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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* Adjunct Professor of EU law, Research Fellow at the Center for Human Rights and Global Justice, and former Emile Noël Fellow at NYU School of Law, and Post-doctoral FWO Fellow at Ghent University, Belgium.

† Professor of EU Law at Ghent University, Belgium and the College of Europe, Natolin, Poland. Our sincere thanks to Members of the European Parliament that commissioned the study giving rise to this publication. In particular we would like to thank MEP Saskia Bricmont, MEP Tineke Strik, Olivier Derruine, Aleydis Nissen (Leiden University), Claudia Francavilla (Human Rights Watch), the representatives of the European Commission, European External Action Service, and the European Ombudsman for their insights on the preceding drafts. Finally, we extend our sincere thanks to fellow (visiting) scholars at the Center for Human Rights and Global Justice, the Jean Monnet Center for International and Regional Economic Law and Justice, the Hauser Global Fellows Program at NYU, and the Ghent European Law Institute at Ghent University. All errors remain our own.

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.

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

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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.

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.

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 agreements[19]—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 *Frente 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]

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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 RTS 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]

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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]

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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.

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 1, 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

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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.

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 Armenia[101] 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]

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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 *and other relevant international human rights instruments to*

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.	*which they are party*, and for the principle of the rule of law *and good governance* which underpin the internal and international policies of both Parties and constitute an essential element of this Agreement.

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]

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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 Nogueras & Luis Hinosoja 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, *as well as the principles of market economy*, 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 *Universal Declaration on Human Rights*, 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, *including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law* as well as the principles of market economy as reflected in the *Document of the CSCE Bonn Conference on Economic Cooperation*, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.

The AA with Bulgaria[117] (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 Kazakhstan[123]	**Article 2(1) CEPA Armenia**[124]	**Article 2(1) Georgia AA**[125]	**Article 2(1) Ukraine AA**[126]
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.

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-whilst-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 Mugraby v. Council and Commission ECLI:EU:T:2011:418, (Sept. 6, 2011); Case C-581/11 P, Mugraby v. Council and Commission, ECLI:EU:C:2012:466, (July 12, 2012).

156. Case T-292/09, Muhamed Mugraby v. Council and Commission, ECLI:EU:T:2011:418, ¶ 60 (Sept. 6, 2011); Case C-581/11 P, Mugraby v. Council and Commission, ECLI:EU:C:2012:466, ¶ 72 (July 12, 2012).

157. *Id*.

158. Case C-581/11 P, Mugraby 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]

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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 2020-2024[195] 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]

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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

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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 organization s 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/transformeurope/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]

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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.

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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.

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.

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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* 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).

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	*US-Israel, US-Jordan*
2. FTAs concluded between 2004 – 2008	*US-Australia, US-Bahrain, US-Chile, CAFTA-DR, US-Morocco, US-Singapore*
3. FTAs concluded between 2009 - 2023	*US-Oman, US-Peru, US-Colombia, US-Korea, US-Panama, USMCA*

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 FTAs[275] 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]

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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.

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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 outliers[304]—virtually absent.

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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 five[308] 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://eurasiainstitutes.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-angiyskiy-_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 nine[315] 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

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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 Mãori* (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.

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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 development[337] 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 justice[341] 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/amerjintelaw.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.

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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.***

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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 judiciable 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 USMCA[366]

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.