THE EFFECTIVENESS OF HUMAN RIGHTS CLAUSES IN EU TRADE AGREEMENTS

CHALLENGES AND OPPORTUNITIES

THE GREENS/EFA in the European Parliament

THE EFFECTIVENESS OF HUMAN RIGHTS CLAUSES IN EU TRADE AGREEMENTS: CHALLENGES AND OPPORTUNITIES

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List of Abbreviations

AA	Association Agreement
ACP	African, Caribbean, and Pacific countries
AFA	Advanced Framework Agreement
CAI	Comprehensive Agreement on Investment
CBAM	Carbon Adjustment Mechanism
CCP	Common Commercial Policy
CEPA	Comprehensive and Enhanced Partnership Agreement
CETA	Comprehensive Economic Trade Agreement
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CTEO	Chief Trade Enforcement Officer
DCFTA	Deep and a Comprehensive Free Trade Area
EEAS	European External Action Service
ECHR	European Convention of Human Rights
EP	European Parliament
EPCA	Enhanced Partnership and Cooperation
GSP	Generalized System of Preferences
FTA	Free Trade Agreement
HRDN	Human Rights and Democracy Network
HRIA	Human rights impact assessment
ICCPR	International Covenant on Civil and Political Rights

ILO	International Labour Organization
ISDS	Investor-State Dispute Settlement
MEP	Member of European Parliament
NDICI	Neighborhood, Development, and International Cooperation Instrument
OACPS	Organisation of African, Caribbean, and Pacific States
PCA	Partnership and Cooperation Agreement
SEP	Single Entry Point
SPA	Strategic Partnership Agreement
TCA	Trade and Cooperation Agreement
TECA	Trade and Economic Cooperation Agreement
TSD	Trade and Sustainable Development
TULRAA	Trade Union and Labour Relations Adjustment Act
UDHR	Universal Declaration of Human Rights
USMCA	United States–Mexico–Canada Agreement
WTO	World Trade Organization

Executive Summary

Despite the increased visibility of human rights considerations in EU trade agreements by virtue of 'essential elements clauses' and concomitant suspension clauses, the enforceability of such provisions has remained modest. To date, the EU has only triggered the option of taking 'appropriate measures' with respect to human rights violations in a limited number of cases, mainly under the Cotonou Agreement with the African, Caribbean and Pacific (ACP) countries. Proceeding from this observation and in light of the European Parliament's call to adopt a more assertive approach regarding the enforcement of human rights clauses, this report contributes to the debate about the role and effectiveness of such clauses in EU trade agreements.

Taking into account the inherent connection between trade and human rights in the EU legal framework, the report 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. Building on this internal contextual and external comparative approach, this report offers several recommendations on how the role of human rights clauses within trade agreements may be improved, while attempting to strike a balance between the benefits of trade liberalization and the need to effectively safeguard human rights in the EU's external relations.

These recommendations entail that, prior to the conclusion of the agreement, clear standards are set concerning the procedural and substantive human rights commitments undertaken by the parties. These standards are developed in reference to internationally recognized human rights standards and mindful of the typology of human rights commitments, human rights obligations and standards of enforcement. The recommendations also provide for a procedural methodology to be followed in the event 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. This involves, amongst other, the creation of a dedicated complaint handling portal for alleged human rights abuses – going beyond the scope of the existing Single Entry Point (SEP) – and regular reporting requirements about the status of compliance with core international conventions. This should allow the European Commission and the European External Action Service (EEAS) to provide a more tailored and coherent approach to human rights protection within the framework of the EU's (trade) relations with third countries.

I. Introduction

In its 2022 resolution on the EU's policy regarding human rights and democracy in the world, the European Parliament (EP) highlighted the importance of strong human rights clauses in international agreements. More specifically, the EP called for "*the systemic inclusion of enforceable human rights clauses in all agreements between the EU and non-EU countries.*"[1]

The inclusion of human clauses is all but new in the EU's external relations practice. Already in 1991, the European Commission issued a communication "*on human rights, democracy and development co-operation*" which paved the way for the EU's approach to human rights conditionality in the framework of international agreements.[2] In essence, this implies 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 termination or (partial) suspension of the agreement under international law.[3] The precise formulation of the human rights clauses developed over time (see *infra*) but, so far, their enforcement has been limited.[4]

To date, the EU has only triggered the option of taking 'appropriate measures' with respect to human rights violations in a limited number of cases, mainly under the Cotonou Agreement with the African, Caribbean and Pacific (ACP) countries. This included the suspension of development aid and/or technical cooperation in response to very serious breaches of democracy and human rights such as a *coup d'état* or the brutal crackdown of popular protests.[5]

Generally, the EU has been reluctant to use the formal suspension procedure foreseen in international agreements with third countries. Instead, the adoption of restrictive measures within the framework of the Common Foreign and Security Policy (CFSP) became a common practice. This was, for instance, the case in response to the "*excessive, disproportionate and indiscriminate use of force by Uzbek security forces*" in 2005 when the Council imposed

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[1] European Parliament resolution of 17 February 2022 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2021, OJ (2022) C 342/191, para. 101.

[2] Commission Communication to the Council and Parliament, 'Human Rights, Democracy and Development Co-operation Policy', SEC (91) 61 final, Brussels, 25 March 1991. On the background and evolution of human rights clauses, see: E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, Leiden, Martinus Nijhoff, 2003, pp. 213-244.

[3] See Art. 44 and Art. 60 of the Vienna Convention on the Law of Treaties (VCLT).

[4] See (and sources cited therein): J. Wouters and M. Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) p. 669.

[5] Some 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. See: I. Zamfir, '*Human Rights in EU Trade Agreements. The Human Rights Clause and its Application*', European Parliament Briefing, EPRS, PE 637.975, July 2019, p. 9. 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 L. Bartels, 'Assessment of the Implementation of the Human Rights Clause in International and Sectoral Agreements', at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2023/702586/EXPO_IDA(2023)702586_EN.pdf

unilateral sanctions such as a weapons export ban and travel restrictions on certain Uzbek individuals, albeit without formally suspending the Partnership and Cooperation Agreement (PCA) with this country.[6]

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 of the PCA with Russia. This may appear surprising taking into account that respect for human rights as defined in the Helsinki Final Act and the Charter of Paris for a new Europe constitutes an essential element of this agreement.[7] However, it is in line with the established practice that the full suspension or denunciation of an agreement to sanction a contracting party is a very exceptional phenomenon.[8] The application of the human rights clause is typically only the 'last resort' in the EU's toolbox for the advancement of human rights. The use of restrictive measures under the CFSP is often deemed more appropriate as it allows for targeted sanctions against individuals and entities that are responsible for human rights violations.[9] Moreover, according to the European Commission, the primary objective of the human rights clause is to promote dialogue and to create incentives for improving respect for and the protection of human rights.[10] More broadly, the envisaged objective of human rights clauses has not necessarily been focused on bestowing enforceable and judiciable rights on trade partners and/or individual (legal) persons. Instead, it has been perceived as a policy-oriented tool, with the objective of enhancing human rights standards generally. This is in line with the 'common approach on the use of political clauses', adopted in 2009, which is still a key point of reference for the promotion of EU values and principles in EU external relations.[11] In other words, the objective of a human rights clause can in no way be reduced to the possibility of adopting punitive measures. Such a clause also provides a legitimate basis for raising human rights concerns in a more constructive manner, amongst others within the framework of human rights dialogues established under international agreements with trade partners.[12]

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[6] See: M. Maresceau, 'Unilateral Termination and Suspension of Bilateral Agreements Concluded by the EC', in: M. Bulterman, L. Hancher, A. McDonnell and H. Sevenster (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer 2009), pp. 455-466.

[7] 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, OJ (1997) L 327/23.

[8] The only true example of such a measure is the denunciation of the 1980 Agreement with Yugoslavia, see: M. Maresceau, *op. cit.*

[9] Bartels, (n. 5).

[10] See the 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, 17 November 2021, available at: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/150903>.

[11] The 'common approach on the use of political clauses' was approved by the Council in COREPER on 3 June 2009. The document was partly de-classified by Council doc. 10491/1/09 of 25 April 2013, see: <https://data.consilium.europa.eu/doc/document/ST-10491-2009-REV-1-EXT-2/en/pdf>

[12] Bartels (n 5). On the human rights dialogues, see *infra* at chapter IV.C.

This rather 'positive' and soft approach is not without criticism.[13] NGOs already expressed their disappointment about the EU's weak reaction to human rights violations and seek a more assertive approach regarding the enforcement of human rights clauses.[14] Moreover, the effectiveness of human rights dialogues is subject to discussion. It has been argued that such dialogues "*often appear as a box-ticking exercise during which the same concerns are raised year after year with seemingly little ambition to security meaningful change*."[15] The revision of the EU's guidelines on human rights dialogues with third countries, adopted on 22 February 2021, aims to address this issue.[16] Amongst others, it is emphasized that the dialogues should be result-oriented, based on concrete cooperation and deliverables, and with more active involvement of civil society actors. However, as observed in the EP's 2022 resolution on human rights and democracy in the world, further steps will be needed to improve the effectiveness of the EU's human rights policy.[17]

A constructive human rights dialogue cannot be disconnected from other instruments such as enforceable human rights clauses in international agreements. In this respect, the EP emphasized that "*the use of these clauses is to be improved, including by setting dedicated monitoring and problem-solving mechanisms*."[18] Amongst others, this involves the use of clear benchmarks that could lead to the introduction of proportionate responses in case of non-compliance, with possible suspension or withdrawal of the EU from the agreement as a last resort. In addition, this may involve procedural guarantees for the trade partners, as well as affected individual (legal) persons in safeguarding relevant fundamental rights.

To address the question how human rights clauses in the EU's trade agreements can be made more effective, this report will proceed from the inherent connection between trade and human rights in the EU legal framework (**II**). The Treaty of Lisbon reinforced this nexus in the sense that the human rights dimension of the EU's trade policy is now firmly anchored in the primary

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[13] See (and sources cited therein): J. Wouters and M. Ovádek, *op. cit.*, p. 669. For a case-study specific assessment of the EU's soft approach to enforcement, see: A. Nissen, 'Not That Assertive: The EU's Take on Enforcement of Labour Obligations in its Free Trade Agreement with South Korea', *European Journal of International Law* (2022) 33 (2), p. 607.

[14] D. Cronin, 'EU "ignoring" its Human Rights Clause', *Politico*, 17 March 2004, at: <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: <https://www.fidh.org/IMG/pdf/20220405_vietnam_eu_bp_en.pdf>.

[15] Human Rights and Democracy Network, 'Recommendations for the revision of the European Union (EU) Guidelines on human rights dialogues with third countries', December 2020, at: <https://hrdn.eu/2017/wp-content/uploads/2021/01/HRDN-Recommendations-for-the-revision-of-EU-guidelines-on-human-rights-dialogues-with-third-countries-Dec-2020.pdf>.

[16] Council of the EU, 'Revised EU Guidelines on Human Rights Dialogues with Partner/Third Countries', doc. 6279/21, 22 February 2021.

[17] European Parliament Resolution of 17 February 2022 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2021, OJ (2022) C 342/191, paras 20-24.

[18] *Ibid.,* para. 101. This is also echoed in the recent study by L. Bartels, *supra* n 5.

law of the Union.[19] Subsequently, the evolution of the law and practice of the EU's human rights clauses is scrutinized (**III**). In this respect, it is noteworthy that the drafting of such clauses significantly developed over time, starting with rather short and general provisions in the 1990s, towards 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 (**IV**). For this purpose, a comparative analysis is made between the rather soft EU approach, which essentially focuses on dialogue instead of sanctions, and the seemingly more assertive approach of the United States (US) (**V**). Drawing from these case studies respectively, the report concludes with a number of policy recommendations and suggestions (**VI**).

II. 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. Of particular significance is the provision in Article 207 TFEU that *"[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*". The latter, enshrined in Articles 3 (5) and 21 TEU, explicitly refer to respect for and promotion of human rights. 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.[20] Whereas the precise scope of international customary law in relation to human rights is subject to discussion, the Universal Declaration of Human Rights (UDHR) and the core human rights conventions used for the GSP+ system constitute an important source of reference.[21]

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*."[22] In other words, the CFR has certain extraterritorial implications in the sense that it applies to all EU

[19] See also: P. Van Elsuwege, 'The nexus between Common Commercial Policy and Human Rights: Implications of the Lisbon Treaty', in: G Van der Loo and M. Hahn (eds.), *The Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon* (Brill 2020), 416-433.
[20] Case C-366/10, *ITAA*, EU:C:2011:864, para. 101.
[21] 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 generalised tariff preferences, OJ (2012) L 303/1. V. Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?', *EUI Department of Law Research* Paper, No. 2016/10, p. 20.
[22] European Commission, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', p. 5, at: <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf>.

activities irrespective of whether they take place within or outside its territorial boundaries.[23] This is underscored by the fact that Article 51 CFR does not encompass the traditional territorial limitation clause as traditionally resurfaces with other international and regional human rights instruments.[24] Of course, the Charter cannot in itself directly impose any obligations upon the EU's external trade partners. Yet, the EU institutions and the Member States are bound to respect the CFR in the framework of the EU's external action. This can, amongst others, be derived from *Opinion 1/17*, which concerned the fundamental rights compatibility of the Investor-State Dispute (ISDS) mechanism foreseen in the Comprehensive Economic and Trade Agreement (CETA) with Canada. On this occasion, 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.*"[25] Taking into account that the CFR has the same legal value as the Treaties, as expressed in Article 6 (1) TEU, it logically follows that the EU's trade agreements must be fully compatible with the Charter.

The consequences of this approach can be illustrated by the *Frente Polisario* case about the EU Council decision approving an agreement concerning the progressive liberalisation of trade in agricultural and fisheries products with the Kingdom of Morocco.[26] 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.*"[27] Whereas the EU cannot be held responsible for actions committed by Morocco, this does not absolve the EU from its obligation to prevent that it indirectly encourages a third country's human rights violations or profits from them by allowing the export to its Member States of products which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate.[28] For this purpose, the Council should have examined that there was no risk and could not simply conclude that it was for the Kingdom of Morocco to ensure that the rights of the Sahrawi population remained guaranteed.[29] In other words, the General Court viewed the existence of a human rights impact assessment prior to the adoption of the Council decision as a crucial procedural requirement. In its appeal judgment, the Court of Justice did

[23] V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity: the Effectiveness Model', in S. Peers et. al. (eds.), *Commentary on the EU Charter of Fundamental Rights* (Hart 2014), p. 1682.
[24] Van Elsuwege, *op. cit.*, p. 422.
[25] Opinion 1/17 (*CETA*), EU:C:2019:341, para. 165
[26] Case T-512/12, *Front Polisario v. Council,* EU:T:2015:953.
[27] *Ibid.*, para. 228. See more generally on the extraterritorial application of the CFR: Angela Ward, 'Article 51 – Scope' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing 2014) p. 1413 – 1454; Marko Milanovic, *Extraterritorial Application of the Human Rights Treaties – Law, Principles, and Policy* (Oxford University Press 2011) 304.
[28] Case T-512/12, *Front Polisario v. Council,* EU:T:2015:953, para. 231.
[29] *Ibid.*, para. 241.

not address this issue. In contrast to the General Court, it concluded that the Association Agreement and the ensuing agreement on the liberalisation of trade in agricultural products did not apply to the Western Sahara, implying that the Polisario Front had no standing to seek the annulment of the decision at issue.[30]

B. Implications in Practice

The practical legal implications of the nexus between trade and human rights cannot be ignored. A good example concerns 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. In the European Commission's view, a separate HRIA concerning the FTA with Vietnam was unnecessary taking into account that the negotiations with Vietnam were taking place under the legal framework established for the ASEAN free trade negotiations. The latter had started before the entry into force of the Lisbon Treaty. 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. 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.*[31] 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.[32] 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*", she took the view that such an obligation can be derived from the spirit of Article 21 (1) TEU and Article 21 (2) (b) TEU in conjunction with Article 207 TFEU.[33]

The Ombudsman closed her inquiry with a critical remark concerning the Commission's approach without drawing any further conclusions, particularly because the analysis of human rights impacts in impact assessments for trade-related policy initiatives has now become standard practice.[34] The impact of proposed trade-related policy initiatives is assessed against the normative framework of the CFR and a number of international sources. Significantly, the

[30] Case C-104/16 P *Council v. Front Polisario,* EU:C:2016:973.
[31] European Ombudsman, 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, para. 5, at: <https://www.ombudsman.europa.eu/en/decision/en/64308>.
[32] *Ibid.*
[33] *Ibid.*, para. 11. See also Bartels, *supra* n. 6, who holds 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.
[34] *Ibid.*, para. 13.

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 county/ies*" with respect to "*civil, political, economic, social, cultural and core labour rights*".[35] 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. This involves an extensive consultation of stakeholders, including those in the partner country/ies.[36]

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 adopts a value-driven approach which is geared to implementing a human rights-centric policy. This is evidenced by the embedding and streamlining of general provisions into trade-related instruments, confirming the EU's commitment to human rights. 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 speciality of the EU in enforcing human rights standards, that to date have overwhelmingly been developed with (Member) States in mind as its duty-bearers. In other words, while the commitment to a human rights centric trade policy has been established, the translation of this policy to a rights-driven approach remains largely absent as concerns the EU separate from its Member States.

As hinted at, various (non-) legislative instruments and the CJEU have reaffirmed the EU's (abstract) commitment to human rights standards. Yet, abstract 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 (procedural and substantive) 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, and the typology of human rights more broadly (see *infra* Section 6). Abstract commitments to human rights do not disclose what specific human rights are effectively may be at stake in a particular trade relation, and the types of conduct that the EU must engage in for those rights to be considered respected, protected, and fulfilled.

[35] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, p. 5 at: <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf>
[36] *Ibid,* p. 6.

First steps have been made by the General Court and the European Ombudsman, by inferring an overarching positive procedural obligation to conduct a HRIA pursuant to trade-related measures (see *supra*). 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.*"[37] The European Commission on the other hand, does not envisage such far-reaching implications. It rather sees the HRIAs as a tool to inform policymakers about the potential impacts of the different options under consideration. 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.*"[38]

In other words, whereas 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?[39]

Whereas the EU institutions enjoy a margin of discretion in areas which involve political, economic and social choices,[40] HRIAs essentially seek to ensure that such choices are made on the basis of a careful and impartial analysis of all available information.[41] 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 (Olivier De Schutter) – the outcome of this process must comply with certain conditions.[42] Amongst others, specific attention must be paid to the implications for the most vulnerable groups. Moreover, "*trade-offs must never*

[37] European Ombudsman *op. cit.*, para. 25.
[38] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, p. 2 at: <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf>.
[39] O. De Schutter, 'The implementation of the Charter of Fundamental Rights in the EU institutional framework', Study for the AFCO Committee, 2016, p. 60.
[40] See e.g. Case C-72/15, *Rosneft*, para. 146; Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*,EU:C:2013:776, para. 120.
[41] Case T-512/12, *Frente Polisario v. Council*, EU:T:2015:953, para. 224.
[42] See : UN General Assembly (2011), Report of the Special Rapporteur on the right to food, Olivier De Schutter: Guiding principles on human rights impact assessments of trade and investment agreements, UN Doc. A/HRC/19/59/Add.5, Geneva: Human Rights Committee, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf>

result in a deprivation of the ability of people to enjoy the essential content of their human rights".[43] 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.[44]

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. 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 mechanisms.[45] 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.[46] 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 institutionalised dialogue on political reform in a partner country.

III. Human Rights Clauses in International Agreements

A. Background and evolution

The first human rights clause was inserted in the Lomé IV Convention of 1989. In a rather general manner, the parties expressed their '*deep attachment to human dignity and human rights*'. 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.[47] 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.[48]

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[43] *Ibid.*, point 6.5.
[44] See also: J. Zerk, 'Human Rights Impact Assessment of Trade Agreements', Chatham House International Law Programme Research Paper, February 2019, available at: <https://www.chathamhouse.org/sites/default/files/2019-02-18HumanRightsTradeAgreements.pdf>
[45] Kube, *op. cit.*, p. 28.
[46] See e.g. L. McKenzie and K. L Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU Singapore FTA', *Journal of Common Market Studies* (2017), pp. 832-849; S. Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations', *Utrecht Journal of International and European Law* (2016), pp. 41-68.
[47] A.-C. Prickartz and I. Staudinger, 'Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union's International Trade Agreements', *Europe and the World: A Law Review* (2019) p. 8.
[48] Fierro, *op.cit.*, pp. 215-217.

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. A first 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 with the Baltic States – only allowed for the immediate suspension of (parts of) the agreement in case of a serious violation of human rights. 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. The latter allows for a process of prior consultation before the adoption of appropriate measures. Only in 'cases of special urgency' and in response to grave human rights violations it is possible to take direct action. In the selection of measures in response, priority must be given to those which least disturb the normal functioning of the agreement. This implies that the measures must be proportional to the violations with suspension of the whole agreement as a last resort.[49]

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. When a party considers that another party does not comply with this obligation, it can bring the matter before a joint committee established under the agreement. The joint committee will then launch a process of consultations aiming to find a mutually acceptable solution. 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.[50]

B. A 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 (FTAs) are linked to broader political *framework* agreements which include an essential elements and non-execution clause.[51] 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.*"[52] Accordingly, the human rights

[49] N. Hachez, 'Essential Elements' Clauses in EU Trade Agreements: Making Trade Work in a Way that Helps Human Rights?", *Cuadernos Europeos de Deusto*, (2015) 53.
[50] For instance, Art. 28 (5) of the SPA with Canada foresees in 15 days whereas Art. 55 of the agreement with Thailand foresees in 30 days.
[51] 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: P. Van Elsuwege, M. Chamon, 'The meaning of "association" under EU law. A study on the law and practice of EU association agreements', at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf>.
[52] Article 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, OJ 2011 L 127/73.

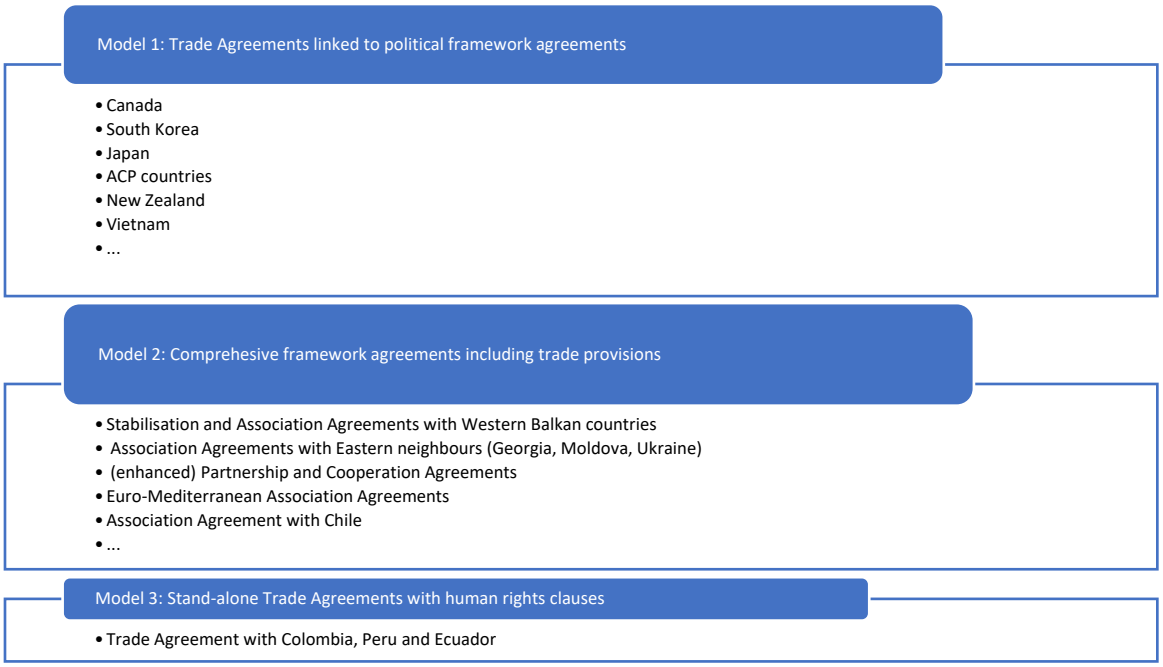
provisions of the latter fully apply with respect to the FTA.[53] A similar approach is followed with respect to the EU's trade relations with the ACP countries, which are offered the possibility of concluding regional Economic Partnership Agreements that are tied to a comprehensive Partnership Agreement (also known as the Cotonou Agreement).[54] 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.[55] The post-Cotonou Agreement with the Organisation of African, Caribbean and Pacific States (OACPS) will follow the same logic.[56] 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 Partnership Agreement with this country.[57] 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 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.[58]

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. 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).[59] 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 and the Enhanced Partnership and Cooperation (EPCA) with Kazakhstan. A third and rather exceptional model involves the conclusion of a stand-alone trade agreement such as the one concluded with

[53] 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 (n. 5) pp. 8 – 11.
[54] 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, OJ (2000) L 195/46.
[55] 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, OJ 2016 L 250/13.
[56] This is agreement did not yet enter into force, but the text of the initialed agreement is available at: <https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf>.
[57] Article 27.4 of the Free Trade Agreement between the European Union and New Zealand. At the time of writing, only the provisional text of this agreement was available at: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en>
[58] Art. 17.18 of the Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, OJ (2020) L 186/160.
[59] See e.g., Art. 478 of the Association Agreement with Ukraine, OJ 2014 L 161/168.

Colombia, Ecuador, and Peru.[60] In this scenario, the human rights clause is included directly in the FTA as there is no link with a political framework agreement.

Figure 1 – *Typology of trade agreements with a human rights clause*



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.[61] The drafting of what constitutes an essential element evolves over time and may take into account 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.[62]

Apart from references to international human rights instruments such as the Universal Declaration of Human Rights, references to regional standards such as the European

[60] 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: OJ 2012 L 354/3.
[61] Hachez, *op. cit.*, p. 89.
[62] See, for instance, Article 771 of the Trade and Cooperation Agreement (TCA) with the United Kingdom, OJ 2021 L 149/982.

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. Recent human rights clauses also tend to include the open-ended reference to "*other relevant human rights instruments*". 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.[63] 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.[64]

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 international policies of the Parties and constitutes an essential element of this Agreement.	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 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. Instead, the provision underscores that the rule of law and human rights are inherent to the relations between the trade partners. Interestingly, there is also no specific reference to the principle of good governance.[65]

[63] See: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en>.
[64] See Bartels (n 5) p. 5.
[65] Conversely, in other EU FTAs the applicable human rights norms, will only be those that are 'applicable', 'legally binding', for the implicated parties or to which they are 'contracting parties'. See Bartels (n 5) p. 5.

Article 1 (1) EU-Korea Framework Agreement

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.

Whereas there is no real consistency in the precise formulation of human rights clauses, 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,[66] but should nevertheless be regarded as an important and positive evolution in the sense that it anticipates on future developments.[67] It also prevents a rather narrow interpretation of the parties' human rights commitments (see *infra* Section 5). 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 in the direction of defining specific human rights benchmarks for the purpose of monitoring and enforcement (see *infra* Section 6).

The evolution and differentiation of the essential elements provisions in Association Agreements (AAs) is further illustrated here:[68]

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	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	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*	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

[66] 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: D. Nogueras and L. Hinosoja Martinez, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems', *Columbia Journal of European Law* (2001) 7 (3), pp. 307-336.
[67] L. Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements', Study for the European Parliament's Subcommittee on Human Rights and the Committee on International Trade, 2014, p. 9.
[68] See also: Van Elsuwege, Chamon, *op. cit.,* pp. 38-39.

element of the present association	policies of the Parties and constitute essential elements of this Agreement.	*Rights*, which guides their internal and international policy and constitutes an essential element of this Agreement.	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[69] signed in 1993 contains the so-called Bulgarian clause,[70] which was slightly modified in the AA with Estonia signed in 1995.[71] In contrast, the agreement with Egypt signed in 2001 only refers to the Universal Declaration on Human Rights, which is the standard reference for agreements with non-European countries.[72] 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' peculiar (territorial and historical) situation.

Juxtaposing a number of agreements with countries from the same region also shows differences in the commitments entered into under an association agreement when compared to a cooperation agreement.[73]

[69] See OJ 1994 L 358/3.
[70] On the Bulgarian clause, see also E. Fierro, *op. cit.* pp. 223 et. seq.
[71] See OJ 1998 L 68/3.
[72] See OJ 2004 L 304/39.
[73] For the EPCA with Kazakhstan, see OJ 2016 L 29/3; for the AA with Ukraine, see OJ 2014 L 161/3.

Article 1 EPCA Kazakhstan	**Article 2(1) CEPA Armenia**	**Article 2(1) Georgia AA**	**Article 2(1) Ukraine AA**
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. *Countering the proliferation of weapons of mass destruction, related materials and their means of delivery* also constitute essential elements 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 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.[74] This may be seen as indicative of the association relationship constituting a more privileged and deeper relationship with more far-reaching commitments than an ordinary cooperation relationship. However, also between similar agreements, certain remarkable differences can be observed. For instance, respect for the rule of law is not one of the essential elements in the association agreements with Georgia and Moldova whereas it is included in the association agreement with Ukraine. The latter also includes unprecedented references to the principles of sovereignty and territorial integrity, inviolability of borders and independence. Whereas this may be connected to the fragile political situation in the country,[75] 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 'general principles.'[76] 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.[77]

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*."[78] It has been argued that this reference to termination – and not merely suspension – of a trade agreement makes the clause "*a truly nuclear option*".[79] It is noteworthy that the SPA with Canada also stands out due to the clarification of the 'special circumstances' under which the human rights clause could be triggered.

For a situation to constitute a "*particularly serious and substantial violation*" [of the human rights clause] its gravity and nature would have to be of an exceptional sort such as a *coup d'état* or grave crimes that threaten the peace, security, and well-being of the international community.[80]

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[74] Note, however, that the essential element clause in the AA 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: N. Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood', *European Law Review* (2015), pp. 391-410.
[75] 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: N. Ghazaryan, *op. cit.*, p. 408.
[76] See e.g. Art. 2, para 3 of the AA with Moldova.
[77] See Art. 455 of the AA with Moldova. For comments, see also. Ghazarian, *op. cit.*
[78] Art. 28, para. 7 of the Strategic Partnership Agreement with Canada.
[79] Zamfir, *op. cit.*, p. 10.
[80] Art. 28, para. 3 of the Strategic Partnership Agreement with Canada.

However, such a formula has not become standard practice. Other agreements make use of less specific formulations. The Strategic Partnership Agreement 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 repercussion*."[81] The recently concluded Framework Agreement on Comprehensive Partnership and Cooperation with Thailand does not even include such a specification. 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* […]."[82]

Finally, apart from references to respect for human rights as part of the essential elements provisions of an agreement, the EU's post-Lisbon trade agreements all include a chapter on Trade and Sustainable Development (TSD) with references to labour and environmental standards that are based on multilateral instruments such as Conventions of the International Labour Organisation (ILO) and the United Nations Convention on Climate Change.[83] There is a certain overlap between general human rights clauses and more specific TSD provisions. After all, it is well established that ILO core labour standards are also human rights and that there is an important link between human rights and environmental protection.[84] Nevertheless, there are significant differences in terms of monitoring and enforcement, with a dedicated dispute settlement mechanism under the TSD chapter, as opposed to an option of non-execution for a violation of the essential elements clause.

IV. 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. First of all, certain self-standing sectoral agreements (e.g., on fisheries, timber or steel) may escape the general conditionality approach.[85] This can be easily solved though the consistent inclusion of a reference to the essential element clauses of a framework agreement. A good practice example can be found in 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

[81] Art. 43, para. 4 of the Strategic Partnership Agreement with Japan, OJ (2016) L 216/15.
[82] Art. 55 (5) of the Framework Agreement on Comprehensive Partnership and Cooperation with Thailand, OJ (2022) L 330/96.
[83] 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: B. Cooreman and G. Van Calster, 'Trade and Sustainable Development Post-Lisbon', in: M. Hahn and G. Van der Loo (eds.), *Law and Practice of the Common Commercial Policy. The First 10 Years of the Treaty of Lisbon*, (Brill-Nijhoff, 2020), pp. 187-205.
[84] L. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', *Legal Issues of Economic Integration* (2013), p. 301.
[85] Hachez, *op. cit.*, p. 93.

Agreement with the ACP countries.[86] However, the negotiation of the EU-China Comprehensive Agreement on Investment (CAI) also reveals the limits of this approach. The latter agreement does not include specific human rights provisions.[87] There is a link with a general framework, which is for the time being the Trade and Economic Cooperation Agreement (TECA) from 1985, but the latter does not include a human rights clause either.[88] Hence, in the absence of a new framework agreement, the CAI is expected to have a rather minimal and indirect impact on human rights.[89] The absence of specific and enforceable human rights clauses in the CAI has, therefore, been heavily criticised by several NGOs.[90] 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*".[91] Accordingly, it was decided that any discussion on the ratification of the CAI is frozen as long as the Chinese sanctions are in place. 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.[92]

The discussion surrounding the CAI with China clearly illustrates how the EU's human rights conditionality in the framework of the Common Commercial Policy has an important *ex ante* dimension, i.e., before the actual conclusion of a trade or investment agreement. Given the European Parliament's role in the ratification process as foreseen under Article 218 TFEU, this offers a significant leverage to put human rights concerns on 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.

In accordance with Article 218 (9) TFEU, 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. The European Parliament is kept informed at all stages of this procedure. It is noteworthy that the EU institutions are not obliged to trigger the human

[86] See: Art. 3, para. 6 and Art. 15 of the Partnership Agreement on Sustainable Fisheries between the European Union and the Islamic Republic of Mauritania, OJ 2021 L 439/1.
[87] 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 (cf. *supra*).
[88] Article 15 of Section VI of the CAI, as available at: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en>.
[89] See: European Commission services' 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, May 2018, p. 6, available at: <https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156863.pdf>.
[90] See: <https://www.rights-practice.org/news/joint-appeal-calling-for-inclusion-of-human-rights-clauses-in-the-eu-china-cai>.
[91] European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs, <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0255_EN.html>
[92] *Ibid.*

rights clause when confronted with human rights violations in a contracting party. This can be derived from the *Mugraby* case before the Court of Justice of the EU.[93] 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. By using the words 'may take', the parties to the Association Agreement indicated clearly and unequivocally that each of them had a right, and not an obligation, to take such appropriate measures. That non-binding nature, expressly envisaged in that provision, cannot be called into question in the 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.[94]

Moreover, it was upheld that the human rights clause is not intended to give rights to individuals.[95] More recent agreements even explicitly exclude the direct effect of these provisions, implying that natural or legal persons cannot invoke the human rights clause before the EU or Member State courts.[96] 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 a broad discretion since it involves complex assessments where political, economic and social choices are to be made.[97] Moreover, it is doubtful whether the contracting parties would agree with the inclusion of directly applicable human rights clauses in international agreements. 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 and parcel of unilateral financial instruments such as the Neighbourhood, Development and International Cooperation Instrument (NDICI)[98] and macro-financial assistance (MFA) to partner countries experiencing a balance of payments crisis.[99] Accordingly, financial assistance can be suspended in the event of degradation in democracy, human rights or the rule of law.[100] With respect to developing countries, an explicit human rights conditionality is included in the EU's Generalised System of Preferences (GSP). Under the GSP Regulation, the European Commission can initiate a procedure for the

[93] Order of the General Court in Case T-292/09, *Muhamed Mugraby v. Council and Commission,* EU:T:2011:418 and Order of the Court of Justice in Case C-581/11 P, EU:C:2012:466.
[94] Case C-581/11 P, *op. cit.* para. 70-71.
[95] Case T-292/09, *op. cit.* para. 61.
[96] Zamfir, *op. cit.*, p. 10.
[97] See, for an example regarding restrictive measures, Case C-72/15, *Rosneft*, EU:C:2017:236, para. 146.
[98] See: https://neighbourhood-enlargement.ec.europa.eu/funding-and-technical-assistance/neighbourhood-development-and-international-cooperation-instrument-global-europe-ndici-global-europe_en
[99] See: https://economy-finance.ec.europa.eu/eu-financial-assistance/macro-financial-assistance-mfa_en
[100] 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, OJ (2021) L 209/1.

temporary withdrawal of tariff preferences from a beneficiary country in case of, amongst others, a serious and systemic violation of the principles laid down in a selected number of core conventions on human and labour rights.[101] In the past, a suspension of trade preferences applied to Myanmar (1997), Belarus (2007), Sri Lanka (2010) and, recently, Cambodia (2020). The latter country 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) linked to political participation, freedom of expression and freedom of association.[102] From a legal point of view, the temporary withdrawal of trade preferences is based upon the adoption of a European Commission delegated regulation, which includes an assessment of the violated rights, as well as the expected actions from the Cambodian authorities (such as the reinstatement of the political rights of opposition members, and the repeal or revision of laws on political parties and NGOs).[103]

As part of the EU's 2021 trade strategy, a revision of the GSP regulation has been initiated.[104] The objective is to strengthen the conditionality approach, amongst others through an update of the relevant conventions and increased monitoring. Without entering into the details of this exercise, it is important to point out that the European Parliament insists on important amendments regarding the procedure for the withdrawal of trade preferences. This includes, *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*."[105] 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. 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.[106] 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

[101] See Art. 19 of Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences, OJ (2012) L 303/1.
[102] European Commission, 'Cambodia loses duty-free access to the EU market over human rights concerns', August 2020, at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1469>.
[103] 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, OJ (2020) L 127/1.
[104] Proposal for a regulation of the European 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.
[105] 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.
[106] *Ibid.*

account to ensure a consistent and holistic approach towards human rights abuses in trade partner countries.

B. The Challenge of Mixity

Human rights clauses are often included in so-called mixed agreements, i.e., agreements concluded by both the EU and its Member States as contracting parties. This is particularly the case because such clauses often form part of broadly defined framework agreements (cf. *supra*), which almost by definition go beyond the scope of EU competences. Moreover, Member States generally prefer the option of mixity for pragmatic and political reasons. It endows them with additional bargaining power while upholding their visibility *vis-à-vis* third countries.[107]

Mixed agreements require a double ratification process (at the EU level and at the level of every individual Member State) before entering into force. 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.[108]

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.[109] Alternatively, an 'interim-agreement' can be concluded between the EU and the third state, which allows for the quick entry into force of those parts of the agreement which do not require Member State ratification.[110] 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.*"[111] Hence, this allows for the inclusion of provisions relating to the general principles (including the

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[107] A. Rosas, 'The Future of Mixity', in: C. Hillion and P. Koutrakos (eds.) Mixed Agreements Revisited. The EU and its Member States in the World, (Hart Publishing 2010) pp. 367-374.

[108] See: CETA ratification tracker at: <https://carleton.ca/tradenetwork/research-publications/ceta-ratification-tracker>.

[109] 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: M. Chamon, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law', *European Journal of International Law* (2020) 31 (3), p. 893 and 896.

[110] 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.

[111] 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, OJ (2017) L 67/1.

essential element clause), political dialogue, human rights cooperation and gender equality. Moreover, the non-execution clause can also be triggered at the stage of provisional application.[112] 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.[113]

Nevertheless, despite the EU's common recourse to provisional arrangements, this practice does not always appear consistent.[114] 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.[115] As observed by N. Hachez, *"[t]his creates significant uncertainty as to the applicability of human rights conditionality during the provisional application phase."*[116] It may well 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.[117] However, proceeding from a literal interpretation of the specific references to the scope of provisional application, it can equally be argued that this is strictly limited to the trade matters of Part IV only. Hence, in order 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. The latter 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.[118]

[112] 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).
[113] 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.
[114] Hachez, *op. cit.*, p. 94.
[115] Council Decision of 25 June 2012 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, OJ (2012) L 346/1.
[116] Hachez, *op. cit.*, p. 94.
[117] In this respect, reference can be made to Art. 31 (1) of the Vienna Convention on the Law of Treaties 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 (n 5).
[118] See Art. 3 of 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, OJ (2022) L 330/70.

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, amongst others, the establishment of human rights dialogues, consultations with partner countries and regional groupings, financial conditionality mechanisms under the NDICI and GSP, public diplomacy, awareness raising campaigns, public statements, declarations and démarches. Clearly, the main focus is on dialogue and positive measures rather than on a punitive approach. This has been confirmed, amongst others, in the EU Action Plan on Human Rights and Democracy 2020-2024[119] and in the Commission's reply to the European Ombudsman's Strategic Initiative concerning the respect for human rights in the context of international trade agreements.[120]

It is a recurring criticism that the effectiveness of this dialogue-based approach is limited in the absence of strong monitoring and enforcement mechanisms. In terms of monitoring, it is noteworthy that there is difference between the labour and environmental standards included in the TSD chapters and the traditional human rights clauses. The TSD chapters generally provide for the establishment of a specialised 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. In contrast, there is usually no special organ 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.[121]

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.

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[119] EU Action Plan on Human Rights and Democracy 2020-2024, available at: <https://www.eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf>.

[120] Commission Reply to the European Ombudsman, Complaint ref. SI/5/2021, C(2022) 9654 final, Brussels, 14 December 2022, p.3.

[121] Amongst others, such dialogues exist with Morocco, Tunisia, Lebanon, Jordan, Egypt and Iraq. L. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', *Legal Issues of Economic Integration* (2013), p. 301.

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 part 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) is to 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 (cf. *supra*).[122] 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.[123]

[122] See e.g. Art. 28, para. 5 of the SPA with Canada, which provides that in cases of special urgency, the Joint Ministerial Committee (JCM) may be involved for urgent consultations.
[123] 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 neighbours, include a separate title on 'civil society cooperation', which includes broadly defined objectives and the establishment of a Civil Society Platform. The latter may make recommendations to the main decision-making body (Association Council or Partnership Council).[124] The involvement of civil society stakeholders is also provided in other recent and pending agreements such as the post-Cotonou agreement with the ACP countries. However, the provisions are broadly drafted, aiming 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. The absence of an effective private complaints procedure has long been identified as one of the major issues preventing a more effective enforcement of labour standards in EU trade agreements.[125] 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 labour and environmental rights included in the TSD chapters is a significant improvement.[126] The creation of the SEP reflects the efforts of the European Commission 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 is in charge of monitoring the implementation and enforcement of EU trade and investment agreements.

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.[127] First, only EU citizens and EU-based organisations can access the SEP. Organisations from non-EU countries have no direct access to the SEP, even though they may contact EU-based organisation to issue a complaint on their behalf. This is what happened when the Dutch-based organisation CNV International submitted a complaint on behalf of trade union organisations in Colombia and Peru with respect to alleged violations of fundamental labour rights, freedom of association and the right to equality.[128] 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

[124] 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.
[125] M. Bronckers and G. Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously', *Common Market Law Review* (2019), pp. 1591-1622.
[126] The new complaints system to fight trade barriers and violations of sustainable trade commitments was launched in November 2020, see: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2134>.
[127] 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), at: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/158519>.
[128] See: <https://etuclex.etuc.org/new-complaint-presented-trade-union-organisations-single-entry-point-sep-european-commission>.

respect to social and environmental standards in a trade-related context. It follows that the SEP seems not very suited to deal with human rights complaints in general, and a distinct human rights complains mechanism has been suggested.[129]

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*."[130] 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*."[131] 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 need to ensure that our trade instruments deliver benefits to EU actors*."[132] 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 organisations in Peru and Colombia (see *supra*).

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. Under this procedure, an Austrian national requested the suspension of the Trade Agreement with Colombia following the violent crackdown of nation-wide protests in this country in April and May 2021.[133] 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.*"[134] 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 (see *supra*). Despite this ambition, the absence of explicit references to the problematic human rights situation in the

[129] 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, shouldn't necessarily be adjudicated or considered analogously as the trade counterparts. See: Kathleen Claussen, 'Reimagining Trade-Plus Compliance: The Labor Story', *Journal of International Economic Law* (2020), pp. 25 – 43.
[130] Commission Reply to the European Ombudsman, Complaint ref. SI/5/2021, C(2022) 9654 final, Brussels, 14 December 2022, p.4.
[131] *Ibid.*, p.5.
[132] *Ibid.*
[133] Petition No. 0828/2021 by I.E. (Austrian) on the need to temporarily suspend the EU-Colombia Trade Agreement.
[134] *Ibid.*

public statements following the EU-Colombia High Level Dialogue and Human Rights Dialogue raised concerns of human rights defenders in the region.[135]

The confidential nature of the human rights dialogues, based on quiet diplomacy, may have limited or even counterproductive consequences.[136] 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.[137] However, the Council did not include such a requirement of transparency when it adopted the revised guidelines in February 2021. Accordingly, the role of NGOs and external stakeholders is essentially limited to that of information providers.[138]

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 without any concrete, enforceable standards.[139] This applies to the traditional human rights clauses and, until recently, also to the labour and environmental standards included in recent FTAs, because they were not subject to the normal dispute settlement procedures.[140] Disputes under the TSD chapters used to be resolved within a system of consultations with a possible referral to a Panel of Experts. This panel has the power to draw up a report and to make non-binding recommendations for the solution of the matter. It has been argued that this soft approach is one of the main weaknesses of the EU's trade-human rights nexus.[141]

A look at the available *ex post* impact assessments seems to confirm the rather weak enforcement of human and labour rights.[142] The report on the EU-Mexico FTA found that "*the*

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[135] See an open letter of NGOs demanding more dialogue on human rights in Colombia: <https://eulatnetwork.org/eu-lat-network-joins-oidhacos-open-letter-on-eu-human-rights-public-statements/>.

[136] See: K. Kinzelbach, *The EU's Human Rights Dialogue with China. Quite diplomacy and its limits*, (Routledge 2015).

[137] Recommendations for the revision of the European Union (EU) Guidelines on human rights dialogues with third countries, December 2020, at: <https://hrdn.eu/2017/wp-content/uploads/2021/01/HRDN-Recommendations-for-the-revision-of-EU-guidelines-on-human-rights-dialogues-with-third-countries-Dec-2020.pdf>.

[138] K. 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, 10-11 November 2009, available at: 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.

[139] Hachez, *op. cit.*, p. 102.

[140] C. Gammage, 'A Critique of the Extraterritorial Obligations of the EU in Relation to Human Rights Clauses and Social Norms in EU Free Trade Agreements', *Europe in the World: A Law Review* (2018) 2, p. 1.

[141] *Ibid.*

[142] The ex-post evaluations are available at the website of the European Commission, DG Trade: <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/>.

commitments to human rights in the agreement still lack effective mechanisms through which human rights could be better monitored or defended".[143] The evaluation report of the implementation of the EU-Korea FTA bluntly concluded that "*the EU-Korea FTA is assessed to have not changed the status quo of human and labour rights in Korea as they were when the FTA came into effect, in the sense that little change (positive or negative) over the 2011 situation and/or longer term trends can be observed*."[144]

Significantly, this report was produced before the EU's decision to request, for the very first time, formal consultations with the Republic of Korea in relation to the country's non-compliance with international labour standards as defined in the TSD chapter of the EU-Korea FTA.[145] This initiative, which was launched in December 2018, reveals a more assertive approach on behalf of the EU and a clear willingness to use the available mechanisms under free trade agreements in order to ensure compliance with standards that go beyond the traditional scope of international trade relations.[146]

This approach produced some effect in the sense that Korea ratified three ILO Conventions and made amendments to its Trade Union and Labour Relations Adjustment Act (TULRAA) following the EU's pressure. Despite this positive evolution, several critical remarks can be made. Aleydis Nissen, for instance, found 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, making it easier for the European Commission to claim that the soft dispute mechanism under the TSD chapter works.[147] 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 labour rights issues in Korea. It is submitted that the EU's approach should be 'more tailor-made'.[148]

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

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[143] Ex-post Evaluation of the Implementation of the EU-Mexico Free Trade Agreement, February 2017: <http://trade.ec.europa.eu/doclib/html/156011.htm>,p. 161.
[144] Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea, May 2018, p. 244 available at: <http://trade.ec.europa.eu/doclib/html/157716.htm>.
[145] Request for consultations by the European Union: <http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf>.
[146] In this respect, it is noteworthy that adopting a more assertive approach towards 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: <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf>.
[147] A. Nissen, 'Not That Assertive: The EU's Take on Enforcement of Labour Obligations in its Free Trade Agreement with South Korea', *European Journal of International Law* (2022) 33 (2), p. 607.
[148] Ji Sun Han, 'The EU-Korea Labour Dispute: A Critical Analysis of the EU's Approach', *European Foreign Affairs Review* (2021) 26 (4), p. 531.

assertive enforcement strategy with the possibility of trade sanctions as a last resort.[149] The latter may be regarded as an important paradigm shift, which is reflected in the text of the new EU-New Zealand FTA.[150] For the first time, the TSD chapter is aligned with the general dispute settlement procedure.[151] Accordingly, a violation of sustainable trade obligations, i.e. core labour standards and commitments under the Paris Agreement on climate change, may lead to trade sanctions.

This reinforcement of TSD chapters goes hand in hand with a number of other recent initiatives aimed at ensuring increased respect for social and environmental standards. Reference can be made to the Carbon Adjustment Mechanism (CBAM), the proposal for a Directive on corporate sustainability due diligence and the proposal for a Regulation on prohibiting products made with forced labour on the Union market.[152] The common thread between all those initiatives is the aim to ensure a level playing field for businesses established within and outside the EU, which 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, amongst others on the basis of the new due diligence legislation, and the approach to trade and sustainable development in the context of international agreements. The latter is more selective in nature, focussing essentially on core labour standards and the Paris Climate Agreement, and differs depending on the countries concerned. Hence, it has been argued that "*more coherence is desirable"* to ensure "*a better connection between obligations that EU governments impose on themselves, and impose on companies, when it comes to the implementation, enforcement and sanctions in respect of sustainability treaties*."[153] In this respect, the discussion about the use and enforceability of human rights clauses in FTAs cannot be disconnected from other instruments such as the GSP+ and corporate human rights due diligence. As observed by Thomas Ackerman, "*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*."[154]

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[149] European Commission, 'The power of trade partnerships: together for green and just economic growth', COM (2022) 409 final, Brussels, 22 June 2022.
[150] C. Ceretelli, 'EU-New Zealand FTA : Towards a New Approach in the Enforcement of Trade and Substainable Development Obligations', *EJIL*:*Talk*, 28 September 2022, at: <https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/>
[151] See Chapter 26 of the EU-New Zealand FTA. The text is available at: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en>.
[152] Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, COM (2022) 453 final.
[153] See: M. Bronckers, 'Due diligence legislation versus trade policy', *Leidenlawblog*, at: <https://www.leidenlawblog.nl/articles/due-diligence-legislation-versus-trade-policy>.
[154] T. Ackerman, 'Extraterritorial Protection of Human Rights in Value Chains', *Common Market Law Review* (2022) p. 152.

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.[155] 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. 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 (see *infra* Annex 2 on the incorporation of benchmarks for businesses and corporations).[156]

V. The Application of Human Rights Clauses in the EU and the US: A Comparison

On a number of occasions, it has been suggested that the US approach to rights-based clauses in trade agreements is considerably or comparatively more effective in achieving the sought-after outcome.[157] Based on a cross-sectional analysis of an approximated 20 FTAs between the US and its trade partner countries, this presupposition is scrutinized to determine its veracity, as well as the factors militating in favor of a more effective marriage between trade and human rights provisions in the context of US trade agreements,

A. Contextualizing a 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, hinting that conversely, the US adopted and continues to adopt a more pragmatic and limited approach to effectuating rights in its trade relations.[158] 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.[159] Unlike the EU, its agreements do not explicitly reference general human rights instruments such as the Universal Declaration of Human Rights. Conversely, the US approach is characterized by a focus on a limited rights-based and

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[155] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights (OEIGWG), Chairmanship Third Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 17, 2021), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf. For an analysis on this (third) draft, see: I. Zamfir, 'Towards a binding international treaty on business and human rights', European Parliament Briefing, May 2022, at: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729435/EPRS_BRI(2022)729435_EN.pdf>

[156] See: <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>

[157] See (and sources cited therein): J. Wouters and M. Ovádek, *op. cit.*, p. 669 – 670.

[158] *Ibid.*

[159] Desirée LeClerq, 'The Disparate Treatment of Rights in U.S. Trade' 90 *Fordham law Review* 1 (2021) p. 13 and onward.

governance approach, whereby the focus is not on international or regional human rights standards, but instead on specific (international) labour and environmental law provisions. This is reminiscent of – if not analogous to – the recent EU approach in TSD chapters.[160] Broadly speaking, it can be concluded that while the EU (initially) adopted a top-down, value-driven, and policy-oriented approach, the US initially adopted a bottom-up rights-driven approach with only cursory references to international bilateral and multilateral arrangements between the trade partners.[161] 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 Universal Declaration of Human Rights. 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. Increasingly however, EU-FTAs have adopted more specific and analogous protective provisions and foresee in institutional arrangements as in the TSD Chapters[162], while US FTAs increasingly expand the set and scope of protected rights[163]. 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.[164] The later agreements, and the USMCA agreement specifically, transforms the language and enforceability of such provisions significantly.[165]

In addition, the combination of TSD chapters of EU trade agreements with general clauses on (civil and political) human rights protections more generally, and the soft approach to enforcement adopted in practice, suggest that the EU considers human rights clauses as a means to engage in policy-making. In other words, rights are included on the EU-side as a means to

[160] Compare and contrast for example, Chapter 13 (Sustainability) EU-Korea AA and Chapter 23 (Labour) US-Mexico-Canada FTA.
[161] See for example, the US-Israel FTA and Article 3 specifically, which holds 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.*"
[162] *Ibid.* See for a case study analysis: A. Nissen, 'Not That Assertive: The EU's Take on Enforcement of Labour Obligations in its Free Trade Agreement with South Korea', *European Journal of International Law* (2022) 33 (2), p. 607.
[163] See Article 23.3, 23.6 (Forced or Compulsory Labour), Article 23.7 (Violence Against Workers), Article 23.8 (Migrant Workers), and Article 23.9 (Discrimination in the Workplace) Chapter 23 (Labour) US-Mexico-Canada FTA.
[164] See for example Annex 17.6 of Chapter 17 of the US-Colombia FTA.
[165] See for example: Article 23.5 – 23.9 USMCA FTA.

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-discourse in US trade relations. In determining the rationale for rights-based inclusions in US FTAs, scholarship has oscillated between these so-called 'trade-plus provisions' pursuing purely altruistic objectives intended to protect rights internally and abroad, as opposed to more duplicitous objectives intended to restrict trade.[166] The truth is however, somewhere in the middle and is hardly ever one or the other extreme of this continuum. Santos notes in this respect that while increasing labour standards may very well be intended to "…*combat the worst forms of labour 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.[167] Accordingly, *LeClercq* concludes that these trade-plus provisions in US trade agreements typically seek to protect the rights of US industries and individual (legal) persons.[168] This nuance is crucial in understanding the different approaches and ensuing questions of effectiveness of rights-protection between the EU and the US. Simply put, while the EU appears to pursue an overarching policy of promoting human rights protections at large to its trade-partners, the US is concerned primarily with ensuring very specific rights of its own industries and individuals in its trade relations. This distinction in pursued objectives inevitably has ramifications on the *ex-ante* (i.e., prescriptive) approaches to rights-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.

B. Evolution of Rights Clauses

1. The Relational Clause

In the 20 FTAs under scrutiny concluded between the US and third countries, the provisions concerning individual (human) labour rights[169], are overwhelmingly compiled in one chapter and largely follow the same structure:

[166] Desirée LeClerq, 'The Disparate Treatment of Rights in U.S. Trade' 90 *Fordham law Review* 1 (2021) p. 4.
[167] Álvaro Santos, 'The Lessons of TPP and the Future of Labour Chapters,' in: Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz and Atsushi Sunami (eds.) *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford 2019) p. 145 – 146.
[168] Desirée LeClerq, 'The Disparate Treatment of Rights in U.S. Trade' 90 *Fordham law Review* 1 (2021) p. 4.
[169] 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.

i. Statement of Shared Commitment
ii. Application and Enforcement of Labour Laws
iii. Procedural Guarantees and Public Awareness
iv. Institutional arrangements
v. Labour Cooperation
vi. Labour Consultations
vii. Definitions

In addition to these rights-based chapters concerning labour specifically, the FTAs concluded by the US and third countries, typically include a single provision in the first chapter concerning 'Initial Provisions' on the relation of the FTA to other agreements between the trade partners. This provision is copied almost verbatim throughout all FTAs and holds that "*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…*".[170]

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 US and Israel in 1985 to the latest provision in the recently concluded USMCA agreement between the US, 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 suggest 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-*chapeau*.[171]

Article 3: Relation to Other Agreements (US-Israel)	**Article 1.1.2: General (US-Australia)**	**Article 1.2: Relation to Other Agreements (US-Mexico-Canada)**
"The Parties affirm their respective rights and obligations with respect to each other under existing bilateral and multilateral agreements, including the Treaty	"The Parties affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral	"Each party affirms its existing rights and obligations with respect to each other under the WTO Agreement and other agreements

[170] US - Korea FTA.
[171] Article 1.2 USMCA FTA.

of Friendship, Commerce and Navigation between the United States and Israel and the GATT."	agreements to which both Parties are party, including the WTO-agreement".	to which it and another Party are party"

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 US with third countries, in line with international (human rights) law. Instead, this 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 this initial provision on the relation of the trade agreement to other commitments by the trade partners, appears to become more limited in safeguarding rights, an inverse trend is noticeable in the rights-based chapters concerning labour. Whereas the initial US-Israel FTA did not include a labour-rights chapter, subsequent agreements not only include explicit chapters on the matter, but increasingly articulate concrete (procedural) obligations stemming from said labour-rights chapters. The FTAs concluded by the US can loosely be grouped in 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*

2. 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 do resurface in a similar manner 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 labour 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, including trade in services or trade in technology, principally between the Parties…"* 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". By that same count, it is evident that these rights must continue to be read in line with the trade-oriented objective of the agreement, and thus a broader right to free movement cannot be inferred from this provision.

3. 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 labour chapter and encompass the right of association, the right to organize and collectively bargain, the prohibition of any form of forced or compulsory labour, labour protections for children and young people, minimum age for employment and elimination of the worst forms of labour, as well as acceptable work conditions and occupational health and safety standards. In other words, the recognized rights and principles are explicitly incorporated, though limited in scope in that they clearly refer only to trade-related (human) rights. Notably, this does not meet the European Ombudsman and the EP's call however, for more enforceable human rights generally (see *supra*), as labour and sustainability rights cannot be equated as being one and the same as human rights generally.

Quite interestingly, the FTAs in this second category explicitly enumerate and articulate a number of procedural requirements that are both binding on the trade partners, and concomitantly indicative of enforceable and judiciable rights for individual (legal) persons.[172] The FTAs in this category adopt a standardized provision which holds that "*Each 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 labour tribunals for the enforcement of the Party's labour laws*" and that these proceedings be "…*fair, equitable, and transparent*".[173] 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 labour laws, which must be compliant with "*internationally recognized labour principles and rights"* according to the Statement of Shared Commitment (see *supra*). While it would be a stretch to read direct effect into these provisions, it does provide individual applicants with more than a mere abstract commitment to labour (human) rights *vis-à-vis* the trade partners. In addition, these FTAs foresee an obligation on behalf of the State Parties to ensure that applicants will have access to remedies to "…*ensure the enforcement of their rights under its labour laws*".[174]

[172] See (e.g.,): Articles 18.3, 18.4, 18.5 Australia-US FTA; Articles 16.3, 16.4, 16.5, 16.6 Morocco-US FTA, Articles 18.3, 18.4, 18.5, 18.6 Chile-US FTA.
[173] Australia-US FTA.
[174] Australia-US FTA para 18.3 (3).

Finally, the FTAs impose the obligation on the trade partners to ensure the promotion of labour laws and their enforcement mechanisms through information dissemination to the public at large via a large number of enumerated modes of dissemination.[175]

While the foregoing provisions are geared towards safeguarding the rights of individual (legal) persons, the Chapters on labour in this second category of FTAs also foresee in procedural provisions to strengthen the cooperation between the trade partners, while concomitantly ensuring respect for the internationally recognized labour rights and principles. Specifically, the Joint Committee established to provide oversight over the FTA more generally, is also tasked with considering matters under the labour chapter. Additionally, 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 labour chapter. 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*".[176] This set of requirements appears to endow the public at large and stakeholders, with the opportunity to raise issues and concerns with respect to non-compliance 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 for the purpose of fostering such cooperation.[177] Again, the analogy with the TSD Chapters under EU FTAs, is clear. Nevertheless, this practice solely covers trade-related rights, as opposed to human rights more generally.

Finally, in addition to this individual-oriented and rights-based approach, the FTAs of this second category establish the possibility of 'Labour Consultations'. Accordingly, these labour consultations allow trade partners to raise any issues or concerns they have with respect to the application of the labour rights. According to these provisions, "*consultations shall commence within 30 days after a Party delivers a request for consultations*" with the objective of finding a "*mutually satisfactory outcome*". Insofar this would fail to yield a mutually beneficial outcome, a subcommittee on Labour Affairs may be convened to help resolve any pending questions.

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 provide fair, equitable and transparent avenues for redress concerning specific labour (human) rights (1), while providing a forum for the trade partners to engage with

[175] See (e.g.): Article 18.3(4) Australia-US FTA; Article 18.4(7) and Annex 18.5 (on Labour Cooperation Mechanism) § 5 (on implementation of cooperation activities) Chile-US FTA.
[176] See Article 18.4(a) and (b) Australia-US FTA.
[177] Article 18.5 Australia-US FTA

stakeholders and the public at large (2) and at the same time balancing this with a cooperative approach through labour consultations for the implicated trade partners (3).

4. 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 (legal) 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.[178] 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 labour chapter. 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.[179] Another significant innovation is the robust requirements of impartiality of officials tasked with the determinations of disputes stemming from the labour chapters.[180]

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 labour laws, and encompasses specific and stand-alone provisions on forced or compulsory labour (1), violence against workers (2), migrant workers (3) and discrimination in the workplace (4) with the latter involving references to discrimination on the basis of sex, pregnancy, sexual orientation, gender identity, and care-giving roles.[181] Similarly, the traditional list of labour rights under US-concluded FTAs, has become more robust by imposing the elimination of all forms of child labour (as opposed to requiring mere "*labour protections for children and young people*").[182]

The provisions on public submissions have also been developed to provide more procedural guarantees, including specific timelines that may be imposed, as well transparency, motivation, and evidentiary standards that may be imposed.[183]

[178] See (e.g.): Article 17.4(2)(a) Peru-US FTA; Article 23.10(3)(b) US-Mexico-Canada FTA.
[179] See (e.g.) Article 17.4(3) Peru-US FTA; Article 23.10(4)(b) US-Mexico-Canada FTA.
[180] See (e.g.) Article 17.4(5) Peru-US FTA; Article 23.10(6) and 23.10(10)(b) US-Mexico-Canada FTA.
[181] See (e.g.) Article 23.3, 23.6 (Forced or Compulsory Labour), Article 23.7 (Violence Against Workers), Article 23.8 (Migrant Workers), and Article 23.9 (Discrimination in the Workplace) Chapter 23 (Labour) US-Mexico-Canada FTA.
[182] See (e.g.) Australia FTA.
[183] Article 23.10(4) US-Mexico-Canada FTA.

Visually, the focus on rights has also been enhanced, as the reference to concrete rights is no longer provided for at the end of the chapter. Instead, these rights now take a prominent place at the start of each labour 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.

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' is a novel compliance tool intended to unilaterally safeguard the right to free association and collective bargaining *vis-à-vis* private actors.[184] Through its inclusion in the USMCA, there is now more diversification in the application of rights-based labor provisions.

C. A final note on terminology

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*"). This language is subsequently connected to enforceable legal obligations, stemming from binding ILO conventions. In other words, the language used in trade-plus provisions in US FTAs is tied to pre-existing 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 "*Respect 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 a whole. 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 on the degree of enforceability of the human rights clauses in EU trade agreements.

D. Interim Conclusions

In US FTAs there is 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

[184] Kathleen Claussen, 'Behind-the-Border Compliance: Trade's Enforcement Conundrum' in Christina Voigt et al (eds.) *Compliance in International Law* (2023, *forthcoming*).

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 US and the EU should not be overemphasized however, as 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 in this sense, demonstrates a clear shift towards increasingly concretized procedural guarantees for both the implicated trade partners, as well as individual (legal) persons, and substantive protections. For example, the parameters trade partners must meet in ensuring access for individual (legal) persons to non-judicial, quasi-judicial 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 labour.

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*).

VI. The Way Forward: Lessons Learned and Policy Recommendations

The inclusion of human rights clauses in EU trade agreements has a long-standing tradition, which cannot be disconnected from the EU's value-driven objectives. 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 of human rights in all EU external policies, including the Common Commercial Policy. Of particular significance is the 2021 Trade Policy Review, which signals an evolution towards an open, sustainable, and assertive trade policy. 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 and a number of autonomous measures to ensure respect for core environmental and labour rights. 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.*"[185] 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 the promotion of 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 questions must first be agreed upon.

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 human rights clauses is determined, this will inform what (prescriptive normative and standard-setting) substantive and procedural provisions (if any at all) should be incorporated in trade agreements. Likewise, 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, that 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 their inclusion is purely policy-oriented, and intended for awareness-raising,

[185] 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), para. 26.

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 (see *infra*).

The question to what extent human rights can and should be promoted through trade agreements remains subject to (academic) discussions,[186] rendering it all the more relevant to determine what the objective and scope of the role of human rights clauses in EU trade agreements should be. In turn, 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 would want to see this coupled with 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 and understanding by 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.***

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 labour 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 very straightforward to decide whether or not certain events fall within under the TSD chapters or not, which is echoed by the interdependence and indivisibility of human rights.[187]

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.[188] Moreover, Article 207 (1) TFEU provides that "*the common commercial policy*

[186] See e.g., A. M. Ibrahim, 'International Trade and Human Rights: An Unfinished Debate', *German Law Journal* (2013) 321-336. See also: Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *European Journal of International Law* (2002) 815 – 844. See more recently: Jennifer Zerk and Rosie Rowe, 'Advancing human rights through trade' Chatham House (Research Paper) (2021), available at: https://www.chathamhouse.org/2021/05/advancing-human-rights-through-trade/01-introduction.

[187] In pointing at the possible implications of such incoherence, Bartels referred to an example in the US 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, *op. cit.*, p. 312.

[188] *Ibid.*

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.

In turn the questions of why, what, and who must be answered, in order to yield suggestions on how such human rights clauses must be construed, in order to assess and increase their effectiveness.

2. Answering the Why, What and Who

a. 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 it 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 current '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 awareness-raising, cooperation, and dialogue. On the other hand, the non-execution 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? 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 (see *infra*).

b. Content of Human Rights Clauses in EU Trade Agreements

Next, the question should be asked *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 human rights generally, or trade-related rights more specifically. As a brief comparison with US practice evidences, 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.[189] In other words, a generalized approach would encompass respect for, as well as the fulfillment of and protection of (non-)derogable rights, (non-)absolute rights, and

[189] The typology of human rights resurfaces across international human rights instruments, as well as across regional human rights instruments.

qualified rights within the realm of civil and political human rights, in addition to economic, social and cultural rights, which – contrary to civil and political human rights – overwhelmingly adopt the standard of progressive realization and non-regression. This entails that the obligations on States for second generation rights, will differ from State to State, bearing in mind a number of contextual factors. Third generation rights, more commonly referred to as collective human rights, as well as the fourth emerging generation of (digital) human rights, may very well also be included in this inquiry. While the foregoing 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. These appear to replicate or are analogous to the labour chapters in US FTAs. Yet, as noted by the European Ombudsperson (see *supra*), this does not meet the objective of protecting human rights more generally.

3. Recipients 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 the 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 (see *supra*)? 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 (legal) persons, or both. Determining whether human rights generally have been respected by the trade partner and *vis-à-vis* individual (legal) 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 (see *supra*). 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

In moving forward, a number of alternative, albeit 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 pre-determined methodology, as opposed to a mere enumeration

of abstract or concrete human rights to protect. 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 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 (see recommendations under Annex 1, 2, 3 and 4). 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 (liberalization). 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 **(a)**, the modes of review **(b)**, as well as the concrete negative, positive, procedural and substantive obligations stemming from abstract human rights commitments **(c)**. These will be dealt with in turn below.

a. 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*** which 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 labour legislation and the ratification of ILO core conventions.[190] 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.[191]

The inclusion of rather blunt essential elements and non-execution 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 situation in the partner countries. The use of ill-defined

[190] K. Marslev and C. Staritz, 'Towards a stronger EU approach on the trade-labor nexus? The EU-Vietnam Free Trade Agreement, social struggles and labour reforms in Vietnam', *Review of International Political Economy* (2022), <https://www.tandfonline.com/doi/full/10.1080/09692290.2022.2056903>.
[191] See: 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: <https://www.fidh.org/IMG/pdf/20220405_vietnam_eu_bp_en.pdf>.

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.

Concrete Recommendation #1: *Standards of Review*

1. **No margin of appreciation/discretion**: This standard entails that the rights at stake should be respected, without fail concerning both the negative *and* positive (procedural and substantive) obligations, as protected under international law. (*e.g.*, prohibition of torture, prohibition of slavery)

   When applied to *States*, this standard indicates that violations of these norms would be sufficient to trigger (partial) suspension of the trade agreement.

   When applied within the realm of business and human rights, this entails that businesses must respect the UN Guiding Principles on Businesses and Human Rights and (potentially in the future) the Treaty on Business and Human Rights, as promoted by the trade party.

2. **Infringement test**: This standard refers to the traditional test whereby certain limitations on human rights are permissible insofar they are based on an accessible and foreseeable legal basis (1), pursue a legitimate aim (2), and are proportional (3). The latter entails that the limitation must be necessary to meet the pursued objective, and that no lesser intrusive measures exist. Arguably, under this category, it may be sensical to impose (partial) trade restrictions *only* when the violations are sufficiently serious and/or systemic (see *infra*).

3. **Progressive Realization**: This standard entails that for a certain set of (economic, social, and cultural) rights, the ability of states to abide by their human rights obligations, will differ depending on a number of (economic) considerations. In other words, this second generation of human rights is characterized by obligations that are reminiscent of common but differentiated responsibilities. Arguably, under this category, it may be sensical to impose (partial) trade restrictions *only* when the violations are sufficiently serious and/or systemic (see *infra*).

4. **Serious and systemic violations:** Typically, the standards (in the absence of a single clear demarcation/benchmarks) to define what constitutes sufficiently serious and systemic, juxtapose a singular and isolated event, with a recurring practice. Likewise, the significance of the violation will play a role in determining whether something is effectively sufficiently serious. In sum, *recurrence, the isolation of the event and the significance of the limitation will determine its serious/systemic nature.* The ECtHR held in *Ireland v UK* that "*A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches".* However, this standard is developed within the context of a rights-based proceeding with an individual claimant before a human rights court. Accordingly, the standard is quite high. Insofar the pursued objective here is to promote human rights in third countries (as opposed to concretizing justiciable rights for individuals), arguably the evidentiary bar could be set slightly lower, bearing in mind the conditions of recurring, analogous or a pattern of breaches and the significance thereof. This standard could be complemented by a pre-defined list of situations that meet this standard.

b. Concretizing the Methods of Review

In addition to concretizing or identifying the relevant standards of review in line with the typology of human rights, effective human rights clauses will also inform with respect to the *method* of review. Here, the proposals for a new GSP Regulation could serve as a source of inspiration. It includes a list of relevant international conventions and monitoring mechanisms. Amongst others, this involves ***regular 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.[192] This information should 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. Significantly, the European Parliament proposed the addition of a non-exhaustive list of situations, which the Commission should take into account in its assessment.[193] A similar list and approach could provide guidance for the assessment of serious human rights violations, which could trigger the application of the non-execution clause under EU trade agreements.

Concrete Recommendation #2: *Methods of Review*

***Annual reporting by the trade partners** on human rights and trade generally, and country-specific/thematic issues in particular

*** Regular reporting by the European Commission** to the European Parliament on continued adherence to pursued human rights objectives in relation to trade partners – based on evidence from various actors and sources such as civil society reports, individual complaints, the UN Universal Periodic Review (UPR).

c. Concretizing Human Rights Obligations Stemming from Human Rights Commitments

In addition, the mechanisms instituted via EU-FTAs on sustainability provide a blueprint that resurfaces also 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.[194] Bearing in mind the typology of rights under the international human rights regime, ***a more tailor-made and flexible***

[192] 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.
[193] *Ibid.*, amendment 28.
[194] 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.

approach could be adopted, which can take into account future evolutions and specific circumstances in the countries concerned.

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 (see *infra* Annex 3). 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 analogously to the US approach, an FTA-internal complaint mechanism could be developed, which doesn't necessarily provide individual (legal) persons with 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

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:

    1. (a) consider matters raised by the submission and provide a timely response to the submitter, including in writing as appropriate; and

    2. (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 enforcements 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 labour, or safe and healthy working conditions, and 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 (see *infra* 'Substantive Obligations' Annex 3).

While a clarification of 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.

Concrete Recommendation #3: *Concrete Human Rights Obligations*

***Negative Human Rights Obligations:** *refrain from contributing or committing human rights violations according to (pre-defined) international norms*

***Positive Human Rights Obligations**:

Procedural (finite) Obligations:

- *Domestic rules on access to courts, quality of procedure, standards on burden, standard and method of proof.*
- *A dedicated complaints-handling mechanism, characterized by transparency, a right of information, and the right to a good administration.*

Substantive (means-based) obligations: *due diligence, human rights impact assessments, inspections, enhanced information-dissemination campaigns* etc.

2. Remedial and Enforcement Mechanisms

Such procedural and substantive normative clarifications could subsequently be coupled with variations of *ex post* (after the fact) 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*** (see *infra* 'Procedural Obligations' Annex 3).

Additionally, ***a transparent and public complaint mechanism*** for both trade partners could be foreseen, which in turn, could trigger consultations between the implicated trade partners. Similarly, certain thresholds of violations (see *infra* 'Standards of Review' Annex 2) 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, 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 is a far more viable 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 a 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 labour and environmental standards. 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 put flesh on the bones 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' may also be

on the agenda. This document pre-dates 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.

Annex 1: Stage-specific Recommended Methodology for Enhancing Human Rights Clauses in EU FTAs

Pre-Conclusion Approach

(i) Concretization

Identify **standards of review based on the typology of human rights (see Annex 2)*

Identify **concretized human rights obligations (negative, positive, procedural and substantive) (see Annex 3)*

(ii) Consultation

**Continued use of EP veto powers in concluding international agreements*

**Right to information of the negotiations and concomitant (soft power) of information on the status of human rights adherence in the state of the trade partner*

**Right to information on country-specific areas of concern for human rights*

Monitoring

****Yearly reporting by the trade partners** on human rights and trade generally, and country-specific issues in particular*

****Regular reporting by the European Commission** to the European Parliament on continued adherence to pursued human rights objectives in relation to trade partners – based on evidence from various actors and sources such as civil society reports, individual complaints, the UN Universal Periodic Review (UPR).*

Review and Remedy

(i) Trade Partners

****Signalling of human rights abuses**: Complaint mechanism through the Single-Entry Point or proprio motu through the yearly reporting*

****Orange Card Phase**: dialogue and cooperation between trade partners, followed by concrete Action Plan within a pre-defined time-frame (in line with the pre-defined standards of review, and concretized obligations)*

****Red Card Phase**: Follow-up on Action plan with potential for (partial) potential suspension depending on the severity of the breach (see Annex 3)*

(ii) Individuals

****Complaint** through the Single-Entry Point*

Non-resolution and absence of remedies: initiate pre-defined domestic **judicial procedures (see Annex 3), for which the burden of proof is reversed to the State, the standard of proof is heightened, and the Action Plan serves as a method of proof*

Annex 2: Recommended Standards of Review of Human Rights Clauses According to Human Rights Typology

GOAL	RECIPIENTS	TYPES OF NORM		STANDARD OF ASSESSMENT
Promotion, Protection and Enforcement[195]	**Trade partners**	**1st Gen HRs** *Civil and Political*	**Non-derogable rights**[196] (e.g., torture, slavery)	No margin of discretion on negative obligation
			Absolute rights[197] (e.g., right to life)	No margin of discretion on negative obligation
			Qualified rights[198] (e.g., right to privacy, right to freedom of assembly)	Infringement-test - Sufficiently serious/grave and systemic
		2nd Gen. HRs *Economic, Social and Cultural*	**Economic, social, and cultural rights**: *e.g., right to health, fair and just*	Progressive realization – systemic and serious violations

[195] The choice is consciously made not to refer to the traditional obligation to "*respect, protect and fulfill*", as this was developed within the context of territorially-construed human rights, that apply to States. Merely transplanting the terminology may run the risk of upsetting the political willingness to consider more extensive human rights enforcement abilities within the EU's trade policy.

[196] **Non-derogable rights:** Article 15 § 2 ECHR identified *non-derogable* rights: Article 2 (the right to life - except in respect of deaths resulting from lawful acts of war); Article 3 (the prohibition of torture and other forms of ill-treatment); Article 4 § 1 (the prohibition of slavery or servitude); and Article 7 (no punishment without law). Three of the ECHR additional protocols additionally contain rights that are not subject to derogation: Protocol No. 6 (the abolition of the death penalty in time of peace and limiting the death penalty in time of war), Protocol No. 7 (the *ne bis in idem* principle only, as contained in Article 4 of that protocol) and Protocol No. 13 (the complete abolition of the death penalty).

[197] **Absolute rights:** rights which cannot be legitimately limited. This does not mean that there may not be exceptions to the application of the right. Instead, it entails that the respect for the right cannot be balanced against the interests of an individual. E.g., Right to life, prohibition of torture, cruel, inhuman or degrading treatment or punishment,

[198] **Qualified rights:** Rights that may be balanced and legitimately restricted, the following three-pronged test: (an accessible and foreseeable) legal basis for the limitation (1); a legitimate aim for the limitation (2); the limitations is proportionate (3). Examples of qualified rights: right to respect for private and family life, home and correspondence; right to freedom of thought, conscience and religion; right to freedom of expression; right to freedom of assembly and association; right to protection of property.

			working conditions; adequate standard of living	
		3rd Gen. HRs *Solidarity rights*	**Collective rights**: *e.g., rights to development, to peace, to a healthy environment, to share in the exploitation of the common heritage of mankind, to communication and humanitarian assistance.*	Progressive realization – systemic and serious violations
		4th Gen. HRs *Digital Rights?*	*Emerging*	*Emerging*
	Businesses and corporations	UN Guiding Principles on Business and Human Rights (and (potentially in the future) the international agreement on Businesses and Human Rights)		No margin of discretion

Standards of Review (in order of appearance)

1. **No margin of appreciation/discretion**: This standard entails that the rights at stake should be respected, without fail concerning both the negative *and* positive (procedural and substantive) obligations, as protected under international law. (*e.g.*, prohibition of torture, prohibition of slavery)

   When applied to *States*, this standard indicates that violations of these norms would be sufficient to trigger (partial) suspension of the trade agreement.

   When applied within the realm of business and human rights, this entails that businesses must abide by the UN Guiding Principles on Businesses and Human Rights and (potentially in the future), the Treaty on Business and Human Rights as promoted by the trade party.

2. **Infringement test**: this standard refers to the traditional test adopted, whereby for certain limitations on human rights are permissible insofar they are based on an accessible and foreseeable legal basis (1), pursue a legitimate aim (2), and are proportional (3). The latter entails that the limitation must be necessary to meet the pursued objective, and that no lesser intrusive measures exist. Arguably, under this category, it may be sensical to impose (partial) trade restrictions *only* when the violations are sufficiently serious and/or systemic (see *infra*).

3. **Progressive Realization**: This standard entails that for a certain set of (economic, social, and cultural) rights, the ability of states to abide by their human rights obligations, will differ depending on a number of (economic) considerations. In other words, this second generation of human rights is characterized by obligations that are reminiscent of common but

differentiated responsibilities. Arguably, under this category, it may be sensical to impose (partial) trade restrictions *only* when the violations are sufficiently serious and/or systemic (see *infra*)

4. **Serious and systemic violations:** Typically, the standards referred to (in the absence of a single clear demarcation/benchmarks) in defining what constitutes sufficiently serious and systemic, juxtapose a singular and isolated event, from a recurring practice. Likewise, the significance of the violation will play a role in determining whether something is effectively sufficiently serious. In sum, *recurrence, the isolation of the event and the significance of the limitation will determine its serious/systemic nature.*

   The ECtHR held in *Ireland v UK*[199] that "*A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches"* [200].

   However, this standard is developed within the context of a rights-based proceeding with an individual claimant before a human rights court. Accordingly, the standard is quite high. Insofar the pursued objective here is to promote human rights in third countries (as opposed to concretizing justiciable rights for individuals), arguably the evidentiary bar could be set slightly lower, albeit bearing in mind the conditions of *recurring, analogous or a pattern of breaches and the significance thereof*. This standard could be complemented by a pre-defined list of situations that meet this standard.

[199] *Ireland v. the United Kingdom*, 18 January 1978, § 159

[200] See also: *Georgia v Russia,* 3 July 2014, § 123: "*As to "repetition of acts", the Court describes these as "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system*"".

Annex 3: Recommended Typology of Concrete Human Rights Obligations in EU FTAs

<table>
<tr><td rowspan="3"><u>Typology of Human Rights Obligations</u></td><td rowspan="2">Substantive obligations</td><td>Negative Obligations</td><td><u>Refrain from contributing or committing the violation through action or omission</u></td></tr>
<tr><td>Positive Obligations</td><td><u>Due diligence requirement</u>: identify tailor-made human rights concerns and submit to the EP in accordance with Right to Information

<u>Human Rights Impact Assessment:</u> with obligatory follow-up, by panels encompassing impartial expert interveners

<u>Single Entry Point</u>: Make a single access point available for complaints on human rights abuses for EU citizens, as well as third country nationals

<u>Standardized Normative FTA Provisions:</u> on access to domestic administrative, quasi-judicial and judicial mechanisms</td></tr>
<tr><td colspan="2" rowspan="3">Procedural obligations</td><td><u>Information dissemination</u>: Provide accessible, transparent information regarding human rights complaints and EU-taken initiatives to remedy human rights complaints in the form of yearly reporting to the public at large and the EP specifically</td></tr>
<tr><td><u>Labour consultations:</u> between the trade partners which focus on cooperation in case of established human rights concerns, which may trigger partial severing of trade benefits in line with the GSP+ approach, in combination with yearly reporting</td></tr>
<tr><td><u>Standardized concrete administrative and judicial procedure</u>: for complaints of human rights abuses in domestic according to the Single-Entry Point for both trade partners</td></tr>
</table>

Annex 4: Concrete Enforcement Responses

ACTORS	NORMS		STANDARD OF ASSESSMENT	METHOD OF ENFORCEMENT	MODE OF NOTIFICATION
Trade partners	**1st Gen HRs** *Civil and Political*	**Non-derogable rights** (e.g., torture, slavery)	No margin of discretion	2-step alarm procedure*	Single-entry point; civil society reporting
		Absolute rights (e.g., right to life)	No margin of discretion	2-step alarm procedure *See supra*	Single-entry point; civil society reporting
		Qualified rights (e.g., right to privacy, right to freedom of assembly)	Infringement-test - Sufficiently serious/grave and systemic	2-step alarm procedure *See supra*	Single-entry point
	2nd Gen. HRs *Economic, Social and Cultural*	**Economic, social, and cultural rights**: *e.g., right to health, fair and just working conditions; adequate standard of living*	Progressive realization – systemic and serious violations	2-step alarm procedure *See supra*	Single-entry point; civil society reporting
	3rd Gen. HRs *Solidarity rights*	**Collective rights**: *e.g., rights to development, to peace, to a healthy environment, to*	Progressive realization – systemic and serious violations	2-step alarm procedure *See supra*	Single-entry point; civil society reporting

		share in the exploitation of the common heritage of mankind, to communication and humanitarian assistance.			
	4th Gen. HRs *Digital Rights?*	*Emerging*	*Emerging*	*Emerging*	*Emerging*
Businesses and corporations	UN Guiding Principles on Business and Human Rights		No margin of discretion	2-step alarm procedure *See supra*	

2 Step Alarm Procedure

A. Trigger: Complaints through the Single-entry Point and/or yearly and 2-yearly reporting.

B. Stage 1: Orange Phase

Dialogue, consultation and cooperation between the trade partners within a body set up by the agreement with subsequent Action Plan

Potential outcomes (depending on the rights at stake)

- *Independent inspection teams*
- *Due diligence and human rights impact assessment progress reporting*
- *Moderated consultations with implicated businesses*
- *Enhanced information dissemination campaigns*
- ...

C. Stage 2: Red Phase

Follow-up and potential (partial) suspension, triggering Article 218 (9) TFEU.

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