-is-for-losers-112390>.

95. *Id.*

96. *Cf.* Bonadio, *supra* note 15 (CONVERSATION).

97. *See* Smith, *supra* note 11, at 289 (arguing “introducing intellectual property rights into this culture [of street art], where street artists may be sued by other street artists under VARA or copyright law for intervening in another artist’s work, could significantly change the culture and norms of street art and harm further creation”); Iljadica, *supra* note 18, at 1 (arguing that ‘street art has its own rules’).

98. Tyson Mitman, *Advertised Defiance: How New York City Graffiti went from “Getting Up” to “Getting Over”* in UNDERSTANDING GRAFFITI, *supra* note 11, at 195.

99. Pitchaya Sudbanthad, *Roundtable: Street Art*, MORNING NEWS (Mar. 23, 2005), <https://themorningnews.org/article/roundtable-street-art> (transcript of the interview with Wooster Collective).

C. *Street Art and the Right to Participate in Cultural Life*

The right to participate freely in cultural life is a crucial element in informing the protective framework for street art. Creative freedom is part of the right to participate in cultural life, as guaranteed in Article 15, paragraph 1, of the ICESCR. The UN CESCR has never expressly discussed 'street art' in its general comments. It has, however, held the view that States have a general obligation to facilitate access to arts in the public space.¹⁰⁰ As pointed out in 2013 by then UN Special Rapporteur for Cultural Rights, Farida Shaheed "[t]he use of public space for art is crucial as it allows people, including marginalized people, to freely access, enjoy and sometimes contribute to the arts, including in its most contemporary forms."¹⁰¹ In the UN Committee on the Rights of the Child's elaboration of Article 31 of the Convention on the Rights of the Child regarding street art specifically for children, it noted that street art contributes to generating a "culture of childhood,"¹⁰² and is a particularly important element for children's physical, emotional, cultural, and sentimental development.¹⁰³

Moreover, art is part of the vast ensemble of elements that are unique to a culture and in this sense, artistic expressions are part of collective cultural identities too. Hence, on the one hand, artistic freedom, including that of artists who work in the public space, serves as a precondition to enable full participation in cultural life, not only for street artists themselves (who contribute to cultural life),¹⁰⁴ but also for members of the public who should be given the opportunity to learn about street art and graffiti as a form of expression in the public space,¹⁰⁵ as well as about their own culture.

Under international human rights law, States must take positive measures to ensure that such preconditions are in place to facilitate participation and access to

100. U.N. Comm. Econ. Soc. & Cultural Rights [CESCR], *General Comment 21 on the Right of Everyone to Take Part in Cultural Life (art. 15, § 1(a) of the ICESCR)* (Dec. 21, 2009), at 4 ¶ 16, U.N. Doc. E/C.12/GC/21.

101. Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, ¶ 65.

102. U.N. Comm. on the Rts. of the Child, *General Comment 17 on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (art. 31)*, U.N. Doc CRC/C/GC/17, at Section III (Apr. 17, 2013), <https://digitallibrary.un.org/record/778539> (Significance of article 31 in children's lives: 'Children's play generates a "culture of childhood," from games in school and in the playground to urban activities such as playing marbles, free running, street art and so on').

103. *Id.* ¶ 15.

104. CESCR, *General Comment No. 21*, *supra* note 100, at 4 ¶ 15 (c) (noting that "contribution to cultural life refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community"); *See also* JANUSZ SYMONIDES, HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT (2003); JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 305–06 (2015); Patrice Meyer-Bisch, *Les Droits Culturels: Forment ils une Categories Specifique des Droits de l'Homme?*, in LES DROITS CULTURELS: UNE CATEGORIE SOUS-DEVELOPPEE DE DROITS DE L'HOMME ? 18–19 (Patrice Meyer-Bisch ed. 1993) [in French]; Julie Ringelheim, *Cultural Rights*, in INT'L HUM. RTS. L. 283 (2014).

105. CESCR, *General Comment No. 21*, *supra* note 100, at 4 ¶ 15 (b) ("Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication").

cultural life.¹⁰⁶ In this regard, it is essential to recognize that graffiti and street art may be found not only in central squares and busy streets, but also on sterile and abandoned buildings and alleys—typically also on trains and tumbledown houses and ruins—where persons with low income or homeless persons may live. Therefore, States should have obligations to make good use of this public space.¹⁰⁷ Secondly, the right to practice art in the public space has a strong collective dimension in the case of street artists who belong to minority or indigenous groups, and whose art often tells the story of cultural resistance and political dispossession.¹⁰⁸ The practice of arts in those cases, as well as the participation in the artistic life of *their* community, is a central element of the consolidation, preservation, and strengthening of their collective cultural identity.¹⁰⁹ At the same time, the exercise of artistic freedom in the case of those street artists who advocate in favor of their collective rights should enjoy additional guarantees. This is also full part of the function of artistic freedom, which is precisely to “contest[] meanings and revisit[] culturally inherited ideas and concepts.”¹¹⁰

III. CONTEXTUALISING OFFENSES UNDER HUMAN RIGHTS LAW

So far, this Article has established that the rights of graffiti and street artists to create and benefit from their moral and economic rights, are protected under human rights law; that artists’ rights should be balanced against other rights and public interests, in light of the necessity and proportionality tests; that values such as pluralism, broadmindedness and tolerance should be considered in that balancing exercise; and that the rights of the public, as well as communities’ cultural rights, should also be taken into account in the event of an infringement of artists’ rights. What remains to be examined is whether there are contextual criteria that human rights bodies might use to assess the legitimacy of infringing upon the aforementioned rights (i.e. creative expression, authors’ rights, and the rights of the public). Such contextualization is not unknown to the ECHR. In interpreting the European Convention, the ECHR may establish lists of criteria and safeguards with respect to violations of qualified rights such as expression and privacy.¹¹¹ This is because under the ‘balancing’ test, human rights bodies

106. *Id.* at 2 ¶ 6.

107. *Cf.* Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, at 14, ¶ 65 (noting that “the use of public space for art is crucial as it allows people, including marginalized people, to freely access, enjoy and sometimes contribute to the arts, including in its most contemporary forms”).

108. *See generally* Smith, *supra* note 11.

109. *Cf.* Yvonne Donders, *A Right to Cultural Identity in UNESCO*, in CULTURAL HUM. RTS. 317, 331 (Francioni & Scheinin, eds., 2008).

110. Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, at 3 ¶ 3.

111. *Cf.* Axel Springer AG v. Germany, App. No. 39954/08 [GC] (2012), Judgment (Feb. 7, 2012), <https://hudoc.echr.coe.int/fre?i=001-109034> (establishing a list of contextual criteria defining the legitimacy of privacy breaches vis a vis article 10 protection).

will eventually also need to consider the particular context and circumstances of an artwork's creation, especially given that the scope of these rights is defined by reference to other rights.

A. What is the Significance of the Aesthetic Quality of the Works at Stake?

The first criterion that should be considered in the balancing exercise between artists' rights and the rights of others (*i.e.* public interests) is the aesthetic *value* of the work. Weighing value in this way could eventually play in favor of preservation, or even, decriminalization of graffiti. Doing so would also resonate well with public perceptions: in most peoples' minds there is a difference between graffiti as vandalism and aesthetically beautiful street art. For example, the widespread graffiti slogan "Putin is a d—head" that has been scrawled on virtually every wall in Ukraine undoubtedly falls within the definition of graffiti but, arguably, is not what most people would call "art." Contrastingly, *Slave Labour*, which depicts a child hunched over a sewing machine making a string of Union Jacks,¹¹² is perceived as genuine street art.¹¹³ Likewise, graffiti art (and not throw ups) is probably what most art educators have in mind when discussing the educational value of street art¹¹⁴ or expanding traditionally constrictive art curricula in a way that incorporates street art.¹¹⁵

This is a tempting argument because value-based assessments are unavoidable in all spheres of cultural policy, including art funding, residence grants, and other chances for governmental support. From the perspective of the art world in the streets, however, a value distinction between art is fairly fluid—if a distinction at all. However, this line of argumentation is a minefield from a freedom of speech perspective. This is not only for philosophical reasons related to the impossibility of defining universally acceptable criteria of value,¹¹⁶ but also because the subjectiveness of the value judgment. The latter can be easily disguised and used for governmental censorship or collateral censorship when imposed by private parties, particularly intermediaries. In the United States¹¹⁷

112. Adam Taylor, "Khuiilo": *The offensive term that has attached itself to Putin*, WASH. POST, (June 17, 2014) <https://www.washingtonpost.com/news/worldviews/wp/2014/06/16/khuiilo-the-offensive-term-that-has-attached-itself-to-putin/>.

113. Susan Hansen & Flynn Danny, 'This is Not a Banksy!': *Street Art as Aesthetic Protest*, 29 CONTINUUM J. MEDIA & CULTURAL STUD. 892, 898 (2015); Salib, *supra* note 20.

114. This perception is corroborated by the fact that Wood Green residents held protests in North London carrying signs that read "Bring back our Banksy" after the work mysteriously disappeared one day. See Jessie L. Whitehead *Graffiti: The Use of the Familiar*, 57 ART EDUC. 25, 32 (2004); Hansen & Danny, *supra* note 113 at 898.

115. James Daichendt, *Artist-driven Initiatives for Art Education: What We Can Learn from Street Art*, 66 ART EDUC. 12, 12 (2015).

116. Amy Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L. J. 1359, 1360 (1990).

117. *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing the three-part test to establish obscenity, of which the third feature is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"); Adler, *supra* note 116, at 1359–60.

and other common law jurisdictions,¹¹⁸ artistic value is a reason not to exclude works that would otherwise be considered as indecent, obscene, or pornographic from the protective scope of artistic freedom. Essentially, value-based judgments risk acting as limitations to the exercise of free speech when taken in its most liberal sense. Who decides what is a work of value? What should the criteria be to understand value and why should “value” be a significant parameter, given the evolution of contemporary art? This is even more problematic in the case of street art because of its subversive content.¹¹⁹ Even when objective criteria are defined to assess a work’s value (such as *artistic excellence*, for instance, as in the case of the current NEA funding schemes),¹²⁰ a subjective judgment is involved, and the viewpoint conveyed by an artwork, is necessarily intermingled with the assessment of the artwork’s merit and views entrenched in one or another theory of art.¹²¹ Subsequently, the “value” criterion, albeit close to public perceptions about art, is not a criterion that could be sustained in international human rights law—in part because it is a dangerous one. An example is the aforementioned judgment in *Ehrmann*.¹²² In this case, the Court held that the State’s interests in urban planning and monument preservation were lawful and, in fact, superior to the owner of the property, who subsequently lost the case. This judgment implies there is an unavoidable possibility of the legislator making subjective value judgments about works of art. This would essentially allow them to sort State-favorable art from art that is not as a basis of value and therefor allow censorship.

118. See PAUL KEARNS, FREEDOM OF ARTISTIC EXPRESSION: ESSAYS ON CULTURE AND LEGAL CENSURE 10 (2014) (noting that British courts grant the possibility to submit “overriding artistic merit” as a defence to charges of either public morality, or obscenity).

119. See, e.g., Feiten, *supra* note 35, at 221.

120. National Council on the Arts, 20 U.S.C.A. § 955 (f)(1) (Advisory functions [of the National Council on the Arts]; policies, programs, and procedures; recommendations; authority of Chairperson; action by Chairperson pursuant to delegation of authority); see also *Grants for Arts Projects: Application Review*, NAT’L ENDOWMENT FOR ARTS (last visited July 22, 2024), <https://www.arts.gov/grants/grants-for-arts-projects/review-criteria> (noting that “applications will be reviewed on the basis of the criteria below, with equal weight assigned to artistic excellence and artistic merit” and that “the review criteria reflect the NEA’s priorities and are aligned with [the NEA] strategic plan”); *Nat’l Endowment Arts v. Finley*, 524 U.S. 569 (1998) (discussing the constitutionality of 20 U. S. C. § 954(d), concerning the NEA funding schemes, which provided at the time that “(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public”).

121. Adler, *supra* note 116, at 1365–67 (discussing *Miller v. California* and noting that the “The Miller test presupposes a theory of art”); *id.* at 1373 (noting that “any post-modern artist who uses sexually explicit material could be at risk under Miller, and the potential chilling effect is incalculable”). Cf. Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 389–93 (2017); Polymenopoulou, *supra* note 54, at 172–74; Svetlana Mintcheva, *When words and Images Cause Pain: The Price of Free Speech*, in CENSORING CULTURE: CONTEMPORARY THREATS TO FREE EXPRESSION (2006).

122. *Ehrmann*, *supra* note 54, at 12–13 (stating that “the general interest, which in the present case is constituted by the protection of heritage, requires that the applicants comply with certain planning regulations”).

B. Political Content and Subversive Graffiti as a Means of Resistance

In carefully defined contexts, graffiti may also be a peaceful way to express political ideals, namely as a way to protest and express dissent and resistance. Such graffiti and street art should stand better chances against its removal, since it is an especially important means of expression for marginalized and disenfranchised people with no other means of expression,¹²³ and those without access to art.¹²⁴ Graffiti and street artists working in extremely repressed conditions should be additionally granted the protective status of human rights activists. This is especially true in contexts where the political situation is fragile. For example, when political violence and conflict rise, street art fulfills an additional role—that of activism in societies where the media are heavily regulated by the State. In these cases, street art should always be protected in the public sphere, whether commissioned or illicit. Few examples corroborate this view. In a case involving graffiti artists vandalizing walls in the streets of Beirut, for example, a Lebanese court found that graffiti of political content is a legitimate exercise of the artists' peaceful protest, and freedom of creative expression.¹²⁵ Inversely, taking down street art in the context of political unrest and arresting street artists—as was the case of Egypt during the Arab Uprisings¹²⁶—should entail State responsibility for violations of these rights.

That said, a contextual approach should always be considered. For example, a difference should be made between private and public property. Destruction of graffiti and street art on public or abandoned property should be considered a violation of freedom of speech regardless of its illicit creation or placement. In this scenario, street artists are not only rights holders of freedom of speech guarantee but also political protesters—and possibly human rights defenders. The ECtHR in particular places a lot of weight on the political nature of a work, action, or form of expression and its contribution to the public debate, particularly when humorous or satirical works are concerned. This Court for example, has sanctioned satirical interventions in the public space, as well as light forms of vandalism, when they express a form of protest.¹²⁷ Also, the Human Rights

123. See Roundtree, *supra* note 9, at 963 (stating “rebellion refers to the value in violating social norms, clashing with authority,” and “bucking the establishment”); Assaf-Zakharov & Schnetgok, *supra* note 9, at 126; Millie, *supra* note 19, at 1282.

124. Cf. Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, at 14 ¶ 65 (noting that “creations are used in public spaces as a peaceful way of manifesting dissent or alternative viewpoints”).

125. *Pub. Prosecutor v. Thebian and Nassereddine*, Beirut First Instance Ct. (Nov. 29, 2019) (judgment in Arabic and English summary available at <https://globalfreedomofexpression.columbia.edu/cases/thebian-and-nassereddine-v-public-prosecutor/>).

126. John Lennon, *Writing with A Global Accent: Cairo and The Roots/Routes of Conflict Graffiti*, in UNDERSTANDING GRAFFITI, *supra* note 11, at 59, 62–72.

127. See *Faber v. Hungary*, App. No. 26005/08 & 26160/08, ¶ 41 (June 12, 2012) (Second Section), <https://hudoc.echr.coe.int/eng?i=001-112446>; *Alekshina v. Russia*, App No. 38004/12 (Sept. 17, 2018) (Third Section), <https://hudoc.echr.coe.int/eng?i=001-184666>; Polymenopoulou,

Committee, since its early case law, has found that when States punish “subversive activities” they must explain their scope and meaning¹²⁸ and substantiate the relevant offences with a “concrete factual analysis.”¹²⁹ In a case against Azerbaijan,¹³⁰ protestor applicants were caught “vandalizing” a statue during protests in Baku. The Court held *inter alia* that the applicants’ Article 10 claim was relevant because the interference with the applicants’ rights to freedom of expression was “grossly arbitrary and incompatible with the rule of law.”¹³¹ Graffiti on private property, however, would likely not enjoy the same protection.¹³² This is because community-based decision making and self-help measures taken by property owners with damaged walls could create tensions within and among communities.

An affirmative defense against criminal prosecution of graffiti artists¹³³ is likely to fail in low-income contexts, particularly where liberal values are endangered. In these contexts, the burden to erase or demolish graffiti and street art is shifted from the State to property owners. This essentially benefits rich and privileged property owners, who can afford such self-help measures, since graffiti removal is generally expensive. It should be held that the content of graffiti or street art should be evaluated under general human rights standards, which accept general restrictions and prohibit hate speech and war propaganda.¹³⁴ For example, content-wise, general limitations to freedom of speech should also apply regardless of the actual medium used to express an opinion. For instance, in a case against Armenia, the ECtHR did not even examine the question of creative freedom in the case of homophobic graffiti used to harass and intimidate a leading

Expressing Dissent: ‘Gag Laws’, Human Rights Activism and the Right to Protest, 32 FLO. J. OF INT’L L. 337, 366–68 (2021) (on minor disturbances and light forms of vandalism).

128. UNHRC, Communication No. 33/1978, *Leopoldo Buffo Carballal v. Uruguay*, U.N. Doc. CCPR/C/OP/1 at 63 (Mar. 27, 1981); *see also* UNHRC, Comm’n No. 1128/2002, *Rafael Marques de Morais v. Angola*, U.N. Doc. CCPR/C/83/D/1128/2002, (Mar. 29, 2005).

129. UNHRC, Communication No. 28/1978, *Luciano Weinberger Weisz v. Uruguay*, U.N. Doc. CCPR/C/11/D/28/1978, (adopted Oct. 29, 1980).

130. *Ibrahimov & Mammadov v. Azerbaijan*, App. No. 63571/16, Judgment, ¶¶ 10, 12, 14, 24, 50, 144 (Feb. 13, 2020) (Fifth Section), <https://hudoc.echr.coe.int/eng?i=001-200819>.

131. *Id.* ¶¶ 173–74; *see also* Polymenopoulou, *supra* note 127, at 336–37.

132. *See* Carroll, *supra* note 21, at 1347–48 (suggesting that a defense against governmental interference could even include “measures of self-help in the hands of community members” – namely, property owners, who would not be prevented according to Carroll, “from either seeking civil remedies for the damage caused by the graffiti or from engaging in the self-help remedy of removing graffiti from private property.” According to Carroll, such approach “enforces a bottom up democratic process that seems somehow poetically fitting for street speech such as graffiti” – although in fact it does not offer “a guaranteed platform for speech, but only protection from governmental interference in the form of a criminal conviction” while “in public forums, the defense would arguably carry more protection, though even this may be limited.”).

133. *Id.* (suggesting that “a vision of democracy based on an open exchange of ideas and a free debate of values that occurs both in formal spheres of government, but also in the informal sphere of the citizenry”).

134. Int’l Covenant on Civ. & Pol. Rts. [ICCPR], *opened for signature* Dec. 16, 1966, 1057 U.N.T.S. 171; UNHRC, *General Comment No. 34*, *supra* note 62, at 5 ¶ 21.

figure of LGBT communities in Yerevan.¹³⁵ However, in a case against Georgia on the arrest of applicants for stenciling on the wall of a Church the phrase “F* homophobia,” the freedom of expression aspect, although claimed, was not found to be relevant.¹³⁶

C. Communities' Participation and Urban 'Legitimacy'

For street art that is evidence of large community engagement, the benefit of the human rights approach is twofold. First, the cultural aspects of graffiti and street art, as well as the need for safeguarding and preservation are taken into account. Examples include the *Great Wall of Los Angeles* in California, a mural painted on the wall adjacent to a Flood Control Channel, representing the history of ethnic peoples of California,¹³⁷ and the great murals in Pretoria and Durban, South Africa, depicting the South African struggles of independence and fight against apartheid.¹³⁸ For such artworks of the public space, obligations to safeguard and maintain may arise, regardless of whether they are commissioned or unsolicited.¹³⁹

The question that arises is whether positive obligations to preserve meaningful and culturally relevant street artworks that express the history of communities and human rights struggles also apply to States in this case. Such safeguarding obligations could be deduced, to the extent of a State's available resources, as per standards related to the art of the public space. Former Special Rapporteur on cultural rights, Karima Bennouna, noted in her 2019 report on culture and the public space that “[p]ublic authorities should promote the presence of arts in public spaces as part of the right to have access to a wide variety of artistic expression.”¹⁴⁰ At this point, one may wonder whether these obligations exist even if that graffiti or street art is not a commissioned work. In this regard, it is important to emphasize that the public does not distinguish between lawful and unlawful artworks. Removal of works from the public space, whether they are made lawfully or not, infringes upon the right of the public to view or otherwise access the artwork. This is especially relevant given that human rights

135. *Oganezova v. Armenia*, App. No. 71367/12;72961/12, Judgment, (May 7, 2022) (Fourth Chamber), <https://hudoc.echr.coe.int/fre?i=001-217250>.

136. *Dzerkorashvili & others v. Georgia*, App. No. 70572/16, Judgment, (March 2, 2023) (Fifth Chamber), <https://hudoc.echr.coe.int/eng?i=001-223292>.

137. Maliha Ikram, *Long-Term Preservation of Public Art: From Cultural Heritage to the Confederacy*, 14 NW. J. L. & SOC. POL. 69 (2018) (arguing that the government should maintain such property under the public trust doctrine).

138. Sabine Marschall, *A Postcolonial Reading of Mural Art in South Africa*, 14 CRITICAL ARTS 96, 101 (2000) (noting that while writing on these projects a journalist coined the term “official graffiti” to denote – and “urban art tolerated by officials”).

139. Ikram, *supra* note 137, at 89 (discussing long-term preservation of public art and arguing that ‘In general, when public art is determined to be a mainstay of a locality, then the public art should be held in public trust for the people’).

140. Karima Bennouna (Special Rapporteur) [S.R.], UNHRC Rep. of the S.R. in the Field of Cultural Rights, ¶ 63, U.N. Doc A/74/255 (July 30, 2019).

law warrants the economic accessibility (*i.e.*, affordability) of economic, social, and cultural rights. States have obligations to provide minimum access to arts. This is because “creative activities” are fully part of the right to access and freely participate in cultural life, which is protected in turn under Article 15(1)(a) of the ICESCR.¹⁴¹

As the UN Committee on ESCR has stipulated in General Comment 21, the ICESCR provides for obligations of all States both to access and participate in cultural life.¹⁴² Among other things, this covers not only “the right to benefit from the cultural heritage and the creation of other individuals and communities,”¹⁴³ but also the “right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community.”¹⁴⁴ In accordance with the Committee’s views on cultural rights, States should ensure availability of artistic expressions in the public space, in order to fully realize the right of everyone to take part in cultural life, and ensure that “arts in all forms,” as well as “shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets” are open to everyone.¹⁴⁵ This, in turn, implies that States should not take deliberate measures to take down street art that is popular in certain localities, but rather preserve it, and ensure it continues to be accessible to everyone. In practice, policy and decision making in cultural matters is likely to preserve such works either by retrospectively legitimizing them,¹⁴⁶ by giving citizens the right to vote as to their fate,¹⁴⁷ or by deciding to restore them.¹⁴⁸ Likewise, when street art is likely to bring substantial touristic revenues to local municipalities, local authorities and property owners are in practice likely to grant permissions to graffiti artists. This is evidenced in Mexico and other Latin American States, which are gradually also changing their legal frameworks in ways that aim at “legalizing” graffiti.¹⁴⁹

141. CESCR, *General Comment No. 21*, *supra* note 100, at 2 ¶ 4.

142. *Id.* at 2 ¶ 3.

143. *Id.* at 4 ¶ 15(b).

144. *Id.* at 4 ¶ 15(c).

145. *Id.* at 5 ¶ 16(a).

146. Peter Levy, *Who Owns Street Art? Missing Banksy Mural Sparks Debate*, WORLD CRUNCH (Sept. 22, 2016), <https://worldcrunch.com/culture-society/who-owns-street-art-missing-banksy-mural-sparks-debate> (noting that Cheltenham, UK, chose to legitimise Banksy’s *Spy Booth* retrospectively even though part of the work was drawn on public property - and in fact, a heritage listed monument).

147. Caroline Davies, *Bristol Public Given Right to Decide Whether Graffiti is Art or Eyesore*, GUARDIAN (Aug. 31, 2009), <https://www.theguardian.com/artanddesign/2009/aug/31/graffiti-art-bristol-public-vote>.

148. Tessa Solomon, *Damaged Banksy Mural in Venice Will Be Restored, Defying Local Critics*, ART NEWS (Oct. 5, 2023), <https://www.artnews.com/art-news/news/damaged-banksy-mural-venice-restored-controversy-1234681275/>.

149. See, e.g., Patricia Covarrubia, *Legalizing Graffiti: Chilean Chamber of Deputies Says YES!* (Oct. 9, 2018), <https://iptango.blogspot.com/2018/10/legalizing-graffiti-chilean-chamber-of.html?m=0>; John Fox, *In Mexico City, Urban Walls Are an Artists’ ‘Battleground’*, EXP MAG (Jan. 1, 2020), <https://expmag.com/2020/01/in-mexico-city-urban-walls-are-an-artists-battleground/>.

CONCLUSION

There are indeed trends in the law that indicate States are granting better protection to graffiti and street art, but these trends are scarce and limited to intellectual property rights, primarily copyright law. There is no evidence that the decriminalization of graffiti is a plausible scenario in the near future. On the contrary, unless popular and economically beneficial, graffiti is likely to be taken down. State practice in fact indicates that the more graffiti expands, the more it is proscribed by either criminal or administrative law (for example, laws on urban planning and protection of the environment), or even by-laws. The human rights approach allows for a nuanced approach in demarcating State obligations and assessing the legitimacy of violations to artists' rights. State obligations under human rights law do not stem only from the right to respect and protect civil liberties such as free speech, creative freedom, or peaceful protest. Rather, State obligations encompass cultural rights and the right to meaningfully and freely participate in cultural life. In this sense, human rights law is more likely to give more just and equitable solutions to protect free speech and creators' rights, while enabling communities' participation in the decision-making process on the art of the public space.

The Article examined three possible criteria that could be taken into account when balancing between street artists' rights and other private rights or public interests: the significant aesthetic quality of the works at stake; the overwhelming consent of the residents of certain urban area; and the political value of works, including activist works in States that rank low in free speech standards and local communities that have no means to express themselves. From these criteria, only the latter two were found to be substantial. In the case of communities, it was emphasized that the public does not know what is illicit and what is commissioned street art. In other words, a decision whether or not to take down an artwork should not be based on the exercise of an individual's right to free speech. Rather, it should consider the context, including communities' cultural rights. For example, street art that is evidence of human rights activism, whether commissioned or illicit, should always be protected, primarily because of the need to protect human rights activists. In such exceptional circumstances violation of street artists rights is an unlawful interference with individual rights of the artists and the right of the public—exercised individually or jointly with others—to participate in cultural life. States should be held responsible under human rights law for taking such graffiti down. In addition, States should have obligations to maintain and safeguard street art that is evidence of cultural or urban heritage worth preserving, in accordance with the right of the public to access cultural life and arts in the public space.

Human Rights Respectful Trade

Joyce De Coninck* and Peter Van Elsuwege†

Despite the increased visibility of human rights in international trade agreements and concomitant trade agreement suspension clauses, the effectiveness and enforceability of such human rights provisions have remained modest. Yet, at the same time, there is an unrelenting demand for more human rights compliant and effective international trade. The disconnect between the purported ineffectiveness of human rights provisions and the demand for more human rights respectful international trade agreements hint at lacking nuance about how human rights can be operationalized and enforced through trade agreements. Notably, demanding that human rights be more effectively protected through trade raises questions, such as which types of human rights should be safeguarded through trade agreements, what the scope of their protection should include, and who will benefit from such protection. Counterintuitively, these granular considerations typically are not featured in discussions on human rights respectful trade. This article dissects and analyzes what it means for international trade agreements to be more human rights respectful.

Taking into account the inherent connection between trade and human rights embedded in the EU's legal framework, the Article scrutinizes the evolving practice surrounding the inclusion of human rights clauses in EU trade agreements as well as the emergence of similar (though not analogous) clauses in US free trade agreements, with additional observations on free trade agreements concluded by third countries. Building on these comparisons, this Article concludes with recommendations on how the role of human rights clauses

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within trade agreements may be improved, all the while attempting to strike a balance between the benefits of trade liberalization and the need to effectively safeguard human rights in international trade agreements.

These recommendations entail that, prior to the conclusion of the trade agreement, clear standards are set concerning the procedural and substantive human rights commitments undertaken by the trade parties. These standards should be developed in a manner reflective of the internationally recognized typology of human rights commitments, human rights obligations, and enforcement standards. The recommendations also provide for a procedural methodology to be followed in the event that human rights violations are observed by the implicated trade partners, focusing on the chronology of the procedure, as well as the burden, standard, and method of proof in establishing such violations.

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INTRODUCTION

The question of whether international trade agreements should and can function as a tool to ensure respect for human rights is garnering increased and intensified attention. Justin Trudeau was recently pressed on ensuring that trade relations between Canada and India are human rights compliant.¹ Further, the United Kingdom is garnering criticism for its permissive stance on human rights abuses in its trade negotiations with the Gulf States.² Similarly, the United States is currently seeking a human rights compliant bilateral trade agreement with Kenya,³ while stakeholders in the European Union (EU) have been advocating for trade relations between the EU and Vietnam to be conditional on respect for human rights.⁴ The leaders of Spain and Ireland sent an open letter to the President of the European Commission asking for an urgent review of the EU's trade relations with Israel in view of the human rights violations in Gaza.⁵ In view of the EU's commitment to global human rights and democracy, the European Parliament (EP) underscored the significance of robust human rights provisions within international agreements.⁶ To be more precise, the EP advocated for the "systematic incorporation of legally binding human rights clauses in all agreements between the EU and nations outside the EU."⁷

The inclusion of human rights clauses is not new in the EU's foreign relations practice. In 1991, the European Commission issued a communication "on human rights, democracy and development co-operation," paving the path for the EU's approach to human rights conditionality in the framework of international

1. Farida Deif, *Canada Should Decry Democratic Backsliding in India*, HUM. RTS. WATCH (May 16, 2023), <https://www.hrw.org/news/2023/05/16/canada-should-decry-democratic-backsliding-india>; Steven Chase, *Trudeau urged to make trade deals with India contingent on respect for human rights*, GLOBE & MAIL (Aug. 15, 2023), <https://www.theglobeandmail.com/politics/article-trudeau-trade-deals-india-human-rights/>. These same concerns have also been raised with respect to the EU and its trade relations with India. *See generally*, Viktor Almqvist, *Human Rights Breaches in Venezuela, Kyrgyzstan and India*, EUR. PARLIAMENT NEWS (Jul. 13, 2023), <https://www.europarl.europa.eu/news/en/press-room/20230707IPR02436/human-rights-breaches-in-venezuela-kyrgyzstan-and-india>. Concerning Australia and its trade relations with India, see Bernie Lai, *Australia and India*, PARLIAMENT OF AUSTRALIA (2023) https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/BriefingBook47p/AustraliaIndia.

2. *UK: Rights Action Needed for Gulf Trade Pact*, HUM. RTS. WATCH (May 3, 2023), <https://www.hrw.org/news/2023/05/03/uk-rights-action-needed-gulf-trade-pact>.

3. US DEP'T STATE, Joint Statement on the Third US Kenya Bilateral Strategic Dialogue (Apr. 24, 2023), <https://www.state.gov/joint-statement-on-the-third-u-s-kenya-bilateral-strategic-dialogue/>.

4. *EU: Press Vietnam to End Rights Abuses*, HUM. RTS. WATCH (June 8, 2023), <https://www.hrw.org/news/2023/06/08/eu-press-vietnam-end-rights-abuses>.

5. Suzanne Lynch, *Spanish, Irish leaders call on Ursula Von der Leyen to review EU-Israel trade accord over human rights concerns*, POLITICO (Feb. 14, 2024), <https://www.politico.eu/article/call-for-eu-review-eu-israel-trade-accord-over-human-rights-concerns-rafah>.

6. Resolution on human rights and democracy in the world and the European Union's policy on the matter – annual report 2021, EUR. PARL. DOC. 65 O.J. (C 342/191) (2022).

7. *Id.* at 101.

agreements.⁸ In essence, the communication provides details on the inclusion of explicit provisions defining respect for human rights as an *essential element* of the contractual relations between the parties, so that a violation of these commitments could justify the agreement's termination or (partial) suspension under international law.⁹ This explicit call for the inclusion of human rights provisions increasingly resurfaces in trade negotiations globally.¹⁰ The precise formulation of the human rights clauses, as they feature in EU trade agreements and international trade agreements more generally, has developed over time.¹¹ However, the enforcement of such clauses has been limited.¹²

To date, the EU has only triggered the option of taking "appropriate measures" in response to human rights violations, and only in a limited number of cases.¹³ This included the suspension of development aid and/or technical cooperation only in response to very serious breaches of democracy and human rights, such as a *coup d'état* or a brutal crackdown of popular protests.¹⁴ More recently, the EU's response to Russia's illegal annexation of Crimea in 2014 and military aggression against Ukraine in 2022 did not lead to the formal suspension

8. Commission Communication to the Council and Parliament, *Human Rights, Democracy and Development Co-operation Policy*, SEC (91) 61 final (Mar. 25, 1991), <http://aei.pitt.edu/2937/1/2937.pdf>. On the background and evolution of human rights clauses, see ELENA FIERRO, *THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE* 213–44 (2003).

9. See Vienna Convention on the Law of Treaties, art. 44, art. 60, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (hereinafter VCLT).

10. See, e.g., "As the Australian Greens' former foreign affairs spokesperson, Janet Rice, has proposed, the Australian Government could consider the inclusion of binding human rights protection clauses or binding clauses that commit to upholding democracy in any free trade agreements with India." Bernie Lai, *Australia and India*, PARLIAMENT OF AUSTRALIA (2023) https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/Research/Briefing_Book/47th_Parliament/AustraliaIndia.

11. See *infra* Section II.

12. See (and sources cited therein) JAN WOUTERS & MICHAL OVÁDEK, *THE EUROPEAN UNION AND HUMAN RIGHTS: ANALYSIS, CASES, AND MATERIALS* 669 (2021).

13. Ionel Zamfir, *Human Rights in EU Trade Agreements. The Human Rights Clause and its Application*, EUROPEAN PARLIAMENT BRIEFING 1, 9 (July 2019), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf).

14. 24 cases have been reported with respect to the Cotonou Agreement. In addition, the EU Council suspended technical meetings under the Partnership and Cooperation Agreement (PCA) with Uzbekistan in response to the 2005 massacre in Andijan. Since 2014, there has been only a single case (in relation to Burundi) where the EU suspended financial support under a human rights clause in an international agreement (art. 96 of the Cotonou Agreement). See Council Decision (EU) 2016/394 as reported in Lorand Bartels, *Assessment of the Implementation of the Human Rights Clause in International and Sectoral Agreements*, EUROPEAN PARLIAMENT THINK TANK (May 15, 2023), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2023/702586/EXPO_IDA\(2023\)702586_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2023/702586/EXPO_IDA(2023)702586_EN.pdf).

of its Partnership and Cooperation Agreement with Russia.¹⁵ This response may appear surprising, considering that upholding human rights is an essential element of this agreement.¹⁶ However, established practice reveals that the full suspension or denunciation of an agreement is a highly exceptional phenomenon.¹⁷ The application of the human rights clause is typically only the “last resort” in the EU’s toolbox for advancing human rights.¹⁸

According to the European Commission—seemingly unlike the approach in US trade agreements¹⁹—the primary objective of the human rights clause in EU trade agreements is to promote dialogue and to create incentives for improving respect for and the protection of human rights.²⁰ To date, the envisaged objective of human rights clauses has not necessarily focused on bestowing enforceable and judiciable rights on trade partners and/or individual (legal) persons.²¹ Instead, it has been perceived as a policy-oriented tool, with the objective of enhancing human rights standards generally.²² Accordingly, the human rights clauses in EU trade agreements do not function as punitive measures.²³ Instead, such clauses currently provide a legitimate basis for raising human rights concerns in a more constructive manner.

Even though this approach is notably different from the US rights-based approach, the positive and soft nature of this approach also faces criticism.²⁴ NGOs continue to express their disappointment about the EU’s weak reaction to human rights violations and seek a more assertive approach regarding the

15. The EU only suspended the negotiations for a new bilateral framework agreement with Russia. In addition, it gradually adopted several packages of unilateral sanctions against Russia. For an overview, see *EU Sanctions Against Russia*, EUROPEAN COUNCIL (June 20, 2024), <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/>.

16. Art. 2 of the Agreement on Partnership and Cooperation between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, 1997 O.J. (L 327/23).

17. The only true example of such a measure is the denunciation of the 1980 Agreement with Yugoslavia. See Marc Maresceau, *Unilateral Termination and Suspension of Bilateral Agreements Concluded by the EC*, in VIEWS OF EUROPEAN LAW FROM THE MOUNTAIN: LIBER AMICORUM PIET JAN SLOT 455, 455–66 (Mielle Bulterman et al. eds., 2009).

18. Bartels, *supra* note 14.

19. See *infra* Section IV.

20. See *Letter from the European Commission to the European Ombudsman on How the European Commission ensures respect for human rights in the context of international trade agreements*, Letter from Valdis Dombrovskis, European Commission Executive Vice-President, to the European Ombudsman (Nov. 17, 2021) <https://www.ombudsman.europa.eu/en/doc/correspondence/en/150903>.

21. Bartels, *supra* note 14, at 2, 33. On the human rights dialogues, see *infra* Section III.C.

22. *Id.*

23. *Id.*

24. See (and sources cited therein) Wouters and Ovádek, *supra* note 12, at 669. For a case-study specific assessment of the EU’s soft approach to enforcement, see Aleydis Nissen, *Not That Assertive: The EU’s Take on Enforcement of Labour Obligations in its Free Trade Agreement with South Korea*, 33 EUR. J. OF INT’L L. 2, 607 (2022).

enforcement of human rights clauses.²⁵ Moreover, it has been argued that human rights dialogues “often appear as a box-ticking exercise during which the same concerns are raised year after year with seemingly little ambition to secure meaningful change.”²⁶

These critiques beg a number of questions. Should human rights clauses in EU and international trade agreements be made more effective and, if so, how? Should the visibility of human rights be enhanced in EU and international trade agreements and, if so, concerning which human rights? Should a more tailored approach be adopted concerning the inclusion of human rights clauses, depending on the content of the trade agreement and partner? Who should be the beneficiaries of such human rights clauses—individuals, the trade partners or both? Building on this last question, should individuals in third countries be granted directly enforceable rights, and, if so, how can such rights be operationalized and made justiciable? The questions raised within this context hint at a far larger shift in the human rights landscape. Rather than primarily being a tool to regulate the relationship between the State and the individual in a rights-based manner, there is a noticeable and quickly evolving shift to human rights governance more broadly, applying to public and private actors alike. This shift calls into question traditional conceptions of extra-territorial jurisdiction in the human rights space, which actors are bound by human rights obligations, and the ultimate objective of human rights. Accordingly, while claiming that human rights clauses should be made more effective in trade agreements may appear straightforward, it is only sensible when paired with a more in-depth inquiry into which types of human rights should be included in trade agreements, to whom they should apply, and what the objective of such human rights clauses is.

To address these questions, this Article will proceed from the inherent connection between trade and human rights, focusing on the EU’s legal framework as an illustration. The EU’s constituent instruments reinforced this nexus in the sense that the human rights dimension of the EU’s trade policy is

25. David Cronin, *EU “ignoring” its Human Rights Clause*, POLITICO (Mar. 17, 2004), <https://www.politico.eu/article/eu-ignoring-its-human-rights-clause/>. For a recent example, see the briefing paper of the International Federation for Human Rights (FIDH) and the Vietnamese Committee on Human Rights (VCHR) with respect to the human rights situation in Vietnam: *Vietnam: Crackdown on Civil Society Intensifies*, FIDH & VCHR 1, 1–8 (APR. 6, 2022), https://www.fidh.org/IMG/pdf/20220405_vietnam_eu_bp_en.pdf.

26. HRDN Troika, *Recommendations for the revision of the European Union (EU) Guidelines on human rights dialogues with third countries*, HUMAN RIGHTS & DEMOCRACY NETWORK (Dec. 1, 2020), <https://www.hrdn.eu/activities/recommendations-for-the-revision-of-the-european-union-eu-guidelines-on-human-rights-dialogues-with-third-countries>.

now firmly anchored in the primary law of the EU.²⁷ In Part II, this Article scrutinizes the evolution of the law and practice of the EU's human rights clauses. In this respect, it is noteworthy that the drafting of such clauses developed over time, starting with rather short and general provisions in the 1990s and expanding into more detailed and sophisticated provisions in the latest generations of trade agreements. The key challenge, however, remains the effective monitoring and enforcement of the relevant commitments. For this purpose, this Article makes a comparative analysis between the rather soft EU approach, which focuses on dialogue instead of sanctions, and the seemingly more assertive rights-based approach in US free trade agreements. In addition, this Article makes a cursory comparison with trade agreements adopted by other actors such as the Eurasian Economic Union (EAEU), the Association of Southeast Asian Nations (ASEAN), New Zealand, and the Southern African Customs Union (SACU). Drawing from these case studies respectively, the Article concludes with three concrete recommendations and several suggestions that exceed the EU's case study and apply more generally to trade agreements.

I. THE NEXUS BETWEEN TRADE AND HUMAN RIGHTS

A. *Obligations Under EU Law*

The use of trade instruments for the promotion of non-trade objectives, including respect for human rights, is well-anchored in the EU's legal framework.²⁸ Of particular significance is the provision in Article 207 TFEU that states "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."²⁹ The policy, enshrined in Articles 3(5) and 21 TEU, explicitly refers to the respect for and promotion of human rights.³⁰ This connection involves an obligation for the EU "to observe international law in its entirety, including customary international law" within the framework of its external action.³¹ Although the precise scope of international customary law in relation to human rights is imprecise and subject to discussion, the Universal Declaration of Human Rights (UDHR) and the core human rights

27. See also Peter Van Elsuwege, *The nexus between Common Commercial Policy and Human Rights: Implications of the Lisbon Treaty*, in *THE LAW AND PRACTICE OF THE COMMON COMMERCIAL POLICY: THE FIRST 10 YEARS AFTER THE TREATY OF LISBON* 416-433 (Guillaume Van der Loo and Michael Hahn eds., 2020).

28. *Id.*

29. Treaty on the Functioning of the European Union art. 207, 2012 O.J. (C 326) [hereinafter TFEU].

30. Treaty on European Union art. 3(5), art 21, 1992 O.J. (C 191) [hereinafter TEU].

31. Case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864, ¶ 101 (Dec. 21, 2011).

conventions used for the GSP+ system constitute an important source of reference.³²

Apart from the EU's obligations with respect to the observance of (customary) international law, the EU Charter of Fundamental Rights (CFR) is of crucial significance. As observed in the European Commission's guidelines on human rights impact assessments, respect for the CFR is "a binding legal requirement in relation to both internal and external policies."³³ In other words, the CFR has certain extraterritorial implications as it applies to all EU activities irrespective of whether they take place within or outside its territorial boundaries.³⁴ This is underscored by Article 51 CFR, which, unlike many other international and regional human rights instruments, does not encompass a traditional territorial limitation clause.³⁵ Of course, the Charter cannot in itself directly impose any obligations upon the EU's external trade partners.³⁶ Yet, EU institutions and Member States are bound to respect the CFR in the framework of the EU's external action.³⁷ This can be derived from *Opinion 1/17*, which concerned the human rights compatibility of the Investor-State Dispute (ISDS) mechanism foreseen in the Comprehensive Economic and Trade Agreement (CETA) with Canada.³⁸ Here, the Court highlighted that "international agreements entered into by the Union must be entirely compatible with the Treaties and with the constitutional principles stemming therefrom."³⁹ Taking into account that the CFR has the same legal value as the Treaties, as expressed

32. See Annex VIII to Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012, applying a scheme of generalized tariff preferences (2012) O.J. (L 303/1). Vivian Kube, *The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?*, 10 EUI DEP'T L. 1, 20 (2016).

33. European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives*, EUROPEAN COMMISSION (Jul. 7, 2022) <https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/991d8e1d-dbaa-49d6-8582-bb3aab2cab48/details> at 5.

34. Violeta Moreno-Lax & Cathryn Costello, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity: The Effectiveness Model*, in COMMENTARY ON THE EU CHARTER OF FUNDAMENTAL RIGHTS 1658, 1682 (Steve Peers et. al. eds., 2014).

35. Van Elsuwege, *supra* note 27, at 422.

36. Pursuant to Article 51 CFR, "the provisions of the Charter are only addressed to the institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are implementing Union law."

37. TEU (Consolidated Version) art. 21 2012 O.J. (C 326) 13.

38. Opinion pursuant to Article 218(11) CETA, ECLI:EU:C:2019:341, ¶ 165 (Apr 30, 2019).

39. *Id.*

in Article 6(1) TEU, it logically follows that the EU's trade agreements must be fully compatible with the Charter.⁴⁰

The consequences of this approach can be illustrated by the *Fronte Polisario* cases, which centers on the EU Council decision to approve an agreement concerning the progressive liberalization of trade in agricultural and fisheries products with the Kingdom of Morocco.⁴¹ Based upon the EU's human rights obligations, the General Court found that the Council is bound "to examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights."⁴² Whereas the EU cannot be held responsible for actions committed by Morocco, this does not absolve the EU from its obligation to prevent Morocco from encouraging a third country's human rights violations. The EU also prevents Morocco from profiting from exports that have been produced or obtained in conditions violating the fundamental rights of the population from the product's territory of origin to reach the EU.⁴³ Applying this to the facts, the General Court held that the Council should have examined whether there was a risk of a violation of the rights of the Sahrawi population.⁴⁴ In other words, the General Court considered the existence of a human rights impact assessment before the adoption of the Council decision as a crucial procedural requirement. In its appeal judgment, the Court of Justice did not address this issue.⁴⁵ However, in another Front Polisario case, the Court of Justice annulled the Council decisions approving the EU-Morocco trade agreements regarding fisheries and agricultural products due to the violation of international law principles of self-determination and the relative effect of treaties.⁴⁶ This illustrates the significance of respect for international law in the EU's external action. In contrast to the General Court, it concluded that the Association Agreement and the ensuing agreement on the liberalization of trade in agricultural products did not apply to the Western Sahara. Consequently, the Polisario Front had no standing to seek the annulment of the decision at issue.⁴⁷

40. Katarzyna Szepelak, *Judicial Extraterritorial Application of the EU Charter of Fundamental Rights and EU Trade Relations – Where Do We Stand?*, in EU TRADE AGREEMENTS & DUTY TO RESPECT HUMAN RIGHTS ABROAD 37 (Eva Kassoti & Ramses Wessel eds., CLEER Papers 2020/1).

41. Case T-512/12, *Front Polisario v. Council*, ECLI:EU:T:2015:953, (Dec. 10, 2015).

42. *Id.* ¶ 228. On the extraterritorial application of the CFR, *see generally*, Angela Ward, *Article 51 – Scope* in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY, 1413–54 (Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward eds., 2014); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHTS TREATIES – LAW, PRINCIPLES, AND POLICY 304 (2011).

43. Case T-512/12, *Front Polisario v. Council*, ECLI:EU:T:2015:953, ¶ 231 (Dec. 10, 2015).

44. *Id.* ¶ 241.

45. Case C-104/16 P, *Council v. Front Polisario*, ECLI:EU:C:2016:973, (Dec. 21, 2016).

46. Joined Cases C-779/21 P and C-799/21 P, *European Commission v. Front Polisario*, ECLI:EU:C:2024:835, (Oct. 4, 2024).

47. *Id.* ¶ 133.

B. Implications in Practice

The practical legal implications of the nexus between trade and human rights are ineluctable. A good example is the discussion surrounding the failure of the European Commission to conduct a specific human rights impact assessment (HRIA) in anticipation of the conclusion of a Free Trade Agreement (FTA) with Vietnam.⁴⁸ In the European Commission's view, a separate HRIA concerning the FTA with Vietnam was unnecessary considering that the negotiations with Vietnam occurred under the legal framework established for the ASEAN free trade negotiations, which pre-dated the entry into force of the Lisbon Treaty.⁴⁹ It further argued that a standalone HRIA would be against the established integrated approach, implying that economic, social, environmental and—as of 2011—human rights impacts are considered together as part of a single, comprehensive exercise.⁵⁰ Moreover, the European Commission pointed at the existence of other human rights instruments such as human rights clauses in the Partnership and Cooperation Agreement (PCA) with Vietnam, the enhanced human rights dialogue, as well as public statements and foreign policy *démarches*.⁵¹ These arguments could not convince the European Ombudsman, who concluded that the European Commission's refusal to carry out a HRIA constituted an example of maladministration.⁵² While acknowledging that “there appears to be no express and specific legally binding requirement to carry out a human rights impact assessment concerning the relevant free trade agreement,” Emily O'Reilly viewed that such an obligation is derived from the spirit of Article 21(1) TEU and Article 21(2)(b) TEU in conjunction with Article 207 TFEU.⁵³

Analyzing human rights impacts in impact assessments for trade-related policy initiatives has become a standard practice since the Treaty of Lisbon.⁵⁴ The impact of proposed trade-related policy initiatives is assessed under the normative framework of the CFR and a number of international human rights documents.⁵⁵

48. Emily O'Reilly, *Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement*, EUROPEAN OMBUDSMAN, <https://www.ombudsman.europa.eu/en/decision/en/64308>.

49. *Id.* ¶ 5.

50. *Id.*

51. *Id.*

52. *Id.* ¶¶ 9, 28.

53. *Id.* ¶ 11. See also Bartels, *supra* note 14, (stating that Article 21 (3) TEU not only requires the EU to “respect” fundamental rights but also demands that the EU “must pursue the objectives” set forth by fundamental rights).

54. *Id.* ¶ 13.

55. This includes a list of ten UN core international human rights instruments. See Annex 1 to European Commission, *Guidelines on the Analysis of Human Rights Impacts in Impact Assessments*

Significantly, the European Commission guidelines entail a broad definition of the scope and depth of the analysis, including “the potential impact of the proposed initiative on human rights in both the EU and the partner country/ies” with respect to “civil, political, economic, social, cultural and core labor rights.”⁵⁶ Moreover, in the case of negotiations of major trade and investment agreements, Sustainability Impact Assessments (SIAs) are undertaken in parallel with the negotiations and allow the European Commission to conduct an extended analysis of the potential human rights impacts.⁵⁷ This involves an extensive consultation of stakeholders, including those in the partner country/ies.⁵⁸

Whereas the foregoing practice reveals increased attention to and awareness of the trade-human rights nexus in the post-Lisbon era, several preliminary questions surface concerning the precise implications of embedding human rights standards in the EU trade-*acquis*.

From the onset, it is apparent that the EU clearly adopts a value-driven approach which is geared to implementing a human rights-centric policy.⁵⁹ This is evidenced by the embedding and streamlining of general provisions into trade-related instruments, confirming the EU’s commitment to human rights.⁶⁰ While this is a necessary first step to concretize the EU’s human rights obligations in trade, it does not (yet) address how this value-driven approach should be translated into enforceable and quasi-judiciable rights of both trade partners, and individual (legal) persons. Nor does this initial step account for the functional specialty of the EU in enforcing human rights standards that, to date, have overwhelmingly been developed with Member States in mind as its duty-bearers.⁶¹ In other words, despite the established commitment to a human rights centric trade policy, the translation of this policy to a rights-driven approach remains largely absent.

As hinted at, various non-legislative instruments and the CJEU have reaffirmed the EU’s theoretical commitment to human rights standards. Yet, these human rights commitments—regardless of whether these norms are found in customary international law, or the CFR—do not reveal much about the concrete negative and positive obligations this generates *vis-à-vis* the EU in meeting these abstract human rights commitments, nor do they account for standards of progressive realization of particular human rights obligations, the protection thereof under international human rights law, or the typology of human rights

for *Trade-Related Policy Initiatives*, EUROPEAN COMMISSION (July 7, 2022) <https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/991d8e1d-dbaa-49d6-8582-bb3aab2cab48/details>.

56. *Id.* at 5.

57. *Id.* at 6.

58. *Id.*

59. Nicolas Hachez & Axel Marx, *EU Trade Policy and Human Rights*, in *THE EUROPEAN UNION AND HUMAN RIGHTS: LAW AND POLICY* 365 (Jan Wouters et. al. eds., 2020).

60. *Id.*

61. JOYCE DE CONINCK, *THE EU’S HUMAN RIGHTS RESPONSIBILITY GAP – DECONSTRUCTING HUMAN RIGHTS IMPUNITY OF INTERNATIONAL ORGANIZATIONS* (2024).

more broadly.⁶² Abstract commitments to human rights do not disclose what specific human rights are at stake in a particular trade relation, and the types of conduct that the EU must engage in for those rights to be recognized, protected, and fulfilled.

The General Court and the European Ombudsman made first steps by inferring an overarching positive procedural obligation to conduct a HRIA pursuant to trade-related measures.⁶³ However, several questions remain concerning HRIAs for the conduct of the Common Commercial Policy (CCP). For instance, the Ombudsman firmly stated that “when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into.”⁶⁴ The European Commission, on the other hand, does not envisage such far-reaching implications. Rather, it sees the HRIAs as a tool to inform policymakers about the potential impacts of the different options under consideration.⁶⁵ According to its Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, “[a]n impact assessment should verify the existence of a problem, identify its underlying causes, assesses whether EU action is needed, and analyse the advantages and disadvantages of available solutions. It is not intended to pass a judgment on the actual human rights situation in a country nor to decide whether a country is eligible for a trade agreement.”⁶⁶

The duty to conduct HRIAs in relation to trade-related policy initiatives may be regarded as a procedural obligation stemming from the combined reading of Article 207 TFEU, and Articles 3 (5) TEU and 21 TEU, the concrete substantive and procedural obligations pursuant to an HRIA are less evident. In particular, the question remains to what extent human rights considerations can be balanced against other interests. May certain negative impacts on human rights be compensated by gains in other areas, for instance, the creation of job opportunities thanks to economic growth, or the introduction of cleaner technologies in a country allowing for progress in relation to sustainable development?⁶⁷

62. See *infra* Section V.B.

63. See *supra* in this Section.

64. Emily O'Reilly, *Decision in case 1409/2014/MHZ on the European Commission's Failure to Carry out a Prior Human Rights Impact Assessment of the EU-Vietnam Free Trade Agreement*, EUROPEAN OMBUDSMAN, ¶ 25.

65. European Commission, *supra* note 55, at 2.

66. *Id.* at 2.

67. Olivier De Schutter, *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework - Study for the AFCO Committee*, EUROPEAN PARLIAMENT 1, 60 (2016), [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU\(2016\)571397_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf).

Whereas the EU institutions enjoy a margin of discretion in areas that involve political, economic and social choices,⁶⁸ HRIAs essentially seek to ensure that such choices are made on the basis of a careful and impartial analysis of all available information.⁶⁹ As highlighted in the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements—drafted by the UN Special Rapporteur on the right to food—the outcome of this process must comply with certain conditions.⁷⁰ Amongst others, specific attention must be paid to the implications for the most vulnerable groups.⁷¹ Moreover, “trade-offs must never result in a deprivation of the ability of people to enjoy the essential content of their human rights.”⁷² Even though these Guiding Principles are not legally binding, they nevertheless provide an interesting point of reference in the broader discussion about the precise implications of HRIAs.⁷³

The increased attention to human rights as a “founding value” (Article 2 and 3(5) TEU), “guiding principle” (Article 21(1) TEU) and “objective” (Article 21(2)(b) TEU) implies at least a duty to put human rights on the agenda of trade negotiations.⁷⁴ Arguably, it involves certain procedural obligations such as conducting HRIAs prior to concluding trade agreements, ensuring that adequate monitoring mechanisms are in place and establishing accountability

68. See, e.g., Case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury*, ECLI:EU:C:2016:381, ¶ 146 (May 31, 2016); Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*, ECLI:EU:C:2013:470, ¶ 120 (July 11, 2013).

69. Case T-512/12, *Frente Polisario v. Council*, ECLI:EU:T:2015:953, ¶ 224 (Dec. 10, 2015).

70. See Olivier De Schutter, (Special Rapporteur on the right to food), *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, UN Doc. A/HRC/19/59/Add.5, (Dec. 19, 2011), Human Rights Committee, https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf.

71. *Id.*, point 5.3.

72. *Id.*, point 6.5.

73. See also Jennifer Zerk, *Human Rights Impact Assessment of Trade Agreements*, CHATHAM HOUSE (Feb. 2019), <https://www.chathamhouse.org/sites/default/files/2019-02-18HumanRightsTradeAgreements.pdf>.

74. TEU (Consolidated Version) (2012) O.J. (C 326) 13, Article 2: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [...]” Article 3 (5): “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”; Art. 21 (1) TEU: “The Union’s action on the international scene 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 [...]”; Art. 21 (2) (b) TEU: “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] consolidate and support democracy, the rule of law, human rights and the principles of international law.”

mechanisms.⁷⁵ The *effectiveness* of EU human rights conditionality in external trade instruments is yet another discussion which largely depends upon a variety of factors such as the integration of trade instruments in a broader human rights agenda (and *vice-versa*), the position of third countries, and the interests of the various actors and institutions.⁷⁶ Within this context, the practice of including human rights clauses and social norms in EU free trade agreements is of considerable significance. Such provisions are the expression of the EU's commitment to the Treaty objectives defined in Articles 3(5) and 21 TEU. Moreover, they provide a normative framework for an institutionalized dialogue on human rights reform in a partner country.

II. HUMAN RIGHTS CLAUSES IN INTERNATIONAL AGREEMENTS

A. Background and Evolution

The first human rights clause was inserted in the Lomé IV Convention of 1989.⁷⁷ In a rather general manner, the parties expressed their “deep attachment to human dignity and human rights.”⁷⁸ However, there were neither references to specific human rights guarantees, nor was there a clause providing for the suspension of the agreement in case of non-compliance.⁷⁹ Following this precedent, the democratization of countries in Latin America and Central and Eastern Europe provided a boost for the inclusion of more developed references to human rights.⁸⁰

Gradually, a more systematic approach was introduced with, on the one hand, an “essential element clause” involving the parties’ commitment to human rights and, on the other hand, a “non-execution clause” allowing for the adoption of appropriate measures in case of a violation of the essential elements.⁸¹ A first

75. Kube, *supra* note 32, at 28.

76. See, e.g., Lachlan McKenzie & Katharina L. Meissner, *Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU Singapore FTA*, 55 J. COMMON MKT. STUD. 4, 832–49 (2017); Samantha Velluti, *The Promotion and Integration of Human Rights in EU External Trade Relations*, 32 UTRECHT J. INT. EUR. L. 83, 41–68 (2016).

77. Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, (1991) O.J. (L 229) 3.

78. *Id.* at art. 5 (2).

79. 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*, 3 EUR. & WORLD L. 8 (2019).

80. Fierro, *supra* note 8, at 215–17.

81. Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries, COM (95) 216 final (May 23, 1995); Council of the European Union, *Conclusions on Human Rights Clauses in Community*

version of the non-execution clause—also known as ‘the Baltic clause’ because it was first included in the bilateral Trade and Co-operation Agreements (TCAs) with the Baltic States—only allowed for the immediate suspension of (parts of) the agreement in case of a serious violation of human rights.⁸² This provision was quickly replaced by a more sophisticated non-execution clause, known as ‘the Bulgarian clause,’ due its first inclusion in the Europe Agreement with Bulgaria.⁸³ The latter allows for a process of prior consultation before the adoption of appropriate measures. It is only possible to take direct action in “cases of special urgency” and in response to grave human rights violations.⁸⁴ In the selection of measures in response, priority must be given to those which least disturb the normal functioning of the agreement.⁸⁵ This implies that the measures must be proportional to the violations with suspension of the whole agreement as a last resort.⁸⁶

In the latest agreements, the non-execution clause is part of a broader article on “fulfilment of obligations,” which starts with a general clause on the parties’ commitment to take any necessary measures for the fulfilment of their obligations under the Agreement.⁸⁷ When a party believes that another party is not complying with this obligation, it can bring the matter before a joint committee established under the agreement.⁸⁸ The joint committee will then launch a process of consultations aiming to find a mutually acceptable solution.⁸⁹ In case of serious violations of the essential elements clause, immediate consultations will be launched for a short and fixed period of 15 or 30 days.⁹⁰

Agreements with Non-member Countries of 29 May 1995 (Bulletin of the European Communities, No. 5/1995, 9, point 1.2.3).

82. Article 21 of the TCA with Estonia stated 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”. Agreement between the European Economic Community and the Republic of Estonia on trade and commercial and economic cooperation, (1992) O.J. (L 403) 7. An identical provision is included in the TCAs with Latvia (1992) O.J. (L 403) 16; and Lithuania (1992) O.J. (L 403) 25.

83. Europe Agreement establishing an Association Between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, (1994) O.J. (L 358) 3.

84. *Id.* at art. 118 (2).

85. *Id.*

86. Nicolas Hachez, *Essential Elements’ Clauses in EU Trade Agreements: Making Trade Work in a Way that Helps Human Rights?*, CUADERNOS EUROPEOS DE DEUSTO 53 (2015).

87. *See, e.g.*, Art. 28 of the Strategic Partnership Agreement (SPA) between the European Union and its Member States, of the one part, and Canada, of the other part, (2016) O.J. (L 329 /45); Art. 55 of the Framework Agreement on Comprehensive Partnership between the European Union and its Member States, of the one part, and Thailand of the other part, (2022) O.J. (L 330/72).

88. *Id.*

89. *Id.*

90. *Id.* art. 28 (5) of the SPA with Canada foresees in 15 days whereas Art. 55 of the agreement with Thailand foresees in 30 days.

B. Typology of Human Rights Clauses in EU Trade Agreements

The inclusion of human rights clauses in trade agreements can take various forms. Typically, separate free trade agreements are linked to broader political *framework* agreements which include an essential elements and non-execution clause.⁹¹ This is, for instance, the case with the EU-Korea Free Trade Agreement which forms “an integral part of the overall bilateral relations as governed by the Framework Agreement.”⁹² Accordingly, the human rights provisions of the latter fully apply with respect to the FTA.⁹³ A similar approach is followed with respect to the EU’s trade relations with the ACP countries, which are offered the possibility of concluding regional Economic Partnership Agreements that are tied to a comprehensive Partnership Agreement (also known as the Cotonou Agreement).⁹⁴ The latter includes a list of fundamental principles, as well as Essential and Fundamental Elements, which are the basis for economic and trade cooperation under the EPAs.⁹⁵ The post-Cotonou Agreement with the Organisation of African, Caribbean and Pacific States (OACPS) follows the same logic.⁹⁶ Another example can be found in the FTA between the EU and New Zealand, which forms part of the common institutional framework established under the EU-New Zealand Partnership Agreement.⁹⁷ Even when the FTA does not explicitly provide that it forms an integral part of a more comprehensive framework agreement, such a connection may exist. For instance, the FTA with

91. The legal basis of such framework agreements can either be Article 217 TFEU (on association), Article 212 TFEU (economic, financial and technical cooperation with third countries) or, for development countries, Article 209 TFEU (on development cooperation) On the difference between association agreements and (partnership and) cooperation agreements, see Peter Van Elsuwege & Merijn Chamon, *The meaning of “association” under EU law; A study on the law and practice of EU association agreements*, EUROPEAN PARLIAMENT (Feb. 2019), [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU\(2019\)608861_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf).

92. Art. 15.14 of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, (2011) O.J. (L 127/73).

93. Bartels notes however, that variations in cross-references between framework and specific (free trade) agreements may complicate the effectiveness of the human rights clause. *See* Bartels, *supra* note 14, at 8–11.

94. Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (2000) O.J. (L 195/46).

95. *See, e.g.*, Article 2 of the Economic Partnership Agreement between the EU and its Member States, of the one part, and the SADC EPA States, of the other part (2016) O.J. (L 250/13).

96. Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part, 2023 O.J. (L 2862).

97. Art. 1.5 (2) of the Free Trade Agreement between the European Union and New Zealand, (2024) O.J. (L 229/1).

Vietnam simply includes a general reference to the “common principles and values reflected in the Partnership and Cooperation Agreement” (PCA) and to the UN Charter and the Universal Declaration of Human Rights in its preamble, together with a specific provision that a material breach of the PCA also allows for “appropriate measures” under the FTA.⁹⁸

Sometimes, there is no separate FTA because the trade relations are integrated in a comprehensive framework agreement. This is, for instance, the case with respect to the association agreements with Ukraine, Moldova, and Georgia.⁹⁹ The latter all include a substantive Title on Trade and Trade-related matters providing for the establishment of Deep and a Comprehensive Free Trade Area (DCFTA).¹⁰⁰ It is noteworthy that a similar approach is followed in comprehensive agreements which do not involve the establishment of a free trade area and only include provisions on trade cooperation. This is, for instance, the case with the Comprehensive and Enhanced Partnership Agreement (CEPA) with Armenia¹⁰¹ and the Enhanced Partnership and Cooperation (EPCA) with Kazakhstan.¹⁰² A third and rather exceptional model involves the conclusion of a stand-alone trade agreement such as the one concluded with Colombia, Ecuador, and Peru.¹⁰³ In this scenario, the human rights clause is included directly in the FTA as there is no link with a political framework agreement.¹⁰⁴

C. Differences in Scope and Formulation of Human Rights Clauses

Despite attempts to include standardized human rights clauses in all agreements between the EU and third countries, significant variations can be observed. Agreements with countries of the same region which are negotiated and concluded around the same time often have comparable clauses, but differentiation is a logical consequence of temporal and geographical factors.¹⁰⁵

98. Art. 17.18 of the Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, (2020) O.J. (L 186/160).

99. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, (2014) O.J. (L 161/3); Association Agreement between the European Union and its Member States, of the one part, and Moldova, of the other part, (2014) O.J. (L 260/4); Association Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part, (2014) O.J. (L 261/4).

100. See, e.g., Art. 478 of the Association Agreement with Ukraine, (2014) O.J. (L 161/168).

101. Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, (2018) O.J. (L 23/4).

102. Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, (2016) O.J. (L 29/3).

103. The EU first concluded a comprehensive trade agreement with Colombia and Peru. Ecuador joined the agreement on 1 January 2017. For the text of the agreement, see (2012) O.J. (L 354) 3.

104. *Id.*; Art. 1 of the agreement provides that “Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement.”

105. Hachez & Marx, *supra* note 59, at 89.

The drafting of what constitutes an essential element evolves over time and may consider the specific situation of certain countries or regions. As a result, recently concluded agreements tend to have more developed essential elements clauses which go beyond the traditional references to democracy, rule and law, and human rights. For instance, the Trade and Cooperation Agreement (TCA) with the United Kingdom also refers to the fight against climate change and the non-proliferation of weapons of mass-destruction as part of a three-limbed essential elements clause.¹⁰⁶

Apart from references to international human rights instruments such as the Universal Declaration of Human Rights, references to regional standards such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Helsinki Final Act and the Charter of Paris for a new Europe are often included in agreements with European countries. Human rights clauses are also increasingly including the open-ended reference to “other relevant human rights instruments.”¹⁰⁷ This evolution can, for instance, be illustrated with a comparison of the human rights clauses included in the 2002 EU-Chile Association Agreement and its successor, the EU-Chile Advanced Framework Agreement (AFA), which was revealed in December 2022 in anticipation of its formal signature and conclusion.¹⁰⁸ Such references appear to indicate that not only existing human rights instruments are relevant, but also future human rights instruments may be relevant in the application of the trade agreement at stake.¹⁰⁹

Figure 1. Typology of trade agreements with a human rights clause

Article 1 (1) EU-Chile Association Agreement (2002)	Article 2(2) EU-Chile Advanced Framework Agreement (2022)
Respect for democratic principles and fundamental human rights as laid down in the United Nations Universal Declaration of Human Rights and for the principle of the rule of law underpins the internal and	Respect for democratic principles and human rights and fundamental freedoms, as laid down in the Universal Declaration of Human Rights <i>and other relevant international human rights instruments to</i>

106. See, e.g., Art. 771 of the Trade and Cooperation Agreement (TCA) with the United Kingdom (2021) O.J. (L 149) 982.

107. Art. 2 (2) of the Advanced Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Chile, of the other part, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en.

108. See Directorate-General for Trade, *EU-Chile: Text of the Agreement*, EUROPEAN COMMISSION, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (last visited 11/15/2022).

109. See Bartels, *supra* note 14, at 5.

international policies of the Parties and constitutes an essential element of this Agreement.	<i>which they are party</i> , and for the principle of the rule of law <i>and good governance</i> which underpin the internal and international policies of both Parties and constitute an essential element of this Agreement.
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Other subtle differences can be observed when comparing the AFA with Chile and the Framework Agreement with Korea. The latter is even more open-ended, as it does not require Korea to be a party or signatory to other relevant international human rights instruments.¹¹⁰ Instead, the relevant provision underscores that the rule of law and human rights are inherent to the relationship between the trade partners.¹¹¹

Whereas the precise formulation of human rights clauses lacks consistency, there is a clear tendency towards more broadly defined clauses of an extended scope. Such a broad formulation seems difficult to reconcile with the request for clear benchmarks,¹¹² but should nevertheless be regarded as an important and positive evolution as it anticipates future developments.¹¹³ It also prevents a rather narrow interpretation of the parties' human rights commitments.¹¹⁴ Indeed, a policy-oriented and value-driven approach to ensuring the trade-human rights nexus does not prevent or rule out the incorporation of enforceable and judiciable human rights clauses. Quite the contrary, the EU's current approach can be regarded as a requisite first step toward defining specific human rights benchmarks for monitoring and enforcement.¹¹⁵

The evolution and differentiation of the essential elements provisions in Association Agreements (AAs) is further illustrated below:¹¹⁶

110. Art. 1 (1) of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, (2011) O.J. (L 127/73) provides that "Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement."

111. Conversely, in other EU FTAs the applicable human rights norms will only be those that are 'legally binding' for the implicated parties or to which they are 'contracting parties.' See Bartels, *supra* note 14, at 5.

112. It has been argued that the absence of concrete normative references may affect the legitimacy and effectiveness of the EU's human rights conditionality. See Diego Noguera & Luis Hinojosa Martinez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems*, 7 COLUM. J. EUR. L. 3, 307–36 (2001).

113. Lorand Bartels, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, EUROPEAN PARLIAMENT'S SUBCOMMITTEE ON HUMAN RIGHTS AND THE COMMITTEE ON INTERNATIONAL TRADE (2014) at 9.

114. See *infra* Section IV.B.

115. See *infra* Section V.A.

116. See also Van Elsuwege & Chamon, *supra* note 91, at 38–39.

Figure 2. The evolution of essential elements provisions in Association Agreements

Article 6 Bulgaria AA	Article 2(1) Estonia AA	Article 2 Egypt AA	Article 2 Serbia SAA
Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe inspires the domestic and external policies of the Parties and constitutes an essential element of the present association	Respect for democratic principles and human rights, established by the Helsinki Final Act and in the Charter of Paris for a New Europe, <i>as well as the principles of market economy</i> , inspire the domestic and external policies of the Parties and constitute essential elements of this Agreement.	Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the <i>Universal Declaration on Human Rights</i> , which guides their internal and international policy and constitutes an essential element of this Agreement.	Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, <i>including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law</i> as well as the principles of market economy as reflected in the <i>Document of the CSCE Bonn Conference on Economic Cooperation</i> , shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.

The AA with Bulgaria¹¹⁷ (1993) contains the so-called “Bulgarian clause,”¹¹⁸ which was slightly modified in the AA with Estonia (1995).¹¹⁹ In contrast, the agreement with Egypt (2001) only refers to the UDHR, which is the

117. See Association Agreement with Bulgaria (1994) O.J. (L 358/3).

118. On the Bulgarian clause, see also Fierro, *supra* note 8, at 223 *et. seq.*

119. See Association Agreement with Estonia (1998) O.J. (L 68/3).

standard reference for agreements with non-European countries.¹²⁰ The more recent Stabilisation and Association Agreement with Serbia contains a significantly elaborated human rights clause, adding a reference to the rule of law, and takes into account Serbia's and the Western Balkans' particular situation.¹²¹

Juxtaposing several agreements between countries from the same region also reveals differences in the commitments entered into under an association agreement versus a cooperation agreement.¹²²

Article 1 EPCA Kazakhstan¹²³	Article 2(1) CEPA Armenia¹²⁴	Article 2(1) Georgia AA¹²⁵	Article 2(1) Ukraine AA¹²⁶
Respect for democratic principles and human rights as laid down in the Universal Declaration of Human Rights, the OSCE Helsinki Final Act and the Charter of Paris for a New Europe, and other relevant international human rights instruments, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.	Respect for the democratic principles, the rule of law, human rights and fundamental freedoms, as enshrined in particular in the UN Charter, the OSCE Helsinki Final Act and the Charter of Paris for a New Europe of 1990, as well as other relevant human rights instruments such as the UN Universal Declaration on Human Rights and the European Convention on Human Rights, shall form the basis of the domestic and external policies of the Parties and constitute an essential element of this Agreement.	Respect for the democratic principles, human rights and fundamental freedoms, as proclaimed in the United Nations Universal Declaration of Human Rights of 1948 and as defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990 shall form the basis of the domestic and external policies of the Parties and constitutes an essential element of this Agreement.	Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms, and respect for the principle of the rule of law shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this

120. See Association Agreement with Egypt (2004) O.J. (L 304/39).

121. Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, (2013) O.J. (L 278/16).

122. For Kazakhstan, see the Enhanced Partnership and Cooperation Agreement with Kazakhstan (2016) O.J. (L 29/3). For Ukraine, see the Association Agreement with Ukraine (2014) O.J. (L 161/3).

123. Enhanced Partnership and Cooperation Agreement with Kazakhstan (2016) O.J. (L 29/3).

124. Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, (2018) O.J. (L 23/4).

125. Association Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part, (2014) O.J. (L 261/4).

126. Association Agreement with Ukraine (2014) O.J. (L 161/3).

		Countering the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement.	Agreement. Promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement.
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While all four agreements were signed between 2014 and 2017 and contain a human rights clause—qualified as an essential element of the agreement—the clauses in the Association Agreements are more elaborate.¹²⁷ This may be indicative of the association relationship constituting a privileged relationship with more far-reaching commitments than an ordinary cooperation relationship. However, even between similar agreements, there are certain remarkable differences. For instance, respect for the rule of law is not an essential element in the association agreements with Georgia and Moldova, whereas it is included in the association agreement with Ukraine.¹²⁸ The latter also includes unprecedented references to the principles of sovereignty and territorial integrity, inviolability of borders, and independence.¹²⁹ This may be connected to the fragile political situation in the country,¹³⁰ but it remains remarkable given the existence of similar challenges in Moldova (Transnistria) and Georgia (Abkhazia and South Ossetia). With these countries, principles such as respect for the rule of law and good governance, as well as international obligations under the UN, the Council of Europe, and the OSCE are included in a different paragraph under the Title

127. Note, however, that the essential element clause in the Association Agreement with Georgia does not refer to ‘the rule of law’ (even though the preamble and several provisions underline the significance of respect for the rule of law as an important feature and objective of the association. *See also* Narine Ghazaryan, *A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood*, 40 EUR. L. REV. 3, 391–410 (2015).

128. Art. 2 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, (2014) O.J. (L 161/3).

129. *Id.*

130. Narine Ghazaryan argued that the inclusion of these specific references “can be interpreted as an expression of the EU’s support of Ukraine in view of the political situation and the Russian annexation of Crimea.” *See* Ghazaryan, *supra* note 127, at 408.

“general principles.”¹³¹ The main difference between “essential elements” and “general principles” is that a violation of the “essential elements” may also lead to a suspension of the trade part of the agreement, whereas this option is excluded in response to the non-fulfilment of other treaty obligations.¹³²

With respect to Canada, the Strategic Partnership Agreement (SPA) provides that “a particularly serious and substantial violation of the human rights clause could serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement.”¹³³ It has been argued that this reference to termination—and not merely a suspension—of a trade agreement makes the clause “a truly nuclear option.”¹³⁴ The SPA with Canada also stands out because it clarifies “a case of special urgency” under which the human rights clause could be triggered.¹³⁵ This concerns situations involving a “particularly serious and substantial violation” of the human rights clause, such as a *coup d’état* or grave crimes that threaten the peace, security, and well-being of the international community.¹³⁶

However, such a formula has not become standard practice. Other agreements make use of less specific formulations. The SPA with Japan more generally refers to violations “with its gravity and nature being of an exceptional sort that threatens peace and security and has international repercussions.”¹³⁷ The recently concluded Framework Agreement on Comprehensive Partnership and Cooperation with Thailand does not even include such a specification.¹³⁸ Instead, it merely states that the non-execution clause may be triggered “if either Party has serious grounds to consider that the other Party has failed to fulfill in a substantial manner any of the obligations that are described as essential elements.”¹³⁹

Finally, apart from references to respect for human rights as part of the essential elements of an agreement, the EU’s post-Lisbon trade agreements all include a chapter on Trade and Sustainable Development (TSD) with references to labor and environmental standards that are based on multilateral instruments such as the Conventions of the International Labor Organisation (ILO) and the United Nations Convention on Climate Change.¹⁴⁰ There is an overlap between

131. See, e.g., Art. 2, ¶ 3 of the Association Agreement with Moldova.

132. See Art. 455 of the Association Agreement with Moldova. For comments, see also Ghazaryan, *supra* note 127.

133. Art. 28, ¶ 7 of the Strategic Partnership Agreement with Canada.

134. Zamfir, *supra* note 13, at 10.

135. Art. 28, ¶ 3 of the Strategic Partnership Agreement with Canada.

136. *Id.*

137. Art. 43, ¶ 4 of the Strategic Partnership Agreement with Japan (2016) O.J. (L 216/15).

138. Framework Agreement on Comprehensive Partnership between the European Union and its Member States, of the one part, and Thailand of the other part, (2022) O.J. (L 330/72).

139. *Id.* at art. 55 (5).

140. Whereas such references were already included in pre-Lisbon trade agreements, the new generation of trade agreements are more explicit in their sustainable development objectives, see Barbara Cooreman & Geert Van Calster, *Trade and Sustainable Development Post-Lisbon*, in THE

general human rights clauses and more specific TSD provisions. After all, it is well established that ILO core labor standards are also human rights and that there is an important link between human rights and environmental protection.¹⁴¹ Nevertheless, there are significant differences in the monitoring and enforcement provisions: the TSD chapter includes a dedicated dispute settlement mechanism, as opposed to an option of non-execution for a violation of the essential elements clause.¹⁴²

III. THE CHALLENGES OF EFFECTIVE MONITORING AND ENFORCEMENT

A. *The Gap Between Ex-Ante and Ex-Post Human Rights Conditionality*

Notwithstanding the remarkable evolution of human rights clauses in the past decades, this evolution is not without criticism. This is mostly due to the lack of consistency and effectiveness in how human rights clauses are incorporated into trade agreements. First, certain self-standing sectoral agreements (e.g., on fisheries, timber, or steel) may escape the general conditionality approach.¹⁴³ This problem can be easily solved through the consistent inclusion of a reference to the essential element clauses of a framework agreement. A good example is the Partnership Agreement on Sustainable Fisheries between the EU and Mauritania, which provides that this agreement is to be implemented in accordance with the human rights clause included in the post-Cotonou Agreement with the ACP countries.¹⁴⁴ However, the negotiation of the EU-China Comprehensive Agreement on Investment (CAI) reveals the limits of this approach.¹⁴⁵ The latter agreement does not include specific human rights provisions.¹⁴⁶ There is a link with a general framework, the Trade and Economic Cooperation Agreement (TECA) from 1985. But this agreement does not include a human rights clause

LAW AND PRACTICE OF THE COMMON COMMERCIAL POLICY: THE FIRST 10 YEARS AFTER THE TREATY OF LISBON 187–205, 416–33 (Guillaume Van der Loo & Michael Hahn eds., 2020).

141. Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, 40 LEGAL ISSUES OF ECONOMIC INTEGRATION 4, 301 (2013).

142. *Id.*

143. Hachez & Marx, *supra* note 59, at 93.

144. See art. 3, ¶6 and art. 15 of the Partnership Agreement on Sustainable Fisheries between the European Union and the Islamic Republic of Mauritania (2021) O.J. (L 439/1).

145. The EU-China CAI is still to be approved. The text of the agreement is https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en.

146. The absence of a human rights clause is often explained on the basis of the agreement's limited focus on investment protection and market access. From a legal perspective, however, there are no obstacles to include a human rights clause to such type of agreements. To the contrary, it would be consistent with the EU's general objectives as enshrined in Articles 3(5) and 21 TEU.

either.¹⁴⁷ Hence, in the absence of a new framework agreement, the CAI is expected to have a minimal and indirect impact on human rights.¹⁴⁸ The absence of specific and enforceable human rights clauses in the CAI has, therefore, been heavily criticized by several NGOs.¹⁴⁹ In a reaction to the adoption of Chinese sanctions against European individuals and entities, including five Members of European Parliament (MEPs), the European Parliament made it clear that “it is not acceptable to deal with trade and investment relations outside the general context of human rights issues and the broader political relations.”¹⁵⁰ Accordingly, it was decided that any discussion on the ratification of the CAI is frozen as long as the Chinese sanctions are in place.¹⁵¹ Moreover, the Commission is expected to use the debate around the CAI to improve the protection of human rights and support for civil society in China.¹⁵²

The discussion surrounding the CAI with China clearly illustrates how the EU’s human rights conditionality in the Common Commercial Policy has an important *ex-ante* dimension, i.e., before the conclusion of a trade or investment agreement. Given the European Parliament’s role in the ratification process of trade agreements as foreseen under Article 218 of the TFEU, this offers significant leverage for adding human rights concerns to the agenda. Of course, a consistent human rights policy also implies the inclusion of strong and enforceable human rights clauses as instruments of an *ex-post* human rights conditionality policy.

A decision to suspend the application of an agreement belongs to the Council upon a proposal from the Commission or the High Representative for Foreign Affairs and Security Policy.¹⁵³ The European Parliament is kept informed at all stages of this procedure.¹⁵⁴ Notably, the EU institutions are not obliged to trigger the human rights clause when confronted with human rights violations in a contracting party. This is demonstrated by the *Mugraby* case before the Court of

147. Agreement on Trade and Economic Cooperation between the European Economic Community and the People’s Republic of China, OJ (1985) L 250.

148. European Commission, *Position Paper on the Sustainability Impact Assessment in support of negotiations of an Investment Agreement between the European Union and the People’s Republic of China*, EUROPEAN COMMISSION (May 2018) https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156863.pdf at 6.

149. See *Calling for Inclusion of Human Rights Clauses in the EU-China CAI*, THE RIGHTS PRACTICE (Jan. 2021) <https://www.rights-practice.org/news/joint-appeal-calling-for-inclusion-of-human-rights-clauses-in-the-eu-china-cai>.

150. European Parliament, *Resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs*, EUROPEAN PARLIAMENT (2021) https://www.europarl.europa.eu/doceo/document/TA-9-2021-0255_EN.html.

151. European Parliament, *MEPs Refuse Any Agreement with China Whilst Sanctions are in Place* (May 20, 2021). <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-while-sanctions-are-in-place>.

152. *Id.*

153. Art. 218(9) TFEU.

154. Art. 218 TFEU.

Justice of the EU.¹⁵⁵ Confronted with an action for a failure to act pursuant to fundamental rights violations in Lebanon, both the General Court and the Court of Justice pointed to the political nature of the human rights clause included in the EU-Lebanon Association Agreement.¹⁵⁶ By using the words “may take,” the parties to the Association Agreement indicated clearly and unequivocally that each of them had a right, but not an obligation, to take such appropriate measures.¹⁵⁷ That non-binding nature, expressly envisaged in that provision, cannot be called into question in light of Article 86(1) of the Association Agreement, which concerns the measures that the parties must take to fulfil their obligations, and not the suspension of those obligations.¹⁵⁸

Moreover, it was upheld that the human rights clause is not intended to give rights to individuals, entailing that such clauses were not intended to endow individuals with justiciable rights.¹⁵⁹ More recent agreements even explicitly exclude the direct effect—or justiciability—of these provisions, implying that natural or legal persons cannot invoke the human rights clause before the EU or Member State courts.¹⁶⁰ This standard practice can be related to the political significance and sensitivities surrounding the enforcement of human rights clauses. Comparable to the adoption of restrictive measures in the field of Common Foreign and Security Policy (CFSP), this is an area where the EU legislature has broad discretion, since it involves complex assessments where political, economic and social choices are to be made.¹⁶¹ It is doubtful whether the contracting parties would agree with the inclusion of directly applicable, enforceable, or justiciable human rights clauses in international agreements.¹⁶² Accordingly, the non-direct effect of such provisions appears a logical consequence of the specific nature of human rights conditionality.

Finally, the EU’s human rights conditionality does not only feature in human rights clauses included in international agreements. It is also part of unilateral

155. Case T-292/09, *Muhamed Mgraby v. Council and Commission* ECLI:EU:T:2011:418, (Sept. 6, 2011); Case C-581/11 P, *Mgraby v. Council and Commission*, ECLI:EU:C:2012:466, (July 12, 2012).

156. Case T-292/09, *Muhamed Mgraby v. Council and Commission*, ECLI:EU:T:2011:418, ¶ 60 (Sept. 6, 2011); Case C-581/11 P, *Mgraby v. Council and Commission*, ECLI:EU:C:2012:466, ¶ 72 (July 12, 2012).

157. *Id.*

158. Case C-581/11 P, *Mgraby v. Council and Commission*, ECLI:EU:C:2012:466, ¶ 70–71 (July 12, 2012).

159. Case T-292/09 (n 89) ¶ 61.

160. Zamfir, *supra* note 13, at 10.

161. See, for an example regarding restrictive measures, *Rosneft*, Case C-72/15, ECJ ¶ 146.

162. This relates to role of human rights clauses international agreements, as explained in Sections I and II of this Article.

financial instruments, such as the Neighbourhood Development and International Cooperation Instrument (NDICI),¹⁶³ and macro-financial assistance (MFA) to partner countries experiencing a balance of payments crisis.¹⁶⁴ Accordingly, financial assistance can be suspended in the event of degradation in democracy, human rights, or the rule of law.¹⁶⁵ With respect to developing countries, an explicit human rights conditionality is included in the EU's Generalized System of Preferences (GSP).¹⁶⁶ Under the GSP Regulation, the European Commission can initiate a procedure for the temporary withdrawal of tariff preferences from a beneficiary country in cases of, amongst others, serious and systemic violations of the principles laid down in a selected number of core conventions on human and labor rights.¹⁶⁷ Suspensions of trade preferences have applied to Myanmar (1997),¹⁶⁸ Belarus (2007),¹⁶⁹ Sri Lanka (2010),¹⁷⁰ and, recently, Cambodia (2020).¹⁷¹ Cambodia lost its duty-free access for certain products such as garments, footwear, and travel goods in response to serious and systemic violations of key principles of the International Covenant on Civil and Political Rights (ICCPR): political participation, freedom of expression, and freedom of association.¹⁷² From a legal standpoint, the temporary withdrawal of trade preferences is based upon the adoption of a European Commission delegated

163. See EUR. COMM'N, NEIGHBOURHOOD, DEVELOPMENT AND INTERNATIONAL COOPERATION INSTRUMENT – GLOBAL EUROPE (NDICI – GLOBAL EUROPE), https://neighbourhood-enlargement.ec.europa.eu/funding-and-technical-assistance/neighbourhood-development-and-international-cooperation-instrument-global-europe-ndici-global-europe_en.

164. See EUR. COMM'N, MACRO-FINANCIAL ASSISTANCE (MFA), https://economy-finance.ec.europa.eu/eu-financial-assistance/macro-financial-assistance-mfa_en.

165. See consideration 40 of the preamble and Art. 20, para 2 of Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe (2021) O.J. (L 209/1).

166. Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences (2012) O.J. (L 303/1).

167. *Id.* at art. 19.

168. Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, (1997) O.J. (L 85).

169. Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus, (2006) O.J. (L 405).

170. Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, (2010) O.J. (L 45).

171. Commission Delegated Regulation (EU) 2020/550 of 12 February 2020 amending Annexes II and IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council as regards the temporary withdrawal of the arrangements referred to in Article 1(2) of Regulation (EU) No 978/2012 in respect of certain products originating in the Kingdom of Cambodia, (2020) O.J. (L 127).

172. Daniel Ferrie & Kinga Malinowska, *Cambodia loses duty-free access to the EU market over human rights concerns*, EUROPEAN COMMISSION (Aug. 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1469.

regulation, which includes an assessment of the violated rights, as well as the expected actions from the Cambodian authorities.¹⁷³

As part of the EU's 2021 trade strategy, a revision of the GSP regulation was initiated.¹⁷⁴ The objective is to strengthen the conditionality approach through an update of the relevant conventions and increased monitoring. Without entering into the details of this exercise, it is noteworthy that the European Parliament insists on important amendments regarding the procedure for the withdrawal of trade preferences.¹⁷⁵ These amendments include, *inter alia*, a requirement for the Commission to "publicly state the grounds for withdrawing preferences and set benchmarks that the beneficiary country should meet for the preferences to be reinstated."¹⁷⁶ The assessment should be based on key indicators such as reports of fact-finding missions, findings of the UN High Commissioner for Human Rights, UN special rapporteurs, independent human rights experts or human rights groups and rulings and opinions by international human rights courts.¹⁷⁷ Another important proposal is to require an analysis of the socio-economic impact of a partial withdrawal in order to assess the human rights implications for the most vulnerable parts of the population.¹⁷⁸ Whereas this process is not directly related to the enforcement of human rights clauses in trade agreements, these suggestions for a more transparent and benchmark-based approach can also be taken into account to ensure a consistent and holistic approach towards human rights abuses in trade partner countries.

B. The Challenge of Mixed Agreements

Human rights clauses are often included in so-called mixed agreements, i.e., agreements where both the EU and its Member States are contracting parties.¹⁷⁹ This is particularly the case because such clauses often form part of broadly

173. Commission Delegated Regulation (EU) 2020/550 of 12 February 2020 amending Annexes II and IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council as regards the temporary withdrawal of the arrangements referred to in Article 1(2) of Regulation (EU) No 978/2012 in respect of certain products originating in the Kingdom of Cambodia (2020) O.J. (L 127/1).

174. *Commission Proposal for a Regulation of the European Parliament and of the Council on applying a generalized scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and the Council*, COM (2021) 579 final (Sept. 22, 2021).

175. European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on applying a generalized scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and the Council, A9-0147/2022.

176. *Id.*, amend. 74.

177. *Id.*, amend. 68.

178. *Id.*, amend. 94.

179. On the practice of mixed agreements, see, e.g., Joni Heliskoski, *Mixed Agreements: The EU Law Fundamentals* in OXFORD PRINCIPLES OF EUROPEAN UNION LAW 1174–1207 (Robert Schütze and Takis Tridimas eds., 2018).

defined framework agreements, which go beyond the scope of EU competences.¹⁸⁰ Moreover, Member States generally prefer the option of mixed agreements for pragmatic and political reasons. It endows them with additional bargaining power while upholding their visibility *vis-à-vis* third countries.¹⁸¹

Mixed agreements require a double ratification process (at the EU level and at the level of every individual Member State) before entering into force.¹⁸² This can easily take several years, with specific concerns from individual Member States potentially complicating the ratification procedure. For instance, the CETA between the EU and Canada was officially signed in October 2016, and in December 2022 ten Member States had still not ratified the agreement due to several contested issues, ranging from the proposed system of investor-State dispute settlement (ISDS) to food safety, consumer protection, and the protection of geographical indications.¹⁸³

In anticipation of the full entry into force of mixed agreements, it is a common practice for the Council to adopt a decision regarding the provisional application of certain parts of the agreement.¹⁸⁴ Alternatively, an interim-agreement can be concluded between the EU and the third States, which allows for the quick entry into force of those parts of the agreement which do not require Member State ratification.¹⁸⁵ The scope of the provisional application can be as broad as the EU's own competences. For instance, the Council Decision on the provisional application of the Cooperation Agreement on Partnership and Development with Afghanistan includes "matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy."¹⁸⁶ Hence, this allows for the inclusion of provisions relating to the general principles defined at the outset of the agreement, including the essential element clause, political dialogue, human rights cooperation, and gender equality. Moreover, the non-execution clause can

180. Van Elsuwege & Chamon, *supra* note 91, at 35–36.

181. Allan Rosas, *The Future of Mixity*, in *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD*, 367–74 (Christophe Hillion & Panos Koutrakos eds., 2010).

182. *Id.*

183. See CETA RATIFICATION TRACKER, <https://carleton.ca/tradenetwork/research-publications/ceta-ratification-tracker>.

184. Only when the constitutional law of a partner third country does not allow for provisional application, this practice will not be followed. For instance, the Framework Agreement on Comprehensive Partnership and Cooperation with Vietnam did not provisionally enter into force because Vietnam's constitutional law did not allow for it. See Merijn Chamon, *Provisional Application of Treaties: The EU's Contribution to the Development of International Law*, 31 *EUR. J. INT. LAW* 3, 893, 896 (2020).

185. Significantly, the Council decision on provisional application can be adopted without involvement of the European Parliament under Art. 218 (5) TFEU. For the conclusion of an interim agreement, the consent of the European Parliament is necessary in so far as the agreement covers matters as defined under Art. 218 (6) TFEU.

186. Council Decision (EU) 2017/434 of 13 February 2017 on the signing, on behalf of the Union, and provisional application of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, (2017) O.J. (L 67/1).

be triggered at the stage of provisional application.¹⁸⁷ In other words, there are no legal obstacles for including human rights clauses and connected provisions on political dialogue within the scope of the provisional application.¹⁸⁸

Nevertheless, despite the EU's common recourse to provisional arrangements, this practice does not always appear consistent.¹⁸⁹ For instance, the EU-Central America Association Agreements only provided for the provisional application of Part IV of this agreement on trade matters, whereas the human rights clause is included in another part of the agreement.¹⁹⁰ As observed by Nicolas Hachez, "[t]his creates significant uncertainty as to the applicability of human rights conditionality during the provisional application phase."¹⁹¹ It may be argued that the provisional application of the trade part of an agreement cannot be read and interpreted in isolation from the general provisions and, therefore, the human rights clause also applies.¹⁹² However, proceeding from a literal interpretation of the specific references to the scope of provisional application, it can be equally argued that this is strictly limited to the trade matters of Part IV only. Hence, to avoid any confusion, a consistent inclusion of references to the human rights clause at the stage of provisional application is a good practice. Such good practice can, for instance, be found in the Council Decision on the signing and provisional application of the Framework Agreement on Comprehensive Partnership and Cooperation with Thailand.¹⁹³ The Council Decision explicitly defines the scope of provisional application, including the essential element and non-execution clause as well as the general provision on human rights cooperation.¹⁹⁴

187. This can be derived from the provisional application of relevant parts under Titles VIII (institutional framework) and IX (final provisions) in combination with Art. 2 (general principles).

188. This is important given the recent tendency to 'split' comprehensive agreements in different parts with a separate, EU-only trade agreement and a mixed framework agreement. In such a situation, the provisional application of the human rights clause prevents a legal loophole where the trade agreement would be in force without the option of triggering the human rights clause.

189. Hachez & Marx, *supra* note 59 at 94.

190. Council Decision 2012/734, 2012 O.J. (L 346) 1 (EU). (On the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters (2012) O.J. (L 346/1)).

191. Hachez & Marx, *supra* note 59 at 94.

192. In this respect, reference can be made to Art. 31 (1) VCLT which defines the treaty provisions ought to be interpreted in light of their context, including also 'other agreements relating to the treaty'. See also Bartels, *supra* note 14, at 4.

193. Council Decision (EU) 2022/2562 of 24 October 2022 on the signing, on behalf of the Union, and provisional application of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Kingdom of Thailand, of the other part, (2022) O.J. (L 330/70).

194. *Id.* at art. 3.

C. The Role of Human Rights Dialogues and the Individual Right of Petition

Human rights clauses are only one instrument in the EU's toolbox of human rights promotion within the framework of its external action. The range of instruments at the EU's disposal include human rights dialogues, consultations with partner countries and regional groupings, financial conditionality mechanisms under the NDICI and GSP, public diplomacy, awareness campaigns, public statements, declarations, and démarches. Clearly, the focus is on dialogue and positive measures rather than on a punitive approach. This is in line with the EU Action Plan on Human Rights and Democracy 2020-2024¹⁹⁵ and the Commission's reply to the European Ombudsman's Strategic Initiative concerning the respect for human rights in the context of international trade agreements.¹⁹⁶

This dialogue-based approach is commonly criticized because it lacks effectiveness without strong monitoring and enforcement mechanisms. In terms of monitoring, it is noteworthy that there is a difference between the labor and environmental standards included in the TSD chapters and the traditional human rights clauses.¹⁹⁷ The TSD chapters generally provide for the establishment of a specialized Committee with senior officials from the respective parties, accompanied by a civil society mechanism that may take the form of a Domestic Advisory Group (DAG) for each party and an annual transnational civil society meeting.¹⁹⁸ In contrast, there is usually no special body dedicated to the monitoring of the essential elements clause, even though subcommittees on human rights and democratic principles may be established on an ad hoc basis.¹⁹⁹

Moreover, some agreements provide for a general cooperation clause in the field of human rights, which provides the basis for "a regular meaningful, broad based human rights dialogue." The agenda of such a dialogue is usually broadly defined and open-ended, as can be illustrated with Art. 30 of the Framework Agreement on Comprehensive Partnership and Cooperation with Thailand.²⁰⁰

195. EU Action Plan on Human Rights and Democracy 2020-2024 at https://www.eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf.

196. European Commission Reply to the European Ombudsman, *Complaint ref. SI/5/2021, C(2022) 9654 final*, EUROPEAN COMMISSION (Dec. 14, 2022) at 3.

197. Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, 40 *LEGAL ISSUES OF ECONOMIC INTEGRATION* 4, 301 (2013).

198. See, e.g., Art. 13.15 of the Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, OJ (2020) L 186.

199. Amongst others, such dialogues exist with Morocco, Tunisia, Lebanon, Jordan, Egypt and Iraq. See Bartels, *supra* note 14.

200. Framework Agreement on Comprehensive Partnership between the European Union and its Member States, of the one part, and Thailand of the other part, OJ (2022) L 330/72.

Article 30 - Human rights

1. The Parties agree to cooperate in the promotion and protection of human rights, based on the principle of mutual consent and respect. The Parties shall foster a regular meaningful, broad-based human rights dialogue.
2. Cooperation in the field of human rights may include, inter alia:
 - (a) capacity-building on implementing international human rights instruments applicable to the Parties and on strengthening the implementation of action plans related to human rights;
 - (b) promoting dialogue and exchanges of contacts and information on human rights;
 - (c) strengthening of constructive cooperation between the Parties within the UN human rights bodies.
3. The Parties shall cooperate on the strengthening of democratic principles, the rule of law and good governance. Such cooperation may include:
 - (a) strengthening cooperation between national and regional institutions competent in human rights, rule of law and good governance;
 - (b) collaborating and coordinating to reinforce democratic principles, human rights and the rule of law, including equality before the law, the access of people to effective legal aid and the right to a fair trial, due process and access to justice, in accordance with their obligations under international human rights law.

In the absence of such dedicated provisions, human rights issues can still be addressed within the joint institutional bodies as a part of the established political dialogue under a framework agreement. Although their names may differ depending on the type of agreement, such bodies play a central role with respect to the monitoring and application of the agreement. For instance, it is an established practice that the Association Council (for association agreements) or Partnership/Joint Council or Committee (for non-association agreements) must be informed and can hold consultations before the adoption of “appropriate measures” under the non-execution clause, with specific rules for cases of special urgency.²⁰¹ In addition, Association or Partnership/Joint Councils are usually endowed with a generic competence “to examine any major issues” arising within the framework of the agreement.²⁰²

201. See, e.g., Art. 28, ¶ 5 of the Strategic Partnership Agreement with Canada, which provides that in cases of special urgency, the Joint Ministerial Committee (JCM) may be involved for urgent consultations.

202. See, e.g., Art. 363 (3) of the Comprehensive and Enhanced Partnership Agreement with Armenia.

Human rights may also be discussed within other joint bodies such as parliamentary committees and civil society consultative committees. Some agreements, such as the one with the EU's eastern neighbors, include a separate title on "civil society cooperation," which includes broadly defined objectives and the establishment of a Civil Society Platform.²⁰³ The latter may make recommendations to the main decision-making body, which is the Association Council or the Partnership Council.²⁰⁴ The involvement of civil society stakeholders is also provided in other recent agreements such as the post-Cotonou agreement with the ACP countries.²⁰⁵ However, the provisions are broadly drafted, aimed at the sharing of information and the possibility to come up with recommendations, but fall short of concrete rights such as the possibility to lodge complaints with respect to violations of specific rights.²⁰⁶ The absence of an effective private complaints procedure has long been identified as one of the major issues preventing a more effective enforcement of labor standards in EU trade agreements.²⁰⁷ In this respect, the possibility for EU-based stakeholders to lodge a complaint to the recently established Single Entry Point (SEP) with respect to violations of the labor and environmental rights included in the TSD chapters is a significant improvement.²⁰⁸ The creation of the SEP reflects the European Commission's efforts to improve the monitoring, enforcement and implementation of the TSD commitments in trade agreements. It follows the appointment, in July 2020, of the Chief Trade Enforcement Officer (CTEO), who oversees monitoring the implementation and enforcement of EU trade and investment agreements.²⁰⁹

The establishment of the CTEO and SEP are important developments in the direction of a more assertive and rights-based trade policy. However, as observed by the European Ombudsman, these initiatives also have important limitations.²¹⁰ First, only EU citizens and EU-based organizations can access the SEP. Organizations from non-EU countries have no direct access to the SEP, even

203. See, e.g., Arts 443–470 of the Association Agreement with Ukraine and Arts. 102–104; Art. 366 of the Comprehensive and Enhanced Partnership Agreement with Armenia.

204. *Id.*

205. Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part, (2023) O.J. (L 2862).

206. *Id.* at art. 65.

207. Marco Bronckers & Giovanni Gruni, *Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously*, 56 COMMON MKT. L. REV. 6, 1591–1622 (2019).

208. The new complaints system to fight trade barriers and violations of sustainable trade commitments was launched in November 2020, see *Commission launches new complaints system to fight trade barriers and violations of sustainable trade commitments*, EUR. COMM'N PRESS CORNER (Nov. 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2134.

209. See *European commission appoints its first chief Trade Enforcement Officer*, EUR. COMM'N PRESS CORNER (July 24, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1409.

210. European Ombudsman, *Closing note on the Strategic Initiative concerning how the European Commission ensures respect for human rights in the context of international trade agreements* (SI/5/2021/VS), EUROPEAN OMBUDSMAN (Jul. 14, 2022), <https://www.ombudsman.europa.eu/en/doc/correspondence/en/158519>.

though they may contact EU-based organizations to issue a complaint on their behalf.²¹¹ This is what happened when the Dutch-based organization CNV International submitted a complaint on behalf of trade union organizations in Colombia and Peru with respect to alleged violations of fundamental labor rights, freedom of association rights, and the right to equality.²¹² Second, the SEP focuses on complaints about trade barriers and non-compliance with sustainability commitments in third countries. It operates under DG Trade of the Commission and is, therefore, essentially an instrument which aims to ensure a level-playing field with respect to social and environmental standards in a trade-related context.²¹³ It follows that the SEP does not seem well suited to deal with human rights complaints in general, and a distinct human rights complaints mechanism has been suggested.²¹⁴

Significantly, in response to the European Ombudsman's suggestions, the European Commission explicitly dismissed the proposal to set up a new and separate complaint-handling portal for alleged human rights abuses. In the European Commission's view, "the existing mechanisms provide sufficient routes for complaints or concerns to be raised to the Commission or to the European External Action Service."²¹⁵ Apart from the SEP and consultations within the framework of human rights and civil society dialogues, there are dedicated websites of EU delegations abroad and the possibility to submit complaints "by correspondence, e-mail, in person meetings or via the European External Action Service contact form."²¹⁶ However, this variety of channels does not really provide an alternative to a single, dedicated and well-known contact point. With respect to the possibility for non-European stakeholders to submit specific human rights concerns, the European Commission points at "limited resources and the

211. *Operating guidelines for the Single-Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements*, EUR. COMM'N, (Dec. 18, 2023), https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf

212. See New complaint presented by trade union organisations before the Single-Entry Point (SEP) of the European Commission, ETUCLEX (Sept. 7, 2024), <https://etuclex.etuc.org/new-complaint-presented-trade-union-organisations-single-entry-point-sep-european-commission>.

213. *The power of trade partnerships: together for green and just economic growth - COM (2022) 409 final*, EUROPEAN COMMISSION (Jun. 22, 2022).

214. European Ombudsman, *op. cit.* This appears to align with the observation made by Kathleen Claussen, who holds that non-trade considerations that do not constitute a driving force for the trade agreement, should not necessarily be adjudicated or considered analogously as the trade counterparts. See Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 23 J. INT. ECON. LAW 1, 25–43 (2020).

215. European Commission Reply to the European Ombudsman, *Complaint ref. SI/5/2021, C (2022) 9654 final*, EUROPEAN COMMISSION (Dec. 14, 2022) at 4. European Commission Reply to the European Ombudsman, *Complaint ref. SI/5/2021, C(2022) 9654 final*, EUROPEAN COMMISSION (Dec. 14, 2022) at 4.

216. *Id.* at 5.

need to ensure that our trade instruments deliver benefits to EU actors.”²¹⁷ In other words, the key priority for the European Commission is to guarantee the rights and interests of EU stakeholders. Non-EU stakeholders can flag their issues through EU-based interest groups, as has been done by a Dutch NGO on behalf of trade union organizations in Peru and Colombia.

EU citizens and natural or legal persons residing or having its registered office in a Member State can also use their right of petition as guaranteed under Article 227 TFEU and Article 44 CFR.²¹⁸ Under this procedure, an Austrian national requested the suspension of the Trade Agreement with Colombia following the violent crackdown of nationwide protests in this country in April and May 2021.²¹⁹ In its response, the European Commission recalled the formal procedural requirements for triggering the human rights clause and concluded that the best way to proceed was to “continue the political dialogue with Colombia on this issue.”²²⁰ This is in line with the EU’s traditional approach, where human rights clauses are mainly used as a reference to foster a constructive dialogue with third countries.²²¹ Despite this ambition, the absence of explicit references to the problematic human rights situation in the public statements following the EU-Colombia High Level Dialogue and Human Rights Dialogue raised concerns of human rights defenders in the region.²²²

The confidential nature of the human rights dialogues may have limited or even counterproductive consequences.²²³ When joint press releases following such dialogues contain vague language without specific commitments or positions, they may give wrong impressions about the human rights situation in a particular country. Ensuring the highest possible transparency regarding the process, timing, and content of human rights dialogues to all relevant stakeholders is therefore of utmost importance. This was one of the explicit recommendations of the Human Rights and Democracy Network (HRDN) for the revision of the EU Guidelines on human rights dialogues with third countries.²²⁴ However, the Council did not include such a requirement of transparency when it adopted the

217. *Id.*

218. *Operating guidelines for the Single-Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements*, EUR. COMM’N (Dec. 18, 2023), https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf

219. Petition No. 0828/2021 by I.E. (Austrian) on the need to temporarily suspend the EU-Colombia Trade Agreement.

220. *Id.*

221. *See supra* Section II.

222. See an open letter of NGOs demanding more dialogue on human rights in Colombia: *EU-LAT Network joins civil society Open Letter demanding more dialogue on human rights in Colombia*, EU-LAT (Feb. 3, 2022), <https://eulatnetwork.org/eu-lat-network-joins-oidhacos-open-letter-on-eu-human-rights-public-statements/>.

223. *See* KATRIN KINZELBACH, *THE EU’S HUMAN RIGHTS DIALOGUE WITH CHINA: QUIET DIPLOMACY AND ITS LIMITS* (Routledge 2015).

224. HRDN, *supra* note 26.

revised guidelines in February 2021.²²⁵ Accordingly, the role of NGOs and external stakeholders is essentially limited to that of information providers.²²⁶

D. Towards a More Assertive Approach

It is a traditional criticism that the EU's approach is overly ambitious, covering a wide range of issues but lacking any concrete, enforceable standards.²²⁷ This applies to the traditional human rights clauses and, until recently, also to the labor and environmental standards included in recent FTAs, because they were not subject to the normal dispute settlement procedures.²²⁸ Disputes under the TSD chapters used to be resolved within a system of consultations with a possible referral to a panel of experts.²²⁹ This panel has the power to draw up a report and to make non-binding recommendations to solve the matter. Clair Gammage argues that this soft approach is one of the main weaknesses of the EU's trade-human rights nexus.²³⁰

A look at the available European Commission's *ex-post* impact assessments seems to confirm the rather weak enforcement of human and labor rights.²³¹ For instance, the European Commission's report on the EU-Mexico FTA found that "the commitments to human rights in the agreement still lack effective mechanisms through which human rights could be better monitored or defended."²³² The EU-Korea FTA implementation report bluntly concluded that "the EU-Korea FTA is assessed to have not changed the status quo of human and labor rights in Korea as they were when the FTA came into effect, in the sense

225. Council of the EU, *Revised EU Guidelines on Human Rights Dialogues with Partner/Third Countries*, doc. 6279/21.

226. Katrin Kinzelbach, *The EU's Human Rights Dialogues: Talking to Persuade or Silencing the Debate?*, Paper presented at the Conference 'The Transformative Power of Europe,' FREIE UNIVERSITÄT BERLIN (Nov. 10-11, 2009) https://www.polsoz.fu-berlin.de/en/v/transforeurope/activities_alt/Content/ic2009/opening_conference/conference_papers/Kinzelbach_Human_Rights_Dialogues_KFG_Conference_Dec_2009.pdf.

227. Hachez & Marx, *supra* note 59 at 372.

228. Clair Gammage, *A Critique of the Extraterritorial Obligations of the EU in Relation to Human Rights Clauses and Social Norms in EU Free Trade Agreements*, 2 EUR. AND WORLD 1 (2018).

229. *Id.*

230. *Id.* at 9.

231. The *ex-post* evaluations are available at the website of the European Commission, DG Trade. See EUR. COMM'N, EX-POST EVALUATIONS, <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/>.

232. EUR. COMM'N, EX-POST EVALUATION OF THE IMPLEMENTATION OF THE EU-MEXICO FREE TRADE AGREEMENT _161 (Feb. 2017), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/6bb189e5-74b9-433b-87f0-26f07408d3ae/details>.

that little change (positive or negative) over the 2011 situation and/or longer-term trends can be observed.”²³³

Significantly, this report was produced before the EU’s decision to request, for the very first time, formal consultations with the Republic of Korea regarding the country’s non-compliance with international labor standards as defined in the TSD chapter of the EU-Korea FTA.²³⁴ This initiative, which was launched in December 2018, reveals a more assertive approach on behalf of the EU. It also shows a clear willingness to use the available mechanisms to ensure compliance with standards that go beyond the traditional scope of international trade relations.²³⁵

This approach produced some effect in the sense that Korea ratified three ILO Conventions and made amendments to its Trade Union and Labor Relations Adjustment Act (TULRAA) following the EU’s pressure.²³⁶ Despite this positive evolution, scholars have raised several criticisms. Aleydis Nissen, for instance, argues that the EU did not address certain controversial issues (such as the effective recognition of collective bargaining and the right to strike) and certain workers (in the public and export sectors) during the proceedings in the Panel of Experts.²³⁷ This makes it easier for the European Commission to claim that the soft dispute mechanism under the TSD chapter works.²³⁸ Ji Sun Han criticized the EU’s focus on procedural questions, such as the ratification of the ILO Conventions and formal amendments to the TULRAA, without fundamentally addressing the root causes of labor rights issues in Korea.²³⁹ Han, therefore, argues that the EU’s approach should be “more tailor-made.”²⁴⁰

233. EUR. COMM’N, EVALUATION OF THE IMPLEMENTATION OF THE FREE TRADE AGREEMENT BETWEEN THE EU AND ITS MEMBER STATES AND THE REPUBLIC OF KOREA, 244 (May 2018), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/5be99665-6477-49a1-b6cc-30c6370c28fa/details>.

234. Request for consultations by the European Union (Dec. 17, 2018), <https://jusmundi.com/fr/document/pdf/other/en-republic-of-korea-compliance-with-obligations-under-chapter-13-of-the-eu-korea-free-trade-agreement-request-for-consultations-by-the-european-union-monday-17th-december-2018>.

235. In this respect, it is noteworthy that adopting a more assertive approach toward the enforcement of commitments made under the TSD chapters was one of the recommendations included in a non-paper of the Commission services in February 2018, entitled ‘Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements’. See *Feedback and Way Forward on Improving the Implementation and enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreement*, POLITICO EUROPE, <https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf>.

236. *Korea ratifies three ILO Conventions*, INT’L LAB. ORG. (Nov. 14, 2011), https://www.ilo.org/resource/news/korea-ratifies-three-ilo-conventions_.

237. Aleydis Nissen, *Not That Assertive: The EU’s Take on Enforcement of Labour Obligations in its Free Trade Agreement with South Korea*, 33 EUR. J. INT’L L. 2, 607 (2022).

238. *Id.*

239. *Id.*

240. Ji Sun Han, *The EU-Korea Labour Dispute: A Critical Analysis of the EU’s Approach*, 26 EUR. FOREIGN AFFS. REV. 4, 531 (2021).

Significantly, following a public consultation, the European Commission announced a revision of the policy on sustainable development in trade agreements. This includes, amongst others, a more tailored and targeted approach with country-based implementation priorities and a more assertive enforcement strategy, with the possibility of trade sanctions as a last resort.²⁴¹ This is an important paradigm shift, which is reflected in the text of the new EU-New Zealand FTA.²⁴² For the first time, the TSD chapter is aligned with the general dispute settlement procedure.²⁴³ Accordingly, a violation of sustainable trade obligations, i.e., core labor standards and commitments under the Paris Climate Agreement, may lead to trade sanctions.

This reinforcement of TSD chapters goes hand in hand with several other recent initiatives aimed at ensuring increased respect for social and environmental standards. Consider the Carbon Border Adjustment Mechanism (CBAM),²⁴⁴ the proposal for a Directive on Corporate Sustainability Due Diligence,²⁴⁵ the proposal for a “Regulation on prohibiting products made with forced labor on the Union market.”²⁴⁶ The common thread between all these initiatives is that they aim to ensure a level playing field for businesses established within and outside the EU. This is crucial to ensure the effective functioning of the EU single market.

However, there is a certain discrepancy between the obligations that the EU wants to impose on companies through the aforementioned legislative initiatives on the one hand, and its approach to trade and sustainable development in the context of international agreements on the other hand. The latter approach is more selective in nature, focusing on core labor standards and the Paris Climate Agreement, and differs depending on the countries concerned.²⁴⁷ Scholars have argued for more coherence to ensure “a better connection” between the sustainability requirements that EU governments impose on themselves in

241. *The power of trade partnerships: together for green and just economic growth*, COM (2022) 409 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0409>.

242. Carlotta Ceretelli, *EU-New Zealand FTA: Towards a New Approach in the Enforcement of Trade and Sustainable Development Obligations*, EJIL:TALK! (Sep. 28, 2022) <https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/>.

243. EU-New Zealand Trade Agreement, EU-NZ, ch. 26, 2024 O.J. (L 866) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202400866#page=479.

244. Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, 2023 O.J. (L 130) 52.

245. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence*, COM (2022) 71 final.

246. *Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labor on the Union market*, COM (2022) 453 final.

247. Marco Bronckers, *Due Diligence Legislation Versus Trade Policy*, LEIDEN L. BLOG (Nov. 18, 2022) <https://www.leidenlawblog.nl/articles/due-diligence-legislation-versus-trade-policy>.

comparison to the ones they impose on companies.²⁴⁸ In this respect, the discussion about the use and enforceability of human rights clauses in FTAs cannot be disconnected from aforementioned legislative instruments such as corporate human rights due diligence. As observed by Thomas Ackermann, “we could hardly expect from EU companies to monitor and to maintain human rights compliance by their trading partners in States with a problematic human right record if the Union itself spared these States for political reasons.”²⁴⁹

Finally, the envisaged legally binding international treaty on business and human rights may become a significant external benchmark in the framework of EU trade agreements.²⁵⁰ This draft instrument aims to clarify the human rights obligations of States and companies in the context of transnational business activities. It covers a number of procedural and substantive provisions including due diligence obligations and access to effective remedies, as well as an international monitoring mechanism.²⁵¹ Within this context, national action plans on business and human rights may be used as instruments within the broader human rights dialogue with EU trade partners.²⁵²

IV. COMPARING HUMAN RIGHTS CLAUSES IN FTAs

A. Rights-Clauses in US Trade Agreements

Scholars have suggested that the US approach to rights-based clauses in trade agreements is considerably or comparatively more effective than the EU’s approach in achieving the sought-after outcome.²⁵³ Based on a cross-sectional analysis of an approximated 20 FTAs between the United States and its trade partner countries, we scrutinize this presupposition to determine its veracity. We also analyze the factors militating in favor of a more effective marriage between trade and human rights provisions in the context of US trade agreements.

248. *Id.*

249. Thomas Ackermann, *Extraterritorial Protection of Human Rights in Value Chains*, 59 COMMON MKT. L. REV., 152 (2022).

250. Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), *Third Revised Draft of a Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OEIGWG (Aug. 17, 2021), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>. For an analysis on this (third) draft, see Ionel Zamfir, *Towards A Binding International Treaty on Business and Human Rights*, EUR. PARLIAMENTARY RSCH. SERV. (May 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729435/EPRS_BRI\(2022\)729435_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729435/EPRS_BRI(2022)729435_EN.pdf).

251. *Id.*

252. See UN Working Group on Business and Human Rights, *National Action Plans on Business and Human Rights*, UN Human Rights Office of the High Commissioner (Nov. 1, 2016), <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>.

253. See (and sources cited therein) Wouters & Ovádek, *supra* note 12, at 669–70.

1. *The Rights-Based Approach in US Free Trade Agreements*

It is commonly regarded that the EU has adopted a more aspirational human rights approach in its trade relations.²⁵⁴ This hints, conversely, that the United States has adopted and continues to adopt a more pragmatic and limited approach to effectuating human rights in its trade relations.²⁵⁵ From the onset, a number of points warrant further elaboration.

First, in developing its trade relations with its trade partners, the United States does not employ a human rights-centric discourse.²⁵⁶ Unlike the EU, its agreements do not explicitly reference general human rights instruments such as the UDHR. Conversely, the US approach is characterized by a focus on a limited rights-based approach, emphasizing neither international nor regional human rights standards, but focusing instead on specific international labor and environmental law provisions.²⁵⁷ This is reminiscent of—if not analogous to—the recent EU approach in TSD chapters.²⁵⁸ Broadly speaking, it can be concluded that while the EU initially adopted a top-down, value driven, and policy-oriented approach, the United States initially adopted a bottom-up, rights-driven approach with only cursory references to international bilateral and multilateral arrangements between the trade partners.²⁵⁹ From the EU side, this is evidenced by the recurring (albeit differentiated) general clauses referencing respect for and commitment to international human rights instruments such as the UDHR. From a US vantage point, this is evidenced by explicit references to specific trade-related rights, including the right of association and the right to organize and bargain collectively.

254. *Id.*

255. *Id.*

256. Desirée LeClercq, *The Disparate Treatment of Rights in US Trade*, 90 FORDHAM L. REV. 1, 13 (2021).

257. *See infra* Section IV.A.2. Evolution of Rights Clauses.

258. Compare Chapter 13 (Sustainability) of EU-Korea FTA, EU-Republic of Korea Free Trade Agreement, EU-S Kor., ch. 13, Sept. 16, 2010, 2011 O.J. (L 127) 6, with United States–Mexico–Canada Agreement, ch. 23, July 1, 2020, OFF. US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA FTA].

259. *See, e.g.*, Israel Free Trade Agreement, art. 3, Aug. 19, 1985, OFF. US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/israel-fta/final-text> [hereinafter US-Israel FTA], (holding that “The Parties affirm their respective rights and obligations with respect to each other under existing bilateral and multilateral agreements, including the Treaty of Friendship, Commerce and Navigation between the United States and Israel and the GATT. In the event of an inconsistency between provisions of this Agreement and such existing agreements, the provisions of this Agreement shall prevail.”)

Increasingly, however, EU FTAs have adopted more specific, detailed, and analogous protective provisions like those in its TSD Chapters,²⁶⁰ while US FTAs increasingly expand the set and scope of protected rights.²⁶¹ On this latter point, it is crucial to note that while earlier US FTAs may have had cursory references to gender, child labor, and migrant rights, this was initially only within the context of priority-setting and cooperation provisions between the trade partners. In other words, these references did not embody self-standing rights-based provisions but were instead political agenda-setting provisions underscoring the need of trade partners to cooperate on these matters.²⁶² The later agreements, and the United States-Mexico-Canada Agreement (USMCA) specifically, significantly transforms the language and enforceability of such provisions.²⁶³

In addition, the combination of TSD chapters of EU trade agreements with general clauses on civil and political human rights protections, plus the soft approach to enforcement adopted in practice, suggest that the EU considers human rights clauses as a means to engage in policymaking. In other words, rights may be included on the EU-side to conduct a particular policy, whereas rights inclusions under US trade agreements appear geared more towards a result-oriented approach with enforceable standards.

The foregoing observation is inevitably related to the larger objective underpinning a rights-based discourse in US trade relations. In determining the rationale for rights-based inclusions in US FTAs, scholarship has oscillated. On the one hand are these so-called “trade-plus provisions” pursuing purely altruistic objectives intended to protect rights internally and abroad; on the other are more duplicitous objectives intended to restrict trade.²⁶⁴ The truth is, however, somewhere in the middle and is hardly ever landing upon one or the other extreme of this continuum. Santos notes in this respect that while increasing labor standards may very well be intended to “combat the worst forms of labor exploitation in developing countries,” such measures may concomitantly be used to protect more developed or wealthier nations from unfair competition stemming from their trade partners.²⁶⁵ Accordingly, Professor Desirée LeClercq concludes

260. *Id.*; for a case study analysis, see Aleidis Nissen, *Not That Assertive: The EU's Take on Enforcement of Labour Obligations in its Free Trade Agreement with South Korea*, 33 EUR. J. INT'L L. 2, 607 (2022).

261. See USMCA FTA, *supra* note 258, art. 23.3 (Labor Rights), 23.6 (Forced or Compulsory Labor), 23.7 (Violence Against Workers), 23.8 (Migrant Workers), 23.9 (Discrimination in the Workplace), and ch. 23 (Labor).

262. See, e.g., United States-Colombia Trade Promotion Agreement, annex. 17.6, May 15, 2012, OFF. US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa> [hereinafter US-Colombia FTA].

263. See, e.g., USMCA FTA, *supra* note 258, art. 23.5 – 23.9

264. LeClercq, *supra* note 256, at 4.

265. Álvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreements*, in MEGAREGULATION CONTESTED: GLOBAL ECONOMIC ORDERING AFTER TPP 145 – 146 (Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz, & Atsushi Sunami eds., 2019).

that these trade-plus provisions in US trade agreements typically seek to protect the rights of US industries and individual persons.²⁶⁶

This nuance is crucial in understanding the different approaches and ensuing questions of effectiveness of rights-protection between the EU and the United States. Simply put, while the EU appears to pursue an overarching policy of promoting human rights protections at large to its trade partners, the United States is concerned primarily with ensuring very specific rights of its own industries and individuals in its trade relations. This perceived distinction in pursued objectives inevitably has ramifications on the *ex-ante* (i.e., prescriptive) approaches to rights-based inclusions in the respective trade agreements, as well as the *ex-post* approaches in case of disregard for such rights-based inclusions, as developed below.

2. *Evolution of Rights Clauses*

a. *The Relational Clause*

In the twenty FTAs under scrutiny in this Article, completed between the United States and third countries, the provisions concerning individual labor rights,²⁶⁷ are overwhelmingly compiled in one chapter and largely follow the same structure:

1. Statement of Shared Commitment
2. Application and Enforcement of Labor Laws
3. Procedural Guarantees and Public Awareness
4. Institutional arrangements
5. Labor Cooperation
6. Labor Consultations
7. Definitions

In addition to these rights-based chapters concerning labor specifically, the FTAs concluded by the United States and third countries typically include a single provision in the first chapter concerning “Initial Provisions” on the relation of the

266. LeClercq, *supra* note 256, at 4.

267. As aforementioned, a comparative analysis of human rights across EU and US trade agreements as such, is not possible, as the latter do not include generalist human rights discourse.

FTA to other agreements between the trade partners. This provision is copied almost verbatim throughout all FTAs and holds that: “[t]he Parties affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party”²⁶⁸

While it could be argued that this entails an overarching obligation to respect international law generally—including human rights law—in accordance with general treaty law, as well as the doctrine of *erga omnes partes*, the absence of any additional clarifications on the scope of this general provision suggests that this is not the case. In fact, the evolution of this provision, starting with the first FTA between the United States and Israel in 1985 to the latest provision in the recently concluded USMCA agreement between the United States, Mexico, and Canada, demonstrates that the provision was, instead, intended to be read restrictively. Textually, the initial general provisions could have been interpreted more expansively in reaffirming the existing bilateral and multilateral commitments of the trade partners. A textual interpretation of the more recent agreements suggests, however, that these clauses refer only to trade-related commitments and the provision should be read solely in light of the related commitments under the WTO’s regime.²⁶⁹

Figure 3. The evolution of Initial Provisions in US Trade Agreements

Article 3: Relation to Other Agreements (US-Israel)²⁷⁰	Article 1.1.2: General (US-Australia)²⁷¹	Article 1.2: Relation to Other Agreements (US-Mexico-Canada)²⁷²
The Parties affirm their respective rights and obligations with respect to each other under existing bilateral and multilateral agreements, including the Treaty of Friendship, Commerce and Navigation between the United States and Israel and the GATT.	The Parties affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO-agreement.	Each party affirms its existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which it and another Party are party.

268. United States-Korea Free Trade Agreement, Aug. 27, 2007, OFF. US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [hereinafter U. S.-Korea FTA].

269. North American Free Trade Agreement, art. 1.2, Jan. 1, 1994, OFF. US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> [hereinafter NAFTA]; USMCA FTA., *supra* note 258, art. 1.2.

270. US-Israel FTA, *supra* note 259.

271. Australia-United States Free Trade Agreement, Jan. 1, 2005, OFF. OF THE US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> [hereinafter US-Australia FTA].

272. USMCA FTA, *supra* note 258, art. 1.2.

The evolution thus indicates a narrowing of the initial relational clause, which could have been construed as an obligation to interpret the FTAs concluded by the United States with third countries, in line with international human rights law. Instead, narrowing of the textual reference to binding bilateral and multilateral agreements between the trade partners actively prevents the US-concluded FTAs from functioning as a tool to pursue a broader human rights policy-oriented approach.

Whereas such ‘Initial Provisions’ on the relationship of the trade agreement to other (international) commitments by the trade partners appears to become more limited in safeguarding rights, an inverse trend is noticeable in the specific rights-based chapters concerning labor. The US-Israel FTA did not include a labor-rights chapter. Subsequent agreements not only include explicit chapters on the matter, but increasingly articulate concrete (procedural) obligations stemming from said labor-rights chapters. The FTAs concluded by the United States can loosely be grouped into three categories based on the concretized substantive and procedural safeguards embedded in their rights-based chapters as developed below:

1. FTAs concluded between 1985 – 2003	<i>US-Israel, US-Jordan</i>
2. FTAs concluded between 2004 – 2008	<i>US-Australia, US-Bahrain, US-Chile, CAFTA-DR, US-Morocco, US-Singapore</i>
3. FTAs concluded between 2009 - 2023	<i>US-Oman, US-Peru, US-Colombia, US-Korea, US-Panama, USMCA</i>

b. Category I: FTAs between 1985 – 2003

The first group is characterized by the absence of or limited specific rights-based provisions. The US-Jordan FTA constitutes somewhat of an anomaly in that it has a set of specific provisions on visa commitments, which resurface in other US-concluded FTAs. While this is not couched in human rights terminology and does not impose additional (procedural) rights as in the case of labor provisions, Article 8 US-Jordan does impose concrete obligations on the trade partners to “permit to enter and to remain in its territory nationals of the other Party solely to carry on substantial trade,” as well as for “the purpose of establishing, developing, administering or advising on an operation of an investment to which they, or a company of the other Party that employs them, have committed or are

in the process of committing a substantial amount of capital or other resources.”²⁷³ These rights must thus continue to be read in line with the trade-oriented objective of the agreement, entailing that a broader right to free movement cannot be inferred from this provision.

c. Category II: FTAs between 2004 – 2008

The second category of US-concluded FTAs is characterized by increased concretization of this limited rights-based approach. The standardized ‘Statement of Shared Commitment’ in the 2005 US-Australia FTA for example, explicitly references the need to strive to respect the rights and principles that surface later in the chapter. These rights and principles are enumerated towards the end of the rights-based labor chapter and encompass the right of association, the right to organize and collectively bargain, the prohibition of any form of forced or compulsory labor, labor protections for children and young people, the minimum age for employment and elimination of the worst forms of labor, as well as acceptable work conditions and occupational health and safety standards.²⁷⁴ In other words, the recognized rights and principles are explicitly incorporated, though limited in scope because they refer only to trade-related human rights. Notably, this does not meet the European Ombudsman and the European Parliament’s insistence on more enforceable human rights in EU FTAs²⁷⁵ given that labor and sustainability rights are not necessarily the same as protected human rights.

Quite interestingly, the FTAs in this second category explicitly enumerate a number of procedural requirements that are both binding on the trade partners and concomitantly indicative of enforceable and judiciable rights for individual persons.²⁷⁶ The FTAs in this category adopt a standardized provision which holds that “[e]ach Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial, or labor tribunals for the enforcement of the Party’s labor laws” and that these proceedings be “fair, equitable, and transparent.”²⁷⁷ In other words, the FTAs of this category hold that insofar individuals have a legally defined interest, they should be able to enforce that State Party’s labor laws, which must be compliant with “internationally recognized labour principles and rights” according to the Statement of Shared Commitment. While it would be a stretch to read direct effect or justiciability into these provisions, it does provide individual

273. Jordan Free Trade Agreement, Dec. 17, 2001, OFF. OF THE US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta>.

274. US-Australia FTA, *supra* note 271, at art. 18.7.

275. See “Resolution” *supra* note 6 and O’Reilly *supra* note 48.

276. See, e.g., US-Australia FTA art. 18.3–18.5; Morocco Free Trade Agreement, art. 16.3–16.5, June 15, 2004, OFF. OF THE US TRADE REP., [hereinafter US-Morocco FTA]; Chile Free Trade Agreement art. 18.3–18.6, June 6, 2003, OFF. OF THE US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta> [hereinafter Chile-US FTA].

277. US-Australia FTA, *supra* note 271.

applicants with more than a mere abstract commitment to labor rights *vis-à-vis* the trade partners. In addition, these FTAs foresee an obligation on behalf of the State Parties to ensure that applicants have access to remedies to “*ensure the enforcement of their rights under its labour laws.*”²⁷⁸

Finally, the FTAs impose the obligation on the trade partners to ensure the promotion of labor laws and their enforcement mechanisms through information dissemination to the public at large via many enumerated modes of distribution.²⁷⁹

While the foregoing provisions are geared towards safeguarding the rights of individual persons, the chapters on labor in this second category of FTAs also have procedural provisions to strengthen the cooperation between the trade partners, while concomitantly ensuring respect for the internationally recognized labor rights and principles. Specifically, the Joint Committee established to provide oversight over the FTA generally is additionally tasked with considering matters under the labor chapter.²⁸⁰ Furthermore, trade partners are tasked with establishing a contact point domestically intended to liaise with the other party and the public on matters covered by the labor chapter.²⁸¹ Specifically, this national contact point must “provide for the submission, receipt, and consideration of public communications on matters related to this Chapter, make the communications available to the other party and, as appropriate, to the public, and review the communications” as well as “coordinate the development and implementation of cooperative activities.”²⁸² This set of requirements appears to endow the public at large and stakeholders with the opportunity to raise issues with respect to noncompliance on behalf of one of the trade partners while recognizing the need to continue cooperation in “labour matters of mutual interest and explore ways to further advance labour standards on a bilateral, regional, and multilateral basis” through a consultative mechanism established to foster such cooperation.²⁸³ Again, the analogy with the TSD Chapters under EU FTAs is

278. US-Australia FTA, *supra* note 271, at art. 18.3(3).

279. US-Australia FTA, *supra* note 271, at arts. 18.3(4), 18.4(7); Chile-US FTA, *supra* note 276, at 18.5(5).

280. US-Australia FTA, *supra* note 271. *See also* Bahrain Free Trade Agreement, Jan. 11, 2006, OFF. OF THE US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta>; Chile-US FTA, *supra* note 276; Dominican Republic-Central America Free Trade Agreement, Mar. 1, 2006, OFF. OF THE US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> [hereinafter CAFTA-DR]; US-Morocco FTA, *supra* note 276; Singapore Free Trade Agreement, May 6, 2003, OFF. OF THE US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta> [hereinafter US-Singapore FTA].

281. US-Australia FTA, *supra* note 271, at arts. 18.4(a), 18.4(b).

282. *Id.*

283. US-Australia FTA, *supra* note 271, at art. 18.5.

clear. Nevertheless, this practice solely covers trade-related rights, as opposed to human rights more generally.

Finally, in addition to this rights-based approach, the FTAs of this second category establish the possibility of ‘labour consultations.’ Accordingly, these labor consultations allow trade partners to raise any issues or concerns they have with respect to the application of labor rights. According to these provisions, “consultations shall commence within 30 days after a party delivers a request for consultations” intending to find a “mutually satisfactory resolution.”²⁸⁴ Should this fail to yield a mutually beneficial outcome, a subcommittee on labor affairs may be convened to help resolve any pending questions.²⁸⁵

This second category of FTAs clearly evidences enhanced awareness of the need to protect individual rights and adopts a three-pronged approach in doing so. These FTAs insert an obligation to (1) provide fair, equitable, and transparent avenues for redress concerning specific labor rights (2) while providing a forum for the trade partners to engage with stakeholders and the public at large and (3) at the same time balancing this with a cooperative approach through labor consultations for the implicated trade partners.

d. Category III: FTAs between 2009 – 2023

The third category of US-concluded FTAs continues this trend but interestingly seems to shift away from an overwhelmingly protectionist stance *vis-à-vis* its own industries and individual persons, in favor of more robust protections generally. In that vein, it is notable to point to the enhanced procedural requirements, which now also encompass reference to “due process of law,” the obligation to prevent undue delays and unreasonable fees, and the transparency of proceedings.²⁸⁶ Following along those lines, this category of FTAs is characterized by provisions on the modalities of final decisions concerning the merits of disputes arising under the labor chapter.²⁸⁷ Final decisions on merit must henceforth, be based on information and evidence provided in line with the right to be heard, state the reasons upon which they are based, and be available in writing without undue delay, as well as accessible to the relevant parties and the public at large.²⁸⁸ Another significant innovation is the robust requirements of impartiality of officials tasked with the determinations of disputes stemming from the labor chapters.²⁸⁹

284. US-Australia FTA, *supra* note 271, at art. 18.6.2.

285. US-Australia FTA, *supra* note 271, at art. 18.6.3.

286. *See, e.g.*, Peru Trade Promotion Agreement, art. 17.4(2)(a), Apr. 12, 2006, OFF. OF THE US TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> [hereinafter PTPA]; NAFTA, *supra* note 269, art. 23.10(3)(b).

287. *See, e.g.*, PTPA, *supra* note 286, art. 17.4(3); Peru-US FTA art 17.4(3); NAFTA, *supra* note 269, art 23.10(4)(b).

288. *See, e.g.*, PTPA, *supra* note 286, art. 17.4(3); Peru-US FTA art 17.4(3); NAFTA, *supra* note 269, art 23.10(4)(b).

289. *See, e.g.*, PTPA, *supra* note 286, at art. 17.4(5); NAFTA, *supra* note 269, art. 23.10(10)(b).

In addition to the enhanced procedural requirements, this third category of FTAs is notable for its expanded *substantive* rights-based approach on the one hand, and its expanded approach to public submissions on the other hand. Complementing the traditional list of protected rights as standardized in the second category of FTAs, the latter category of FTAs now explicitly notes how trade partners must promote compliance with their respective labor laws, and encompasses specific and stand-alone provisions on forced or compulsory labor (1) violence against workers (2) migrant workers (3) and discrimination in the workplace (4) with the latter involving references to discrimination based on sex, pregnancy, sexual orientation, gender identity, and caregiving roles.²⁹⁰ Similarly, the traditional list of labor rights under the US-concluded FTAs has become more robust by imposing the elimination of all forms of child labor, as opposed to requiring mere “*labour protections for children and young people*.”²⁹¹

The provisions on public submissions have also been developed to provide more procedural guarantees, including specific timelines that may be imposed, as well as transparency, motivation, and evidentiary standards that may be imposed.²⁹²

Visually, the focus on rights has also been enhanced, as the reference to concrete rights is no longer provided at the end of the chapter. Instead, these rights now take a prominent place at the start of each labor chapter, hinting at a shift towards a policy-oriented approach to the rights clause inclusion in US FTAs, which goes hand in hand with the traditional rights-based approach in these same instruments.²⁹³

Finally, one of the most innovative elements of the most recent agreement concerns enforcement, and notably, the obligations bestowed on businesses affected by the trade agreement. The ‘Rapid Response Labor Mechanism (RRLM)’ is a novel compliance tool intended to unilaterally safeguard the right to free association and collective bargaining for private actors.²⁹⁴ Through its inclusion in the USMCA, there is now more diversification in the application of rights-based labor provisions.

290. See NAFTA, *supra* note 269, arts. 23.3, 23.6, 23.7, 23.8, 23.9.

291. See, e.g., US- Australia FTA, *supra* note 271.

292. Art. 23.10(4), USMCA FTA.

293. NAFTA, *supra* note 269, art. 23.10(4).

294. Kathleen Claussen, *Trade’s Enforcement Conundrum*, in INTERNATIONAL COURTS VERSUS NON-COMPLIANCE MECHANISMS 175, 171-186 (Christina Voight and Caroline Foster eds., 2024).

3. Terminological Divergence

The terminology employed throughout all rights-based clauses in US FTAs is remarkable in that it consistently emphasizes that the trade partners “*shall strive to ensure that*,” combining language that imposes an enforceable obligation (“shall”), immediately followed by an open ended, means-based understanding of that obligation (“strive to”).²⁹⁵ This language is subsequently connected to enforceable legal obligations, stemming from binding ILO conventions.²⁹⁶ In other words, the language used in trade-plus provisions in US FTAs is tied to preexisting and binding obligations for the implicated trade partners.

Conversely, the EU’s human rights clauses refer to non-binding international rights standards in an abstract manner, recalling a general “[r]espect for democratic principles and human rights as laid down in the Universal Declaration of Human Rights...and for the principle of the rule of law” which underpins the FTA on the whole. Arguably, by decoupling this “essential elements” clause, however, from the non-execution clause, the essential elements clause arguably falls short terminologically in generating the same tenor of targeted obligations for the trade partners. Conceivably, this is a conscious political choice, but it does set the tone for the degree of enforceability of the human rights clauses in EU trade agreements.

4. Interim Conclusions

In US FTAs there is a clear perceptible shift away from generalized human rights provisions and instruments. Instead, US FTAs have decidedly adopted a highly targeted approach, whereby international trade is primarily tied to and limited by trade-oriented rights discourse. Arguably, this trend is influenced by the undecided debate on the role of human rights in free trade thinking which characterizes US trade policy. Conversely, the EU’s approach to the incorporation of human rights in its trade law appears to push a much broader human rights political agenda, by invoking generalized respect for universal human rights standards on its trade partners. While this is in line with the EU’s human rights obligations under the Charter, it renders generalized enforcement of those abstract human rights commitments much more difficult in practice, if not complemented with specific and concrete normative human rights commitments binding on the trade partners. This distinction in approaches by the United States and the EU should not be overemphasized. A clear shift from rights-based to value-based is perceptible in US FTAs, while a clear shift is likewise noticeable in EU FTAs from value-based to rights-based.

US practice demonstrates a clear shift towards increasingly concretized procedural guarantees for both the implicated trade partners, as well as individual persons, and substantive protections. For example, the parameters trade partners must meet in ensuring access for individual persons to nonjudicial, quasi-judicial

295. See, e.g., US-Peru FTA, art. 17.6.2; US-Morocco FTA, art. 16.1.

296. *Id.*

and judicial avenues for redress, have been increasingly elaborated on and clarified. Considerations of due process now complement these provisions, as well as requirements of impartiality and independence. Similarly, there has been a substantive shift to include considerations of (*inter alia*) gender, provide protection for migrant workers, and ensure the elimination of child labor.

Mindful of the foregoing, the US approach to rights inclusion in its FTAs is characterized by an explicit and robust *ex-ante* and *ex-post* approach, albeit for a far more limited set of rights. The US FTAs have invested in clear terminological clarifications of the imposed obligations *ex-ante*. Similarly, many of the rights-related provisions are accompanied with detailed provisions on the forms and quality of redress avenues available to both individual (legal) persons (*ex-post*).

B. Human Rights Clauses in a Broader Context

The integration of dedicated human rights clauses in trade agreements that go beyond mere aspirational language is largely attributed to the United States, Canada, the EU and the European Free Trade Association (EFTA).²⁹⁷ While the present contribution does not lend itself to a thick comparison inquiring into the “underlying legal, social, economic and political context” on the (non)inclusion of human rights or human rights-adjacent clauses into different free trade agreements beyond the EU and the United States, several thin empirical comparisons surface, nonetheless.²⁹⁸ These thinner empirical observations, as developed below, provide a glimpse of the frequency and the rigor with which human rights clauses appear in free trade agreements beyond the EU and the United States. These observations evince different and tailored approaches to the inclusion of human rights clauses, suggest different underlying causes for their non-inclusion and are suggestive of the need to develop a thicker comparative approach to the critiques and desirability of human rights clauses within trade agreements.

297. “The US, Canada, the EU and the members of EFTA are the main demandeurs of human rights language in PTAs. The EU and EFTA focus on human rights under the Universal Declaration of Human Rights; but they rely on aspirational language and dialogue. Canada and the United States focus on specific human rights; put these provisions in the body of the trade agreement and often make them binding.” Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?* WTO: RESEARCH AND ANALYSIS (Feb. 15, 2022), https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm#fnt1. See also Wouters & Ovádek, *supra* note 12, at 648.

298. Rosalind Dixon, *Comparative Constitutional Modalities: Towards Rigorous but Realistic Comparative Constitutional Studies*, COMPARATIVE CONSTITUTIONAL STUDIES’ (forthcoming) at 7-8.

1. General Observations

In comparing free trade agreements adopted within the framework of MERCOSUR, ASEAN, the Eurasian Economic Union, SACU and by New Zealand, a number of unsurprising inferences can be drawn.²⁹⁹

First, virtually all adopted free trade agreements adopt and replicate the language of Article XX GATT, whereby preferential treatment may exceptionally be cast aside in the interest of the adoption of measures “necessary to protect human, animal or plant life or health.” If interpreted teleologically, (and expansively), such provisions could be read as a tool to pursue a human rights agenda, should this be desired.³⁰⁰

Secondly, the examined free trade agreements exhibit only cursory engagement with general international law. When international law is alluded or referenced to, it is primarily in the context of treaty interpretation rules.³⁰¹ In essence, these references seek to emphasize that the rules governing the interpretation of the trade agreements are determined by the customary international law principles pertaining to treaty interpretation.³⁰²

Third, in the investigated free trade agreements, a rights-centric discourse features mainly in the relationship between the parties and in relation to the dispute settlement sections of the trade parties.³⁰³ In other words, any textual reference to *fundamental* or *human* rights is—with the exception of a limited number of outliers³⁰⁴—virtually absent.

299. This thin, empirical comparison was developed so as to ensure a cursory canvassing of a number of different trade regions globally, but by means purports to be exhaustive. As the Article is first and foremost dedicated to the question on how to make human rights clauses in EU trade agreements more effective, and to that end adopts a comparative lens by comparing with US trade practices where human rights clauses (or clauses adjacent thereto) are typically considered to be more effective, this comparison merely points to the potential for further and thicker comparative research on the question. In investigating whether human rights clauses appear in these trade agreements, the following search terms were relied on as prompts: *human rights; fundamental rights; international law; environment(-al); climate; sustainability; rights; ILO; labo(u)r; Charter*.

300. See Gillian Moon, *GATT Article XX and Human Rights: What Do We Know from the First Twenty Years?*, MELBOURNE J. INT’L L. 16, 432-483 (2015); Qiaozi Guanglin, *The balance between public morals and trade liberalisation: analysing the importance of Article XX(a) of the GATT and its application*, AMSTERDAM L.F. 10 20-40 (2018).

301. See, e.g., Mercosur-Israel Free Trade Agreement, ch. 1, art. 4, https://www.gov.il/BlobFolder/policy/israel-mercosur-free-trade-agreement/he/sahar-hutz_agreements_Mercosur-fta-EN-2010.pdf; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), ch. 28, art. 28.12(3), <https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf>; EURASIA EAEU-Serbia FTA, Annex 5, art. 9, <https://eec.eaeunion.org/upload/medialibrary/56c/Agreement.pdf>.

302. *Id.*

303. See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), ch. 28, <https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf>.

304. See SACU-EFTA FTA, Preamble clause 9, available at <https://www.efta.int/sites/default/files/media/documents/legal-texts/free-trade-relations/southern-african-customs-union-SACU/EFTA-SACU%20Free%20Trade%20Agreement.pdf> (“Reaffirming their commitment to the principles and objectives set out in the United Nations Charter and the

2. *Eurasian Economic Union*

Established in 2015, the Eurasian Economic Union (EAEU) consists of Russia, Belarus, Kazakhstan, Kyrgyzstan, and Armenia. Similar to other regional economic integration initiatives, its primary objective is to achieve economic integration toward the creation of a common market.³⁰⁵ Yet, this objective of economic integration does not—at present—appear intertwined with the global north’s conceptualizations of human rights standards.³⁰⁶ This means that the EAEU does not actively appear to pursue a human rights heavy agenda, albeit it does not actively seek to disavow human rights either.³⁰⁷ How does this translate to free trade agreements negotiated by the EAEU? Of five³⁰⁸ negotiated and publicly available FTAs, four do not have any mention of human rights (broadly and strictly construed) at all, with the exception of the aforementioned clause concerning measures necessary to protect human, animal, or plant life or

Universal Declaration of Human Rights”). *See also* Comprehensive and Progressive Agreement For Trans-Pacific Partnership (CPTPP), Preamble clause 6, <https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf> (“Reaffirm the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest”); New Zealand and the United Kingdom of Great Britain and Northern Ireland FTA, Preamble clauses 5, 7-10, <https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/NZ-UK-Free-Trade-Agreement.pdf>).

305. Aram Terzyan, *Political Freedoms and Human Rights in Eurasian Economic Union Countries: The Cases of Russia, Armenia, Belarus, and Kazakhstan*, CENTER FOR EAST EUROPEAN AND RUSSIAN STUDIES, EURASIAN AFFAIRS RESEARCH PAPERS 2 (2020), http://eurasianinstitutes.org/files/file/22_human_rights_in_eaeu_countries.pdf.

306. *Id.*

307. *Id.* at 17.

308. Agreement on Economic and Trade Cooperation Between the Eurasian Economic Union and its Member States, of the One Part, and The People’s Republic of China, of the Other Part (EAEU-China FTA) https://eec.eaeunion.org/upload/medialibrary/5b9/Tekst-angiykiy-_EAEU-alternate_-final.pdf; Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Islamic Republic of Iran, of the other part (EAEU-Iran FTA) https://eec.eaeunion.org/upload/medialibrary/77b/FTA-EAEU_Iran.pdf; Free Trade Agreement Between the Eurasian Economic Union and its Member States, of the One Part, and the Republic of Serbia, of the Other Part (EAEU-Serbia FTA) <https://eec.eaeunion.org/upload/medialibrary/56c/Agreement.pdf>; Framework Agreement on Comprehensive Economic Cooperation Between the Eurasian Economic Union and its Member States, of the One Part, and the Republic Of Singapore, of the Other Part (EAEU-Singapore Framework Agreement) https://eec.eaeunion.org/upload/medialibrary/766/EAEU_Singapore-Framework-Agreement.pdf; Free Trade Agreement Between the Eurasian Economic Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part (EAEU-Vietnam FTA) <https://wtocenter.vn/upload/files/fta/174-ftas-concluded/188-vietnam—eurasian-241-full-text/FTA%20VN%20-%20EAEU%20-%20Full%20text.pdf>.

health.³⁰⁹ Besides a cursory and aspirational reference in the EAEU-China trade agreement to promote “sustainable development and cooperation in trade and investment,”³¹⁰ and a cursory reference in the EAEU-Iran trade agreement to environmental cooperation,³¹¹ these agreements do not seem to mirror the trade and sustainability chapters found in EU or US trade agreements, nor do they reflect the human rights language incorporated in those agreements.

The 2015 free trade agreement with Vietnam is slightly different, in that—unlike the other trade agreements negotiated by the EAEU—it foregrounds “the promotion of commercial and economic cooperation in areas of common interest on the basis of equality, mutual benefit, nondiscrimination, and international law.”³¹² While parts of this provision also surface in the EAEU-China trade agreement,³¹³ the reference to ‘international law’ is unique to the EAEU-Vietnam FTA. Additionally, the EAEU-Vietnam FTA—similar to its European Union and US counterparts—has a fully dedicated chapter on sustainable development, highlighting the interplay of international labor law, sustainability, and environmental law.³¹⁴ In light of its nascent entry and the absence of any precedent, hard conclusions cannot be drawn as to the effectiveness of this chapter, nor the broader implications for human rights flowing from this trade agreement. It is notable, however, that the language used in the chapter on sustainability broadly echoes its counterparts in EU and US trade agreements. This signals the need for a thicker comparison to determine the underlying reason for this outlier approach, whether this evinces another shift towards gradual emerging global consensus on the necessity of sustainability chapters in trade agreements, or whether this is simply demonstrative of tailored trade arrangements based on the implicated trade parties.

3. *New Zealand*

The free trade agreements negotiated and adopted by New Zealand are unique in several ways. First, of the nine³¹⁵ consulted and publicly available trade

309. EAEU-China FTA, EAEU-Iran FTA, EAEU-Serbia FTA, EAEU-Singapore Framework Agreement.

310. Chapter 10, Article 10.1(1)(d) EAEU-China FTA.

311. Chapter 10, Article 10.1(a) EAEU-Iran FTA.

312. Preamble Clause 3 EAEU-Vietnam FTA.

313. Chapter 10, Article 10.1(2) EAEU-China FTA.

314. Chapter 12, EAEU-Vietnam FTA. At present, given the only recent entry into force of the agreement, there is limited scholarship on the effectiveness of this chapter.

315. Australia New Zealand Closer Economic Relations Trade Agreement (New Zealand-Australia Trade Agreement); Agreement Between New Zealand and Singapore on a Closer Economic Partnership (New Zealand-Singapore Trade Agreement); Trans-Pacific Strategic Economic Partnership Agreement (TPSEP); Thailand-New Zealand Closer Economic Partnership Agreement (New Zealand-Thailand Trade Agreement); Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA); New Zealand-Malaysia Free Trade Agreement (New Zealand-Malaysia FTA); New Zealand-Hong Kong, China Closer Economic Partnership Agreement (CEP); Free Trade Agreement Between New Zealand and the Republic of Korea (KNZFTA); Comprehensive

agreements, the overwhelming majority feature references to the 1840 Treaty of Waitangi.³¹⁶ While these clauses are not textually presented as being of a human rights nature, they refer to New Zealand's foundational instrument, which constitutionalized the rights and privileges of the Māori, and safeguards their ownership of their lands, forests, and possessions.³¹⁷ Such provisions allow for New Zealand to adopt "more favourable treatment to Māori in respect of matters covered by this Agreement" and additionally indicate that the trade agreement is to be interpreted mindful of the Treaty of Waitangi.³¹⁸ While there appears to be acknowledgement that the insertion of the Treaty of Waitangi exception clause contributes to the credible continued protection of Māori rights and privileges, the practical enforcement thereof remains a question of continued scrutiny and does not reveal much about human rights protections more generally.

A second notable feature of the trade agreements negotiated and adopted by New Zealand concerns the prominence of clauses highlighting the interdependence of economic development, social development, and environmental protection as crucial building blocks of sustainable

And Progressive Agreement For Trans-Pacific Partnership (CPTPP); Free Trade Agreement Between New Zealand and the United Kingdom of Great Britain And Northern Ireland (New Zealand-UK-N. Ireland FTA).

316. Article 74, New Zealand-Singapore FTA ("1 *Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfillment of its obligations under the Treaty of Waitangi.* 2 *The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Part 10 shall otherwise apply to this Article. An arbitral tribunal appointed under Article 61 may be requested by Singapore to determine only whether any measure (referred to in paragraph 1) is inconsistent with its rights under this Agreement.*"). The Treaty of Waitangi is New Zealand's founding instrument and represents the political agreement concluded between the Māori and the English and aims *inter alia* to safeguard rights of the Māori. Hence, despite not being referred textually as such, the Treaty of Waitangi embodies the spirit of rights of self-determination, ownership, rights and privileges.

317. *See generally* Treaty of Waitangi 1840 <https://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf>.

318. On the effectiveness of such clauses, see, e.g., Mika, Jason. *Ūropi Tauhokohoko Ka Taea: New Zealand-European Union Free Trade Agreement: An Independent Assessment of the Impacts for Māori* (2023), <https://researchcommons.waikato.ac.nz/bitstream/handle/10289/15926/NZ-EU-FTA-An-Independent-Assessment-of-the-Impacts-for-Maori.pdf?sequence=2> (last visited 4 February 2024); Holster, Bonnie, and Matthew Castle. *Between Innovation and Precedent: The Treaty of Waitangi Exception Clause in Aotearoa New Zealand's Free Trade Agreements Policy Quarterly* 18, no. 4 (2022): 26-32 <https://ojs.victoria.ac.nz/pq/article/view/8014>.

development.³¹⁹ The recurrence of the interdependency clause concerning environmental protection and sustainability does not generally result in enforceable operative provisions in the trade agreement text. However, the relative terminological consistency of these clauses and their prominence in the respective preambles of the consulted trade agreements reveal that the arrangements thereunder are to be interpreted in light of the dynamic objectives of sustainable development. Only in the 2016 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) do such clauses appear to translate into extensive dedicated chapters, focused not solely on sustainable development and environmental protection, but with dedicated attention to climate change and concomitant international agreements,³²⁰ and how this relates to Māori environmental concepts.³²¹

Finally, New Zealand's negotiated trade agreements overwhelmingly recall the importance of the UN Charter in its endeavor to pursue and maintain international peace and security under the exception clauses.³²²

These targeted environmental and UN Charter references in New Zealand concluded trade agreements do not reveal much about human rights at large, much less the effectiveness of their protection in the application of these trade agreements. A notable exception in this regard, however, concerns the most recent New Zealand-UK-N. Ireland FTA.³²³ In addition to having a dedicated chapter on Environment and one on trade and labor, the agreement also features a dedicated chapter on trade and gender equality.³²⁴ These chapters are buttressed by the overarching preambular clauses underscoring the resolve to pursue good governance and the rule of law, recognizing the parties' autonomy and "the protection and promotion of public health, public morals, animal welfare, labour standards, safety, the environment including climate change, and in the case of New Zealand meeting its Te Tiriti o Waitangi/The Treaty of Waitangi obligations," along with the necessity to take urgent action to protect the environment, and the objective to pursue equitable treatment of women.³²⁵ In other words, there is a significant increase in preambular provisions which—according to the rules of interpretation of international law—frame the agreement beyond singular and strict trade-related provisions, as well as dedicated chapters to achieve these objectives. The effectiveness of these preambular clauses and dedicated chapters cannot be assessed because of their recent adoption, but much like the US and EU practice, this expansion in value-centric provisions evidences

319. *See, e.g.*, Preamble clause 11 and Article 16.10 TPSEP; Preamble clause 6 New Zealand-Thailand Trade Agreement; Preamble clause 5 AANZFTA; Preamble clause 9 New Zealand-Malaysia FTA; Preamble clause 16 CEP; Preamble clause 7 KNZFTA; Preamble clause 6 CPTPP; Preamble clause 14, New Zealand-UK-N. Ireland FTA.

320. Chapter 20 CPTPP; Chapter 22 New Zealand-UK-N; Ireland FTA.

321. Chapter 22, Article 22.2 New Zealand-UK-N; Ireland FTA.

322. *See, e.g.*, Article 15.3 New Zealand-Thailand FTA; Article 76.b New Zealand-Singapore.

323. New Zealand-UK-N. Ireland FTA.

324. Chapter 25 New Zealand-UK-N. Ireland FTA.

325. Preamble New Zealand-UK-N. Ireland FTA.

a notable shift towards a more granular, integrated, and intersectional approach to trade agreements.

4. *ASEAN*

Compared to New Zealand, the inclusion of human rights related provisions in ASEAN free trade agreements appear rather underwhelming. ASEAN—the Association of Southeast Asian Nations—is currently composed of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam, and is a political and economic union that, similarly to the EU, has its own human rights declaration.³²⁶ The ASEAN Human Rights Declaration (AHRD) encapsulates civil and political rights, economic, social and cultural rights, the right to development, and the right to peace in a single instrument.³²⁷ Yet the AHRD and its concomitant mechanism has been criticized for being ineffective, providing only weak and procedurally limited protection, as well as undermining the universality of human rights.³²⁸ While a thicker comparative study would be required to comprehensively understand the near-total absence of human rights references in the consulted ASEAN negotiated trade agreements,³²⁹ it is notable that the universality, indivisibility, interrelatedness and interdependence of human rights in the AHRD is immediately tempered by the consideration “that the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”³³⁰ With the exception of references to the UN Charter and its role in the maintenance of international peace and security, no notable strict or broad (relating e.g. to environmental protection and sustainable development or labor protections) references to fundamental or human rights can be found, thus barring an assessment of the effectiveness question.

326. ASEAN Human Rights Declaration, November 19, 2012, <https://asean.org/asean-human-rights-declaration/>

327. Bui, Hien. “*The ASEAN Human Rights System: Critical Analysis*.” *ASIAN J. COMP. L.* 11, no. 1 (2016) 111-140.

328. *Id.*

329. Asia-Pacific Trade Agreement (APTA); ASEAN-India Trade in Goods Agreement (ASEAN-India Goods); ASEAN-India Trade in Services Agreement (ASEAN-India Services); ASEAN-India Trade in Investment Agreement (ASEAN-India Investment); Global System of Trade Preferences (GSTP). In addition, the India-Mercosur Preferential Trade Agreement and the South Asia Free Trade Agreement (SAFTA) were consulted.

330. Article 7 ASEAN Human Rights Declaration. Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012, <https://www.refworld.org/docid/50c9fea82.html>.

5. Southern African Customs Union (SACU)

The Southern African Customs Union (SACU) finds its origin in 1889, which sought, *inter alia*, to achieve a common external tariff, free movement of products manufactured within SACU and a revenue-sharing formula.³³¹ The SACU is comprised of Botswana, Eswatini, Lesotho, Namibia, and South Africa. In 2014, the FTA between SACU and the European Free Trade Area (EFTA)³³² was adopted, followed by the 2016 SACU-Mercosur trade agreement,³³³ and the 2021 trade agreement between SACU, Mozambique, the United Kingdom, and Northern Ireland.³³⁴ The SACU-MERCOSUR trade agreement is silent on human rights in both a strict and broader sense. However, it is notable that the SACU-EFTA FTA explicitly underscores the importance of the UDHR and makes a cursory reference to employment opportunity and sustainable development in preambular clauses 8 and 9. The aspirational reference to the UDHR is somewhat reminiscent of earlier EU trade agreements, where cursory references to human rights were not transposed into dedicated provisions or chapters in the actual trade agreement, as is the case here. Conversely, the reference to sustainability and the environment does resurface in the operative part of the text—albeit summarily—in Article 28 (on services, investment and public procurement), as well as Article 30 (on economic cooperation and assistance).³³⁵ Article 28 underscores that it is “inappropriate to encourage investment by relaxing health, safety or environmental standards,” whereas Article 30 holds that the EFTA States shall provide technical assistances to SACU States to “support the SACU States’ own efforts to achieve sustainable economic and social development.”³³⁶ Again, without any further clarifications of the obligations and rights flowing from these provisions, it will be hard to assess the effectiveness of these cursory human rights references.

The latest SACU trade agreement, however, evidences a similar shift as mentioned prior, in the direction of a less singular approach to trade. For example, the latest SACU agreement employs terminology such as improving living conditions while promoting sustainable development³³⁷ and additionally makes explicit reference to the SDGs.³³⁸ The dedication of the instrument to sustainable development is immediately buttressed by the very first chapter of the agreement, which—unlike other free trade agreements—foregrounds “Sustainable

331. 1910 Southern African Customs Union (SACU) Agreement, 23 July 1910, <https://www.sacu.int/docs/agreements/1910/1910-agreement.html>.

332. Free Trade agreement between the EFTA States and the SACU States (SACU-EFTA FTA).

333. Preferential Trade Agreement between the Common Market of the South (MERCOSUR) and The Southern African Customs Union (SACU) (SACU-MERCOSUR Trade Agreement).

334. Economic Partnership Agreement Between the Southern African Customs Union Member States and Mozambique, of the One Part and the United Kingdom of Great Britain and Northern Ireland, of the Other Part (SACU, Mozambique and the UK and N. Ireland trade agreement).

335. Articles 28 and 30, SACU-EFTA FTA.

336. *Id.*

337. Preamble clause 3 SACU, Mozambique and the UK and N. Ireland Trade Agreement

338. *Id.*

Development and Other Areas of Cooperation,” while invoking terms such as solidarity.³³⁹ The second chapter is specifically dedicated to the nexus of trade and sustainable development, building on relevant ILO and UN instruments, to ensure that the application of the agreement “shall fully take into account the human, cultural, economic, social, health, and environmental best interests of their respective populations and of future generations” while embracing ownership, participation, and dialogue.³⁴⁰ Particularly, the reference to future generations evokes consideration of planetary justice³⁴¹ that go beyond the realm of human rights in a Western linear understanding of temporality.³⁴² These rather recent developments—though infinitely thought provoking—do not yet lend themselves to conclusive determinations on the effectiveness of human rights clauses in trade agreements or how the EU could learn from these practices.

6. *Cursory Comparative Observations*

Beyond the EU and the United States, the references to fundamental or human rights, both as self-standing norms or more broadly construed as environmental or labor related norms, appear less robustly defined in the operative clauses and chapters of trade agreements. Though there is a noticeable rise in such clauses in more recent trade agreements (New Zealand, SACU), it remains unclear whether the integration of such human rights provisions indicates a larger emerging trend wherein human rights are considered intimately intertwined with trade, or rather, whether this is just a tailor-made aspect of trade negotiation. In other words, are such inclusions the result of a bigger paradigm shift on the question of human rights and trade more generally, or are we merely witnessing the outcomes of specific bilateral negotiations?

One crucial question that arises when comparing these practices with US practice (a broadening approach) and EU practice (a concretizing approach) on the inclusion of human rights clauses, goes to the idea of the rationale behind the constitutionalization of rights. Put differently, what would be the objective of codifying specific human rights in trade agreements, and what are the potential impacts of such codification? In this vein, it may be observed that while the constitutionalization of rights in international trade instruments may pursue

339. SACU, Mozambique and the UK and N. Ireland Trade Agreement.

340. Chapter 2 SACU, Mozambique and the UK and N. Ireland Trade Agreement.

341. On planetary justice, see, e.g., Frank Biermann et al., “*Planetary Justice as a Challenge for Earth System Governance: Editorial*,” 6 *EARTH SYS. GOVERNANCE* 100085 (2020), <https://doi.org/10.1016/j.esg.2020.100085>.

342. Katharina Hunfeld, *The Coloniality of Time in the Global Justice Debate: De-Centring Western Linear Temporality*, 18 *J. GLOBAL ETHICS* 100 (2022), <https://doi.org/10.1080/17449626.2022.2052151>. On planetary justice; see Biermann et al., *supra* note 341 at 6.

commendable goals, the act of incorporating human rights into a constitutional framework may lead to unintended consequences. This process could result in the ossification of these rights, potentially hindering their interpretation in a manner that maintains their practical and effective application, as opposed to becoming theoretical and illusory. One could question whether such considerations also apply to the concretized incorporation of human rights in trade agreements. If the latest SACU trade agreement is any indication, there may very well be an almost imperceptible shift underway from the incorporation of *human rights* clauses in trade agreements, to the incorporation of justice-centric clauses pointing instead to *planetary justice*, including considerations of intergenerational and MOTH (more than human) justice.³⁴³

Bearing these considerations in mind, one conclusion that could be drawn from the foregoing illustrations goes to the point of universality of human rights. If one takes at face value the risks associated with overly detailed codification of rights language in trade agreements (such as perpetuated neo-colonialist rationales through biased rights discourse, normative imperialism, ossification of rights and values), it may be more sensical to opt for ‘discordant parity’ in trade agreements.³⁴⁴ The ‘discordant parity thesis’ does not conceive of one rights system as *ipso facto* superior to another and instead leaves different systems to compete with each other in articulating effective human rights.³⁴⁵ More concretely, incorporating human rights references based on the UDHR in the preambular clauses of trade agreements may ultimately be more likely to contribute to effective human rights protection with trade partners, as the UDHR is more universal than regional or domestic human rights regimes.³⁴⁶ Conversely, human rights clauses that attempt to impose regional standards on States that do not adopt these same standards may lead to the result that those such human rights clauses are looking to protect, are effectively disregarded.³⁴⁷

V. THE WAY FORWARD

The inclusion of human rights clauses in EU trade agreements has a long-standing tradition which cannot be disconnected from the EU’s claimed value-

343. For a discussion on planetary justice, including references to intergenerational and MOTH considerations see Dipesh Chakrabarty & Bruno Latour, *The Climate of History in a Planetary Age* (University of Chicago Press 2021).

344. Eyal Benvenisti & Alon Harel, *Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity*, 15 INT’L J. CONST. L. 36 (2017), <https://doi.org/10.1093/icon/mox002>.

345. Crucially, the authors in developing this ‘discordant parity thesis’ are analyzing international human rights law and constitutional law rights, which may raise doubts on the applicability of this thesis across various international regimes instead.

346. Rebecca Adami, *Women and the Universal Declaration of Human Rights* (1st ed., Routledge/Taylor & Francis Group 2019).

347. Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 Am. J. Int’l L. 211 (2014), <https://doi.org/10.5305/amerjintlaw.108.2.0211> (last visited Feb. 4, 2024).

driven objectives.³⁴⁸ The Treaty of Lisbon only reinforced the nexus between trade and human rights. This resulted in the adoption of new policy frameworks and strategies ensuring the mainstreaming inclusion of human rights in all EU external policies, including the Common Commercial Policy.³⁴⁹ Of particular significance is the 2021 Trade Policy Review, which signals a shift towards an open, sustainable, and assertive trade policy.³⁵⁰ This set in motion a number of significant developments, such as the revision of the GSP Regulation, the enforcement of trade and sustainable development commitments on the basis of complaints made to the Chief Trade Enforcement Officer (CTEO), the inclusion of stronger dispute settlement options in relation to TSD chapters of trade agreements,³⁵¹ and a number of autonomous measures to ensure respect for core environmental and labor rights.³⁵² However, as concluded by the European Ombudsman in her recent inquiry on how the Commission ensures respect for human rights in the context of international trade agreements: “the TSD approach is not primarily aimed at addressing human rights abuses.”³⁵³ The focus is essentially on the creation of a level playing field for trade and the protection of the interests of EU-based stakeholders.

Hence, the question remains how the EU can play a more effective role with respect to promoting respect for human rights and what specific role can be attributed to human rights clauses included in international trade agreements. However, in determining the role of human rights clauses in EU trade agreements, as well as the assessment of their effectiveness, a number of preliminary considerations must first be agreed upon.

348. Hans Kundnani, *Eurowhiteness: CULTURE, EMPIRE AND RACE IN THE EUROPEAN PROJECT* (Hurst Publishers 2023); Catherine Gegout, *WHY EUROPE INTERVENES IN AFRICA: SECURITY PRESTIGE AND THE LEGACY OF COLONIALISM* (Oxford University Press 2018).

349. Peter Van Elsuwege, *The nexus between Common Commercial Policy and Human Rights: Implications of the Lisbon Treaty*, in *THE LAW AND PRACTICE OF THE COMMON COMMERCIAL POLICY: THE FIRST 10 YEARS AFTER THE TREATY OF LISBON* 416-433 (Guillaume Van der Loo and Michael Hahn eds., 2020).

350. European Commission, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final.

351. See, e.g., in the EU-New Zealand FTA, *supra* note 97.

352. See, e.g., new legislation regarding CBAM, Corporate Sustainability Due Diligence and the forced labor products ban, *supra* Section III.D.

353. Emily O'Reilly, *Closing note on the Strategic Initiative concerning how the European Commission ensures respect for human rights in the context of international trade agreements* (SI/5/2021/VS), EUROPEAN OMBUDSMAN ¶ 26 (Jul. 14, 2022) <https://www.ombudsman.europa.eu/en/doc/correspondence/en/158519>.

A. General Considerations

1. The Need for Institutional and Policy Coherence

Institutional implications: First, this study underscores that any question of efficacy of human rights clauses in EU trade agreements must be preceded by clarity on the objective and the role of such clauses. Once the concrete objectives of the insertion of the human rights clauses are determined, this will inform what prescriptive normative and standard-setting substantive and procedural provisions (if any at all) should be incorporated in trade agreements. Furthermore, clarity on the sought-after objectives of human rights clauses in EU trade agreements will inform what enforcement mechanisms should look like. That is to say, any mechanisms of enforcement triggered in case of systemic human rights breaches will be characterized and determined by the objective of the human rights clauses in EU trade agreements. For example, if the objective of the clause is purely policy oriented, and intended for raising awareness, it would be counterintuitive to overwhelmingly dwell on provisions on how trade partners should guarantee individual access to administrative, quasi-judicial, and judicial remedies to individual litigants in line with considerations of due process, as is the case in US FTAs. Conversely, a policy-oriented objective would be more likely to demand a broader and cooperative accountability mechanism, focusing on human rights dialogues, trade negotiations, and consultations, including the separability and subsequent severing of certain trade benefits.

The question of to what extent human rights can and should be promoted through trade agreements remains subject to academic discussions,³⁵⁴ rendering it even more relevant to determine what the objective and scope of the role of human rights clauses in EU trade agreements should be. This likewise requires coherence between the EU institutions on the role and objective of the human rights clauses in EU trade agreements. It appears currently that the European Commission, for example, is more oriented towards a policy-oriented approach, whereas the European Parliament appears to pursue a more rights-based approach. Moreover, the Commission focusses essentially on trade-related human rights issues, whereas the EEAS is in charge of political human rights dialogues. Incoherence between the EU institutions on the roles and objectives of EU human rights clauses may further complicate the role played by an understanding of the Member States in effectuating their relations with third States. Hence, *close coordination across different services and policies is crucial to ensure a more effective and comprehensive human rights approach vis-à-vis the EU's trade partners.*

354. See, e.g., Abadir M. Ibrahim, *International Trade and Human Rights: An Unfinished Debate*, 14 GER. L.J. 1, 321-336 (2013); See also Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT. L. 4, 815-44 (2002). See also Jennifer Zerk & Rosie Rowe, *Advancing Human Rights Through Trade* CHATHAM HOUSE (May 26, 2021) <https://www.chathamhouse.org/2021/05/advancing-human-rights-through-trade/01-introduction>.

Policy implications: The question of coherence does not only have an institutional dimension—it also has important practical and policy implications. For instance, a violation of core labor standards is subject to the TSD monitoring and enforcement mechanisms, whereas other human rights violations fall under the more rudimentary political dialogue provisions and the human rights clause. In practice, however, it may not always be straightforward to decide whether certain events fall under the TSD chapters or not, which is echoed by the interdependence and indivisibility of human rights.³⁵⁵

Legal implications: Arguably, the requirement of coherence also has an important legal dimension in the sense that Article 21 TEU requires the EU to treat all human rights as indivisible.³⁵⁶ Moreover, Article 207 (1) TFEU provides that “the common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action,” implying that the EU’s trade policy cannot be disconnected from the EU’s broader human rights agenda.³⁵⁷

In turn the questions of why, what, and who must be answered to yield suggestions on how such human rights clauses must be construed, to assess and increase their effectiveness.

2. *Answering the Why, What, and Who*

Rationale for Human Rights Clauses in EU Trade Agreements:

Determining the role of human rights clauses in EU trade agreements requires first determining *why* these human rights considerations are being included. No question of efficacy can be answered without knowing what is being tested for efficacy. This question is deceptively simplistic. On the one hand, the open-ended call for respect for international human rights law in the prevalent ‘essential elements’ clauses indicates a focus on mutual respect for international human rights norms as a policy objective to trade partners of the EU through means of raising awareness, cooperation, and dialogue. On the other hand, the nonexecution clause in EU trade agreements signals a more definitive enforcement—and possibly rights-driven—role of these clauses, irrespective of their current effectiveness. Hence, within single trade agreements concluded by the EU, the objective of these clauses remains rather elusive. Is the objective to ensure trade liberalization generally, albeit solely with like-minded trade partners?

355. In pointing at the possible implications of such incoherence, Bartels referred to an example in the United States where administrators once rejected a petition under the US Generalised System of Preferences in relation to the murder of a trade union leader on the basis that it constituted a violation of ‘human rights’ rather than of ‘workers’ rights. See Bartels, *supra* note 14, at 312.

356. *Id.*

357. See Van Elsuwege, *supra* note 27.

Alternatively, is the objective to protect individuals and industries abroad, or individuals and industries within the EU, or both? Is the objective to enhance the EU's legitimacy as a global human rights actor internally and externally? While one objective does not exclude the others, all objectives will demand a different approach to ensure (soft or hard) enforcement.

Content of Human Rights Clauses in EU Trade Agreements: The next question to be asked is *what* EU trade agreements are seeking to protect and promote through human rights clauses in trade agreements. If the objective of the human rights clauses is to ensure respect for international human rights standards within third States, the question must be asked whether this objective refers to general human rights, or more specifically, trade-related rights. As a brief comparison with US practice demonstrates, the outcome of this inquiry significantly alters the ability to assess the effectiveness of human rights adherence, as the effectiveness analysis could subsequently encompass either a wide variety of human rights, all of which adopt different standards of compliance, or a relatively narrow category of trade-tangential rights.³⁵⁸ In other words, a generalized approach would encompass respect for, as well as the fulfillment and protection of non-derogable rights, non-absolute rights, and qualified rights within the realm of civil and political human rights. Additionally, this would include economic, social, and cultural rights, which—contrary to civil and political human rights—overwhelmingly adopt the standard of progressive realization and non-regression. This means that the obligations on States for second-generation rights will differ from State to State, dependent upon several contextual factors. Third-generation rights, more commonly referred to as collective human rights, as well as the emerging fourth generation of (digital) human rights, may very well also be included in this inquiry. While these different types of human rights do not argue *against* the inclusion of a generalized rights provision in EU trade agreements, the *content* of the human rights clauses may merit significant further elaboration in subsequent chapters or provisions of the FTA, if the effectiveness thereof is to be assessed in a methodologically sound manner.

First steps in concretizing the rights have been taken as demonstrated by the TSD Chapters in EU trade agreements.³⁵⁹ These appear to replicate or are analogous to the labor chapters in US FTAs. Yet, as noted by the European Ombudsperson, this does not meet the objective of protecting human rights more generally.³⁶⁰

358. The typology of human rights resurfaces across international human rights instruments, as well as across regional human rights instruments.

359. See Section III.D.

360. See O'Reilly, *supra* note 48.

3. *Beneficiaries of Human Rights Clauses in EU Trade Agreements*

Within that same vein, if the objective is to promote international human rights standards to trade partners of the EU in line with the EP 2022 resolution on the EU's policy regarding human rights and democracy in the world, it must also be determined *who* is the recipient of those human rights. Would rights-based inclusions be directed and executed solely *vis-à-vis* the trade partner itself in its bilateral trade relations with the EU? Will any of its obligations be directed at private corporations that may be involved in questionable human rights practices as is the case in the newest USMCA? Or alternatively, would the objective likewise be to foster the development of judicable claims for individuals in the jurisdiction of the trade partner reminiscent of indirectly judicial individual rights in US FTAs? Again, the scope of the protected human rights will impact the extent to which those rights can be enforced *vis-à-vis* the trade partner, individual persons, or both. Determining whether human rights generally have been respected by the trade partner and *vis-à-vis* individual persons, will be a significantly larger endeavor, than assessing solely whether trade related human rights are sufficiently protected. The CJEU has determined that currently, there are no directly enforceable rights that can be inferred from EU trade agreements. This does not mean however, that this could not be envisaged by future trade agreements, in a manner that is reminiscent of the practice under US FTAs.

B. *Concrete Recommendations*

Moving forward, a number of alternative, but not mutually exclusive, approaches are plausible. Two overarching conclusions may be drawn from the foregoing observations and analysis. First, the EU's approach to human rights clauses in its trade agreements appears overwhelmingly in need of a predetermined methodology for human rights to be safeguarded, as opposed to a mere enumeration of theoretical human rights commitments or concrete human rights obligations that warrant protection. Second, to meet the need to ***provide a tailored approach to human rights protection***, as well as bearing in mind the standard of progressive realization of certain types of human rights, it appears advisable to ***focus on cementing and contouring enforceable procedural obligations*** in addition to establishing substantive human rights obligations. These two observations form the basis of the concrete recommendations.

1. *Preventative and Prescriptive Measures*

Depending on the outcome of the questions on why, what, and who posed above, *ex-ante*—that is to say, prescriptive—commitments must be drafted accordingly. As considered above, a concretization of the general human rights commitments spelled out in the 'essential elements' clauses could serve as a

necessary and realistic complement to these abstract commitments. Moreover, this approach would better balance the—oftentimes conflicting—goals pursued by human rights and trade. Thus, general ‘essential elements’ clauses could serve as a means to contextualize the values underpinning the agreement, while more concrete (core) rights could set a more realistic and tailored standard against which the conduct of the trade partners can be tested. However, in concretizing the abstract human rights commitments, a distinction must be made between the standards of review to assess human rights compliance, the modes of review, as well as the concrete negative, positive, procedural, and substantive obligations stemming from abstract human rights commitments. These will be dealt with in turn below.

Concretized Standards of Review According to Human Rights Typology: A coherent approach requires the identification of **a clear and ambitious yet realistic set of pre-signature or pre-ratification commitments** that trade partners must meet before the Council and European Parliament sign/approve the agreement. This approach yielded some results with respect to EU-Vietnam FTA where a clear position of the European Parliament and some Member States resulted in reforms to Vietnam’s labor legislation and the ratification of ILO core conventions.³⁶¹ However, as recent developments in Vietnam also reveal, a more assertive monitoring and enforcement of human rights commitments is also necessary *after* the entry into force of the trade agreement.³⁶²

The inclusion of rather blunt essential elements and nonexecution clauses appears to be insufficient in itself. Crucially, the question remains how the threshold of a breach or sufficiently serious breaches of human rights violations can be defined, and which objective benchmarks can be used to assess the present situation in the partner countries. The use of ill-defined and open-ended provisions in existing human rights clauses gives a lot of leeway to the parties with respect to the precise thresholds or criteria for the application of the suspension clause. Whereas a certain margin of appreciation is somehow unavoidable, **a further operationalization of what exactly constitutes a particularly serious breach of the essential elements clause** and how this can be assessed is, therefore, recommended.

Concretizing the Methods of Review: In addition to concretizing or identifying the relevant standards of review in line with the typology of human rights, an effective human rights clause must also inform parties with respect to the *method* of review. Here, the proposals for a new GSP Regulation could serve as a source of inspiration. The proposal includes a list of relevant international conventions and monitoring mechanisms. Amongst others, this involves **regular**

361. Kristoffer Marslev & Cornelia Staritz, *Towards a stronger EU approach on the trade-labor nexus? The EU-Vietnam Free Trade Agreement, social struggles and labour reforms in Vietnam*, REV. INT. POL. ECON. (2022), <https://www.tandfonline.com/doi/full/10.1080/09692290.2022.2056903>.

362. See *Vietnam: Crackdown on Civil Society Intensifies: Briefing paper for the 10th EU-Vietnam human rights dialogue*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH) & VIETNAMESE COMMITTEE ON HUMAN RIGHTS (VCHR), https://www.fidh.org/IMG/pdf/20220405_vietnam_eu_bp_en.pdf (last visited Apr. 25, 2024).

reporting requirements about the status of compliance with core international conventions supplemented with information from EU institutions, offices or agencies, civil society actors, interest groups, and complaints received through the SEP.³⁶³ This information will help the Commission in determining the existence of serious and persistent violations which could lead to the temporary withdrawal of trade preferences as a last resort. The European Parliament proposed the addition of a non-exhaustive list of situations, which the Commission should consider in its assessment.³⁶⁴ A similar list and approach could guide the assessment of serious human rights violations, which could trigger the application of the nonexecution clause under EU trade agreements.

Concretizing Human Rights Obligations Stemming from Human Rights Commitments: In addition, the mechanisms instituted via EU-FTAs on sustainability provide a blueprint that resurfaces in US trade practices on safeguarding specific rights. Through a cross-sectional analysis of those core conventions, a compilation of core human rights could be identified, which are more than just tangentially related to trade relations.³⁶⁵ Bearing in mind the typology of rights under the international human rights regime, ***a more tailor-made and flexible approach could be adopted***, and could take into account future evolutions and specific circumstances in particular countries.

Overly detailed concrete (positive and negative) human rights commitments spelled out per trade agreement would likely be too far reaching and tedious. Yet, at the same time, in line with the approach adopted under US trade agreements, it could be feasible to differentiate—based on the aforementioned typology of rights—between finite ***procedural*** requirements and ***substantive*** means-based obligations.

For example, trade agreements could incorporate concrete *procedural* requirements and standards that must be guaranteed in domestic legislation (e.g., due process, impartiality, reasonable time) ensuring access to an effective remedy for individuals and legal persons detrimentally affected by unlawful human rights State conduct generally, or with respect to certain fundamental rights. In other words, this would ensure more effective human rights protection, without *per se* imposing specific and enforceable human rights obligations on trade partners. In addition, and similarly to the US approach, an FTA-internal complaint mechanism could be developed, which does not necessarily provide individual persons with

363. European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council on applying a generalized scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and the Council*, A9-0147/2022. (May 15, 2022).

364. *Id.*, amend. 28.

365. Such a list of core conventions and human rights may be adopted in the framework of the joint institutions established under framework agreements with third countries.

a judiciable right but *does* provide for an enforcement mechanism more generally between the trade partners. Such complaint mechanisms could then be employed as a means to trigger consultations between the trade partners when there is signaling of concrete and/or significant human rights abuses.

Article 23.11: Public Submissions USMCA³⁶⁶

1. Each Party, through its contact point designated under Article 23.15 (Contact Points), shall **provide for the receipt and consideration of written submissions from persons of a Party** on matters related to this Chapter in accordance with its domestic procedures. Each Party shall make readily accessible and publicly available its procedures, including timelines, for the receipt and consideration of written submissions.
2. Each Party shall:
 - (a) consider matters raised by the submission and provide a timely response to the submitter, including in writing as appropriate; and
 - (b) make the submission and the results of its consideration available to the other Parties and the public, as appropriate, in a timely manner.
3. A Party may request from the person or organization that made the submission additional information that is necessary to consider the substance of the submission.

By adopting standards on the quality of domestic enforcement mechanisms without predefining the details of such procedures, and by ensuring a transparent and publicly available complaint mechanism within the context of the trade agreement itself, both dimensions (the State as a trade partner and the State as a duty bearer of human rights) are better developed to ensure (basic) human rights compliance.

In addition, *substantively*, trade agreements could set forth a number of core human rights commitments related to the trade agreements that must be respected by the trade partners. For example, the elimination of child labor, the guarantee of safe and healthy working conditions, or the elimination of cruel and degrading treatment in employment could be incorporated into the trade agreements as core commitments. Similarly, overarching substantive obligations could be written into trade agreements, requiring trade partners to conduct an annual human rights impact assessment, reminiscent of the right to information currently enjoyed by the European Parliament in the EU trade agreement negotiations.

While clarifying applicable procedural and substantive requirements may appear to be limiting to a certain extent, practice has demonstrated that horizontal, cross-sectional, and abstract human rights commitments do not yield effective enforcement. Hence, any clarification, *in addition* to the ‘essential elements’ clause, could be beneficial in at least ensuring a minimum standard of (enforceable) human rights respect.

366. See USMCA FTA, *supra* note 258.

2. Remedial and Enforcement Mechanisms

Such procedural and substantive normative clarifications could subsequently be coupled with variations of *ex-post* enforcement mechanisms. What is evident from the practice with the current execution clauses, is that—much like the Article 7 TEU procedure within the EU—a nuclear suspension option is not likely to be triggered, regardless of the scope of potential human rights abuses. Hence, other *ex-post* enforcement mechanisms could be adopted, which—as aforementioned—could ensure effective access to administrative, quasi-judicial, and judicial remedies according to *domestic legislation*.

Additionally, *a transparent and public complaint mechanism* for both trade partners could be provided, which in turn could trigger consultations between the implicated trade partners. Similarly, certain thresholds of violations could then trigger temporary restrictions of trade benefits, as opposed to an all-out suspension of the agreement. Whereas such thresholds cannot be defined in abstract terms, they may be adopted in the framework of the joint institutions established under framework agreements with third countries. A core consideration is to ensure the highest possible transparency during this process by allowing for the active involvement of external stakeholders. This should allow for a more tailor-made and flexible approach, which can take into account future evolutions and specific circumstances in the countries concerned. By including more intermediary remedial and enforcement mechanisms, reminiscent of the approaches adopted in US FTAs, the EU's GSP+, and the sustainability chapters in EU-FTAs, it is far more likely that the soft approach, focused on cooperative, remedial, and enforcement steps, will be a more effective option in response to complaints of human rights violations.

Finally, within the EU, recent initiatives such as the new role of the CTEO and the creation of the SEP are important developments to ensure more effective monitoring and enforcement of the sustainability commitments under the EU's trade agreements. However, the specific focus on trade-related issues implies that these mechanisms are not fully equipped to deal with human rights abuses beyond the labor and environmental concerns. This may be solved through *the creation of a dedicated complaint handling portal for alleged human rights abuses*. Even though there are already various mechanisms to inform the European Commission and the EEAS about human rights concerns in third countries, a dedicated contact point for general human rights abuses could be a significant instrument to enhance the effectiveness of the rudimentary enforcement mechanisms under existing human rights clauses. Just as the SEP and the CTEO play a crucial role in the monitoring and enforcement of sustainability commitments under trade agreements and the GSP, a comparable mechanism operating under the auspices of the EEAS may streamline the EU's efforts on human rights promotion in third countries. In this respect, a revision of the 2009 common approach to the use of

political clauses should also be on the agenda. This document predates the entry into force of the Lisbon Treaty and may be brought in line with the more assertive approach envisaged under the new trade policy agenda.