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Negotiating Dignified Work

The case of labour rights provisions in Free Trade Agreements
celebrated by the European Union

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Abstract

Globalization has transformed the geography of world production and increased the number global supply chains that define the configuration of world trade. Among some of the effects of trade expansion are a new division of labour and an increased pressure on labour standards, with labour rights being an hot-topic out of the agenda of the World Trade Organization. This thesis analyzes the efforts of the European Union to include the protection of labour rights in its trade policy through the so-called labour rights provisions in Free Trade Agreements, by specifically studying their effectiveness and shortcomings. The central chapters of the thesis focus on an assessment of the effectiveness of labour provisions in two chosen cases, namely the Free Trade Agreements between South-Korea and Vietnam. In both situations labour provisions have revealed to be fuzzy in their words and weak in their enforcement mechanisms. We defend that the structural failure of such clauses reflects and is a result of the political subordination of labour rights to trade concerns. The next pages will also suggest a more effective model that would not only ensure victim participation and accountability, but also strengthen the legitimacy of EU's values-based trade policy. In line with this model, we defend that in the long run labour provisions should be part of a wider reflection on how to make the multilateral global trade system a tool for sustainable development that delivers to every human being and is centered on the dignity of decent work.

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1. Introduction

Globalization has impacted the labour world dramatically. For some, the mechanisms and forces of globalization, - considering that there is such a repetition of patterns in the last decades motivated by a general phenomenon we can identify as *globalization*- mostly threaten labour rights by jeopardizing the state's capacity of guaranteeing workers claims¹ and generally enforce social policies. For others, the increased integration of labour markets into a global labour market is contributing, among other positive results, to narrowing income gaps around the world and creating opportunities for developing countries². Either way, it's hardly disputable that workers' rights haven't been in good shape in the last decades. According to a report from the International Trade Union Confederation in 2018³, 65% of the countries in the world excluded workers from the right to establish or join a trade union, 87% have violated the right to strike and 81% have violated the right to collective bargaining.

In fact, it seems that workers everywhere face new challenges and threats with the rise of global supply chains and consequential market competitiveness, that puts at risk the fulfillment of core working rights achieved in the beginning of the 20th century. At the same time, the risk of letting neoliberal policies stifle the working rights agenda, is not only a problem of the global south but also represents the impoverishment of workers rights and democracy everywhere. When developing countries are willing to put their work force's rights below companies interests of expansion and competitiveness in the name of economic grow (that by itself does not mean social development if not frameworked by social policies), it fatally pushes western countries to the same conditions of exploration and abuse of their trading partners.

This paper aims to focus on a possibly promising counterwave coming with political globalization. Among all the different debates surrounding the impact of globalization on labour rights, one of the most prominent relates trade to worker's rights. The discussion, based on the premise that labour rights are human rights to which every

¹ See, for example, Charles Tilly, "Globalization Threatens Labor's Rights", *International Labor and Working-Class History*, no. 47 (1995): 1-23.

² See, for example, "Globalization, Labor Markets, and Inequality", Uri Dadush and William Shaw, accessed July 6, 2021, <https://carnegieendowment.org/2012/02/02/globalization-labor-markets-and-inequality-pub-47028>

³ International Trade Union Confederation, *2018 ITUC Global Rights Index*, Brussels: General Secretary, 2018, accessed March 13, 2021. <https://www.ituc-csi.org/IMG/pdf/ituc-global-rights-index-2018-en-final-2.pdf>

human being is entitled to, focuses on the idea that political and economic globalization brought a sense of duty to states and non-state actors to at least not influence negatively the enjoyment of such rights and freedoms in other parts of the world.

In this context, more and more often powerful players defend that trading nations should be held to strict labour rights if they want to enter major trade markets in the world, such as the US, Canada or the EU. In the other side of the Atlantic, the North American Free Trade Agreement (NAFTA) was the first free trade agreement to incorporate a binding labour provision in 1994, opening the debate on how to access and improve such social clauses. Meanwhile, in 2007 the US concluded a landmarking nine years long dispute with Guatemala over compliance with labour clauses – and in the waiting time, seven members of one of the unions that signed the complaint were killed.

As for the EU, institutions have enthusiastically embraced such clauses (or at least *in paper*). In fact, the promotion of fundamental rights through Trade Policy has a special meaning in the context of the EU with treaty-based references and constitutionalisation of fundamental social rights, and a landmark case from the CJEU obliging the respect of fundamental social rights in its external relations. There are currently different instruments in which such conditionality is explicit : the General System of Preferences, an unilateral scheme of arrangements aimed at developing countries and “vulnerable”⁴ countries (GSP+) , for which the adherence depends on signing a wide scope of international human rights sources⁵, and Free Trade Agreements, where a Human Rights Clause and a Trade and Sustainable Development Chapter covers issues such as labour rights, environmental standards and consumer protection. For the monitoring of the implementation of the clauses contained in the TSD chapter, mechanisms are established involving civil society representatives from both parties and possibly arbitration mechanisms are set up.

This thesis seeks to analyze to what extent labour rights conditionality clauses in Free Trade Agreements are effective and worth fighting for by taking as a case study the implementation of such clauses by the EU in its trade relations with South Korea and

⁴ Word used in the “Non-Paper” of the European Commission accessing the promotion of fundamental rights in the EU Trade Policy. European Commission, *Non paper, Using EU Trade Policy to promote fundamental human rights* (2016), 2

⁵ Countries are expected to ratify and implement 27 international conventions on human and labour rights, including Multilateral Environmental Agreements. For the Everything But Arms (EBA) arrangement, a special program under the GSP initiative, respecting the principles of 15 core United Nations (UN) and International Labour Organisation (ILO) Conventions on human rights and labour rights is necessary.

Vietnam. Different key considerations arise preliminary: What are the rights at stake? How does the incorporation of these rights into economic international law affects its content? How can they be enforced in a manner that guarantees true consolidation and avoids retrogressive measures ? Should democratic countries be negotiating with states that do not act on human rights violations when they are able to in first place?

The paper develops as follows: chapter 2 first explains the existing tension between labour rights and trade liberalization and why for some there are incompatibilities and systemic problems, frameworking the need problem of intersecting labour rights and trade. For that, the beginning will also touch open the current role of the WTO and its position towards labour rights. This is followed by a contextualization of the appearance of human rights conditionality as a practice and a brief explanation of the approach of the Trade Unions and the ILO to Human Rights Conditionality in Trade.

Chapter 4 further approaches the trade agenda of Europe where it includes labour rights and the political process that led to the integration of labour conditionality into trade policies. Having analyzed current practical and theoretical applications of labour clauses in Free Trade Agreements, Chapters 5, 6 and 7 will scrutinize different cases of implementation- or lack of- in the chosen cases.

Some methodological remarks should be made on how to determine effectiveness. Examining the effectiveness of social clauses raises the question of ultimate success or failure of such a policy. So, the main question when considering effectiveness is: if coherently implemented, do social clauses in the selected trade agreements actually result in better labour rights protection?⁶

According to Oran R. Young⁷, when evaluating international regimes or governance systems, there can be six dimensions of effectiveness: effectiveness as a problem solving, effectiveness as a goal attainment, behavioral effectiveness, process effectiveness, constitutive effectiveness and evaluative effectiveness. This thesis will part from Young's scheme and analyze three dimensions of effectiveness of labour clauses in selected FTA, namely, effectiveness as problem solving- examining if labour clauses operate *to solve the problems that triggered parties to create them in the first place-*

⁶ Jan Wouters, Manfred Nowak, Anna-Luise Chané, and Nicholas Hachez. *The European Union and Human Rights : Law and Policy* (Oxford: Oxford University Press, 2020) , 603

⁷ Oran R. Young, *International Governance: protecting the Environment in a Stateless Society* (London: Cornell University Press, 1994), 143

behavioral effectiveness- concluding on the impact of the regime on states and corporations to alter their behavior- and constitutive effect – meaning, if the mere existence of labour clauses led to the creation of social practices involving the expenditure of time, energy and resources that otherwise wouldn't exist.

Finally, chapter 8 will draw recommendations on how to improve the effectiveness of such clauses. After, a conclusion will be addressed.

This dissertation will explore the theoretical and practical problems of labour rights conditionality mechanisms in place in the EU Trade policy and further analyze the dynamics that led to them being effective or not in three different cases. The main research question is: Is labour rights conditionality in the context of trade an effective policy worth developing?.

2. Defining notions: Globalization and Trade liberalization

Globalization is a concept that does not entail an easy definition. Although few could agree on a definition of globalization, the phenomenon is presented in literature and public discourse as something that *is*, a common reference and object of inquiry peacefully accepted as an external fact⁸. By rising from the conceptual consensus around globalization as something that is happening *out there*, our material perception of the phenomenon is marked by the discourse around it- for example, the idea of globalization as an harmful expression of the capitalist ideology that brings corporations interests to the forefront of public agendas⁹; globalization as something that creates a striving environment for states to establish the “best possible existence”¹⁰; or globalization as a world community that is taking a large number of people from the “obscurity in the forest and desert and rural isolation to request (...) a decent life for themselves and a better life for their children”¹¹.

Hence, globalization can be conceived based on how it interacts with different realities, such as economic interdependence, technological advance, the growing importance of global institutions or cultural homogenization. This thesis will develop on a notion of globalization centered on economic globalization and based on its relation and impact on labour rights.

To start with, if we see globalization as a continuous process or set of processes (in contrast with a fixed and static state of affairs¹²), it refers to processes that *potentially encompass the whole globe*. This does not mean it factually encompasses the whole globe, but rather there must be potential for universality. In accordance to this, Jeffrey A Hart and A. Prakash in a leading book define globalization as:

“... a set of processes leading to integration of economic activity in factor, intermediate, and final goods and services markets across geographical

⁸ Jernej Pikalo, “Economic Globalisation, Globalist Stories of the State, and Human Rights.”, in *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization*, edited by Wolfgang Benedek, Koen De Feyter, and Fabrizio Marrella, 17–38. European Inter-University Centre for Human Rights and Democratisation. (Cambridge: Cambridge University Press, 2007).

⁹ See, for example, Naomi Clark, *The Shock Doctrine* (UK: Penguin Books, 2008)

¹⁰ Words used during the speech of Janez Drnovsek as Prime Minister of Slovenia. J. Drnovsek, “Strateski svet za nacionalna vprasanja: Vstop Slovenije v NATO ne bo ogrozil slovenske nacionalne identite”, 22 of July 22, translated by Jernej Pikalo in Pikalo, Jernej, “Inter-disciplinary Perspectives on Human Rights and Economic Globalization” in *Economic Globalization and Human Rights* ed. By Wolfgang Benedek, Koen de Feyter and Fabrizio Marrella (Cambridge: Cambridge University Press 2007), 20

¹¹ Kenichi Ōmae, *Borderless World* (London: HarperCollin, 1996), 1

boundaries, and the increased salience of cross-border value chains in international economic flows.”¹³

Global economy witnessed a mutation between the mid-80's and the end of 90's that transformed production by decomposing production processes, with global supply chains on the rise. The current financial and trade liberalization policies and the development of new information and communication technologies (ITC) allowed transnational companies to reallocate capital, goods and services freely, with the technological development lowering the costs of remote coordination of activities. Such a process resulted in a new international organization of work, where companies of developed countries more easily combine high technologies at home and low-wage workers abroad, which allows transnational companies to reduce the labour costs per unit of production. Within this paradigm, policies have been designed to attract foreign direct investment (FDI) and smooth the process of transnational companies that coordinate global value chains, which in 2013 accounted for 80% of current global trade.¹⁴

Accordingly, states should comply with an international order in which ideally there is free flow of trade in goods and services, liberalized foreign direct investment, removed capital controls and a labor force that can move to where it is most productive.¹⁵ As David Harvey puts it, neoliberalism is a political economic theory according to which wellbeing is best achieved by:

“...liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.”¹⁶

From the vision above described, one can preview that human rights enthusiasts might be skeptical when considering economic globalization. Although globalization does not affect state's human rights commitments, conflicting obligations may arise with the sphere of human rights law when states chose to commit in law with economic

¹³ A. Prakash and J. Hart, “Introduction” in *Globalization and Governance* (London: Routledg, 1999), 3

¹⁴ UNCTAD, “World Investment Report 2013, Global Vallue Chains: Investment and Trade for Development”, United Nations Publication

¹⁵ Koen De Feyter, “Introduction.” in *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization*, edited by Wolfgang Benedek, Koen De Feyter, and Fabrizio Marrella, 1–14. European Inter-University Centre for Human Rights and Democratisation

¹⁶ David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press 2005), 2

globalization¹⁷, especially when services and goods with a social value or collective utility are at stake- for example, privatization of water-related services, health services, prisons or social security services. Contrarily, by conceiving globalization as something happening *outside*, a natural fact states alone can't control, when encountering such conflict most states prefer to provide legal security under international law, i.e., guaranteeing the performance of contracts that allows economic activity to happen and risking to enact in the face of human rights violations.

Furthermore, despite the current economic vision having deeply entrenched global institutions, many scholars¹⁸ and institutions are denying that those golden rules really led to economic growth and a reduction in poverty and inequality everywhere. As an example, a survey of the World Bank's self-review, Learning from Reform (2006), was entitled "Goodbye Washington Consensus, Hello Washington Confusion", and the institution, that was historically and institution pushing for liberalization policies, seems to be more and more engaged with an idea of development that goes beyond economic development.

To conclude, globalization is a not a *natural phenomenon* or something happening independently of states power. In fact, by willingly subscribing the neo-liberal agenda frameworked in instruments of economic international law, states are in the exercise of their sovereignty, and ultimately consenting with a program that aims at organizing the labour market in a specific way. The concept of wild and deregulated markets has led to important discussions on fundamental rights and UN bodies are increasingly worried about the impact of globalization, and of trade, on human rights¹⁹.

¹⁷ Koen De Feyter, "Introduction." in *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization*, edited by Wolfgang Benedek, Koen De Feyter, and Fabrizio Marrella, 1–14. European Inter-University Centre for Human Rights and Democratisation.

¹⁸ See, for example, David Held, *Global Covenant* (Cambridge: Polity Press, 2004) ; UN Human Rights Council, "Report of the Independent Expert on the promotion of a democratic and equitable international order" (2016) UN Doc A/HRC/36/40, or UN Human Rights Council, "Report of the Special Rapporteur on extreme poverty and human rights" (2015) UN Doc A/HRC/29/31

¹⁹ See, for example, some of the references in Wolfgang Benedek(2007), "The World Trade Organization and Human Rights" in W. Benedek, K. De Feyter, & F. Marrella (Eds.), *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization* (European Inter-University Centre for Human Rights and Democratisation, pp. 137-169). Cambridge: Cambridge University Press, 148-149

2.1. The tension between Labour Rights and Globalization

“... globalisation risks downgrading the central place accorded to human rights by the Charter of the United Nations in general and the International Bill of Human Rights in particular. This is specially the case in relation to economic, social and cultural rights. Thus, for example, respect for the right to work and the right to just and favourable conditions of work is threatened where there is an excessive emphasis upon competitiveness to the detriment of respect for the labour rights contained in the covenant.”²⁰

The above transcript was part of the statement on Globalisation and Economic, Social and Cultural Rights of the UN Committee on Economic, Social and Cultural Rights adopted on the fiftieth anniversary of the Universal Declaration of Human Rights and illustrates how labor rights are threatened under the current economic order, which can be seen by the rise of widespread abuses including child labor, hazardous working conditions, punishingly long work days or suppression of the freedom to associate and organize.

Hence, there are different phenomena that explain the nefarious impact of globalization on labour rights. Firstly, globalisation strengthens the harm of social, economic and political forces that erode the social protections of welfare economy; secondly and at the same time, it generates a degree of integration of national in transnational institutions that is conducive to a harmonization of practices, principles and rule of governance.

On the one hand, globalization contributes to the devaluation of national social policies by being developed upon a profit and market centered vision that perceives labour protection and social security programmes as of wicked economic value. In fact, the integration of markets, nation-states and technologies that allows individuals and corporations to reach other parts of the globe *farther, faster, deeper and cheaper* than in any other point in history depends on not having to carry the economic burden of social concerns.

On the other hand, the result of harmonization of policies by the elimination of trade barriers is that countries all over the world suffer unregulated competition from

²⁰ UN Committee on Economic, Social and Cultural Rights, “Statement on Globalization and Economic, Social and Cultural Rights” (11 May 1998) UN Doc E/1999/22

emerging countries where workers have no alternative but to enter the labour market with lower salaries and social protection²¹. This, combined with the de-nationalisation of activities by companies, leads to the so-called *race to the bottom*, that is the effect of governments downgrading protection to the lowest common denominator level in workplace standards in order to attract or retain investment. As a result, regulation becomes an aspect of comparative economic advantage. In this sense, courts can also develop an important role by requiring the elimination of national-level rules that are considered to constitute a de facto barrier to trade²².

According to this view, trade unions are also faced with the classic prisoner's dilemma²³, as result of incorporating on their agenda higher domestic labour standards increasing the risk of companies reallocating their capital to other jurisdictions. The only available path for trade unions and workers that is at the same time compatible with globalization is the recognition and enforcement of international labour standards, which interrelates with its inclusion on the foundation of global governance.

Finally, it is hard to assess if arguments of social dumping are justified with empirical data, and although that is not the focus of this introductory pages, a brief note should be left on this hard-to-gain discussion. In fact, the data available is inconclusive²⁴, although econometric studies tend to show that countries in which trade was more open experience a faster improvement in working conditions when compared to countries with closed trade policies²⁵. This is not surprising given that economic globalization stimulates generally investment and economic activity, but it doesn't mean that fears of social dumping are without foundation, as far as we cannot prove causality nor compare it to a more sustainable trading system where labour rights are more protected. Most importantly, for the purposes of including a social dimension into trade, which will be developed in the next sections, it doesn't matter if the nefarious impact of trade can be shown or even proven as long as there is simply a *risk* that needs to be accessed.

²¹ Christine Breining-Kaufmann, *Globalisation and Labour Rights* (Oxford: Hart Publishing, 2007), 169

²² Philip Alston, *Labour Rights as Human Rights* (Oxford, Oxford University Press 2005), idem, 42

²³ Christine Breining-Kaufmann, *Globalisation and Labour Rights* (Oxford: Hart Publishing, 2007), 232

²⁴ Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Oxford: Hart Publishing, 2015), 13

²⁵ Robert J Flangan, *Globalization and Labour Conditions. Working Conditions and worker rights in a global economy* (Oxford; Oxford University Press, 2006), 85

2.2 Upholding Labour Rights in a Globalized World

2.2.1 The ILO and the inclusion of Labour Rights into the Human Rights Agenda

Moreover, globalization is more than the effort or result of deliberately liberalising and deregulating markets²⁶. The integration of markets, nation-states and technologies has contributed to - or is also a result of- political and social universalization of values. In this sense, political globalization not only contributed to the recognition and universalization of labour rights as human rights, but also brought labour rights (and human rights in general) as a framework for global governance.

On the one hand, universalization of labour rights is a result of the creation of an “International Labour Code” that constitutes international law addressing minimum labour standards and the incorporation of such standards into sources of international human rights law.

Firstly, “International Labour Code” stands for what the ILO defines as a set of conventions, declarations and resolutions under the auspices of the International Labour Organization²⁷. The ILO was born in 1919 as the first specialized agency of the UN that arose in response to the “process of industrialization that had brought miserable living conditions for the working class, such as child labour, excessively long hours of work, and unhealthy working conditions”²⁸ and as a consequence of nineteenth-century technological developments that spiked labour and social movements and widespread demands for social justice and better living standards for working people all over the world²⁹.

The link between trade and labour rights was acknowledged since the beginning of the organization. For states, the purpose of the ILO was initially related to the fact that the integration into global markets would lead to a collective action problem summed up

²⁶ Christine Breining-Kaufmann, *Globalisation and Labour Rights* (Oxford: Hart Publishing), 57

²⁷ Wolfgang Benedek, “The World Trade Organization and Human Rights” in *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization*, ed. W. Benedek, K. De Feyter, & F. Marrella (Eds.), European Inter-University Centre for Human Rights and Democratization, (Cambridge: Cambridge University Press) pp. 137-169, 142

²⁸ “International Labour Organization (ILO)”, Max Planck Encyclopedias of International Law, accessed April 16, 2021, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e490#law-9780199231690-e490-div1-1>

²⁹ “International Labour Organization”, The Nobel Peace Prize accessed April 16, 2021 <https://www.nobelprize.org/prizes/peace/1969/labour/history/>

in the ILO constitution preamble: “ the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries”³⁰. This idea constitutes the argument of the *competitive advantage* in a free market system: as nations compete in global markets, those who have lower production costs due to the insufficient working standards and social protection would have an unfair advantage and that would discourage other nations to move towards the improvement of workers’ rights. Furthermore, after the World War II, the Declaration of Philadelphia reaffirmed the urgency to ensure that the development of trade should not come at the expense of workers’ rights, by including among the principles on which the ILO is based that “labour is not a commodity” and that “poverty anywhere constitutes a danger to prosperity everywhere”.³¹ Since then and in roughly 100 years of existence, the ILO has truly consolidated an authority of sources of international labour law that create obligations on states, including the elaboration and adoption of 190 conventions and more than 200 recommendations.

On the other hand, the inclusion of labour rights into the Human Rights system and sources has been multilevel. To start with, a number of labour rights were incorporated in the Universal Declaration of Human Rights (UDHR) of 1948, being followed by the International Covenant of Economic, Social and Cultural Rights (ICESCR) and have subsequently been replicated into a large range of treaty provisions in both universal and regional jurisdictions. These are: the right to be free from slavery (art. 5 of the UDHR), the right to non-discrimination and equal protection of the law (art. 7 UDHR); the right to freedom of association (art. 20 UDHR); the right to social security (art. 22 UDHR); the right to work, to free choice of employment, to just and favourable conditions of work, and protection against unemployment (art. 23 UDHR and 6 to 8 ICESCR); the right to equal pay for equal work (art. 23 UDHR); the right to form and to join trade unions (art. 23 UDHR); and the right to reasonable limitation of working hours (art. 24 UDHR).³² Different commonly conceived “labour principles” have also been merged into the International Covenant on Economic, Social and Cultural rights and in a very wide body of other international legal sources

³⁰ The commonly used term “ILO Constitution” refers to Part XIII of the Treaty of Versailles (1919), which specifies on the different ILO bodies, the functioning of the Conference and the adoption and application of international labour standards.

³¹ Paragraph I (a) and (c) of the Declaration of Philadelphia

³² Philip Alston “Labour Rights as Human Rights: The Not so Happy State of the Art” in *Labour Rights as Human Rights*, ed Philip Alston (Oxford: Oxford University Press 2005), 2

2.2.2 The WTO and Labour Rights

The separation of labour standards from trade issues within the WTO has not always been the dominant paradigm. When the International Trade Organization (ITO) was first established in 1946, it came into the international map of institutions as to help developing trade in light of the Article 55 of the UN Charter and in close cooperation with the UN Economic and Social Council³³, with the charter of the ITO stating that the organization would “facilitate through the promotion of mutual understanding, consultation and co-operation, the solution of the problems relating to international trade in the field of employment, economic development, commercial policy, business practices and commodity policy.”³⁴ Further, the charter also mentioned that fair labour standards and unemployment should be concerns calling for international cooperation and that “all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit”³⁵. Nonetheless, the ITO was never brought to life due to opposition from the US under president Truman to ratify the charter, and it was a temporary and strictly functional version of the charter – the GATT³⁶ – that would bring to life the World Trade Organization more than 40 years later.

With the failure of the ITO, what got lost in the way was more than the dimensions of economic development and full employment has part of the agenda, but rather the project of an institution that would gradually perceive on how to develop international trade. In 1995 the Marrakesh Agreement came into force, marking the beginning of an organization that was member-driven and that had the power to impose economic sanctions in the multilateral regime (on the contrary to the ILO or other UN Human Rights mechanisms). The previous reference to economic and social progress and

³³ definition of the functions of the ITO in Art 72 of the Charter. The Charter included chapters on Employment and Economic Activity (II); on Economic Development and Reconstruction (III); on Commercial Policy (IV); on Restrictive Business Practices (V); and on Inter-Governmental Commodity Agreements (VI)

³⁴ United Nations Conference on Trade and Employment, held at Havana, Cuba, from 12 November 1947, to 24 March 1948, Final Act and Related Documents (Havana, Cuba, March 1948) (Charter of International Trade Organization, Art 1)

³⁵ Charter of the ITO, art. 2 and 7

³⁶ The General Agreement on Tariffs and Trade (GATT) was a shorter and provisional version of the ITO Charter that dealt with functional issues of Trade and had become applicable in January 1948 in order to avoid an unexpected suspension of trade flows.

development, as mentioned in the article 55 of the UN Charter, was also excluded from the preamble of the GATT, and the WTO stood outside the UN system.

Although the WTO tried to detach itself from social issues, the US and the EU, supported by Canada and Japan³⁷, continued pushing for the inclusion of a link between minimum labour standards and trade. Such efforts have been faced with resistance by developing countries who fear disguised protectionism and losing their comparable advantage³⁸, which lead to WTO Members having stated at the WTO Ministerial Conference:

“We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.”³⁹

In fact, the year before the signature of the Singapore Ministerial, a mobilization of under-developed countries led by India had resulted in 85 countries signing the Dehi Declaration, affirming that they are “Deeply concerned... about the enforcement of labour standards through the imposition of a social clause”⁴⁰, which was also supported by many trade unions.

Nowadays, there is still no scheme of protection of minimum labour standards within the WTO. Some disperse references can be encountered, such as the GATT provision that refers to prison labour as a general exception under article XX(e) or the 2007 International Coffee Agreement where member states pledge to “improve the standard of living an working conditions of populations engaged in the coffee sector,

³⁷ Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Milton: Taylor & Francis Group, 2020), 24

³⁸ Schutter, Olivier De. *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Oxford:Hart Publishing, 2015),11

³⁹ WTO Ministerial Declaration of Singapore, 18 December 1996, para 4

⁴⁰ Cited in Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Milton: Taylor & Francis Group, 2020), 24

consistent with their state of development, bearing in mind internationally recognized principles and applicable standards on those matters”⁴¹. Nevertheless, there is no general provision in the WTO system of sources regarding products produced in violation of basic human rights.

All things considered, the current separation of trade from labour standards was not always the paradigm. The exclusion of the WTO from the UN system brings incoherence problems, namely when considering the human rights agenda⁴²; still, small developments have been made in the last years with the recognition of other “non-trade issues” in the WTO agenda, i.e public health and sustainable development.⁴³ Furthermore, the case of the World Bank and the IMF could give some clues over the next step for approaching “non-trade” issues, and a common and agreed vision over labour standards and trade by the global north and the global south, that includes governments and civil society , urges to be conceived.

⁴¹ Article 37 of the International Coffee Agreement (ICA) (28 September 2007)

⁴² Wolfgang Benedek (2007). “The World Trade Organization and Human Rights” In W. Benedek, K. De Feyter, & F. Marrella (Eds.), *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization* (European Inter-University Centre for Human Rights and Democratisation, pp. 137-169). Cambridge: Cambridge University Press

⁴³ *Ibid*, 157-58.

3. Including Labour Rights into Trade

With the topic of labour standards having been barely mentioned at the WTO since the Singapore Ministerial Conference⁴⁴, regional Trade Agreements have offered the opportunity to experiment different means of regulating the protection of labour standards. In fact, from the 1990's there was a major rise in the number of Free Trade Agreements containing labour rights provisions, from just 2 in 1989 to 91 in 2019. Remarkably, it was the European Union who accounted for most of this last number.⁴⁵

In order to understand the concept of labour provisions, this chapter will briefly introduce the discussion that has been brought to different decision making rooms since the Uruguay Round of the GATT from 1986, by presenting the position of opposite forces and the ILO, as well as proposing a legitimization rhetoric from a human rights based approach. Following a brief conceptual note on labour provisions, the next lines will systemize the historical references to labour standards and labour relations in trade agreements.

3.1. Labour Rights Provisions – Defining the Term

The concept of labour provisions adopted through this paper follows ILO's *broad-based* definition, referring to:

“(1) any reference to standards that address labour relations or minimum working terms or conditions; (2) any mechanism to promote compliance with the standard, such as consultative bodies to facilitate dialogue, which can be permanent or temporary; (3) a framework for cooperative activities, such as technical assistance, exchange of best practice, training, and others.”⁴⁶

⁴⁴ Lorand Bartels, “Social Issues: Labour, Environment and Human Rights”, *Bilateral and Regional Trade Agreements: Commentary and Analysis*, edited by Simon Lester and Bryan Mercurio, 342–66. (Cambridge: Cambridge University Press, 2009), 4

⁴⁵ Out of 38 FTA signed during these period, 20 featured labour provisions. Source: WTO Regional Trade Agreements Data Base.

⁴⁶ International Labour Organization, European Commission and Flanders State of Art, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, (Geneva: ILO, 2017), 1

According to Lorand Bartel's thought⁴⁷, there are three legal formulations for incorporating labour issues into trade agreements:

- a) Inclusion of WTO general exceptions in FTA for unilateral measures with specific modifications and incorporations.

This happens when regional trade agreements assume a list of general exceptions found in Article XX of the GATT. Still, as the only reference in the general exceptions to labour rights concerns products of prison labour (e)), many countries modify this clause in order to allow a wider policy space. Although it is rare for regional trade agreements to contain exceptions for unilateral measures concerning labour issues⁴⁸, a classic example is the 2008 Cariforum-EC Economic Partnership Agreement, which contains a footnote to its general exceptions phrasing: "The Parties agree that... measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health"⁴⁹.

- b) Use of conflict clauses to protect rights/ reiterate obligations contained in other treaties.

These clauses are submitted to article 30(2) of the Vienna Convention on the Law of Treaties, that states: "when a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". The EU-Singapore FTA contains an example of a conflict clause that is particularly wide: "the provisions of this Agreement shall be without prejudice to the rights and obligations of the Parties under the (WTO Agenda) and any other international agreement to which they are a party"⁵⁰. Similarly, the preamble of many EFTA agreements state that "no provision of this agreement may be interpreted as exempting the Contracting Parties from their legal obligations under other international agreements"- although this specific case may not be interpreted as if those human rights or labour rights regimes prevail.

⁴⁷ Lorand Bartels, "Social Issues: Labour, Environment and Human Rights." In *Bilateral and Regional Trade Agreements: Commentary and Analysis*, edited by Simon Lester and Bryan Mercurio, 342–66. (Cambridge: Cambridge University Press, 2009),

⁴⁸ Lorand Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements." *Legal Issues of Economic Integration* 40, no. 4 (2013): 297

⁴⁹ Art 224(1) EU-Cariforum FTA (2008) L 289/I/3

⁵⁰ Art. 16.18 EU-Singapore FTA (2019) L 294/3

c) Including provisions with positive regulation of social protection, that substantiate obligations for the parties.

The NAFTA appeared as an innovative regional trade in relation to integration of social issues in general, by imposing substantive obligations on the parties- on the one hand, guaranteeing that the laws of the state-members entailed the minimum standards of environmental and labour protection⁵¹, and on the other hand, assuming an obligation to promote compliance and enforce such legislation⁵². Both side agreements- concerning environmental and labour issues – provided a complaints mechanism that could be triggered by “citizen submissions”, and dispute settlement would only be available when there was a breach of the obligation to enforce domestic environmental laws and labour laws in the cases of occupational safety and health, child labour and minimum wage labour standards.⁵³

As for the European Union, traditionally the paradigm was to deal with issues of labour by way of cooperation, and only recently in 2008 the EU followed the post-NAFTA model through Sustainable Development Chapters. This will be specifically addressed further in this dissertation.

3.2 The position of Trade Unions

It was in the context of the Uruguay Round of the GATT (1986-1994), in which parallelly to the General Agreement on Trade and Tariffs a number of agreements on agriculture, textiles and clothing and services were being discussed, that the trade-labour linkage was brought to the table. The attitude of trade unions was not unanimous: while some trade unions in the developed countries raised concerns of “unfair competition”, the US proposed a working group with the participation of the ILO to develop the potential of social clauses, being backed by the European Trade Union Confederation and trade

⁵¹ On labour issues, the Regional Trade Agreement includes 12 labour “principles”: (i) freedom of association and protection of the right to organize; (ii) the right to bargain collectively; (iii) the right to strike; (iv) prohibition of forced labour; (v) labour protection for children and young persons; (vi) minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; (vii) elimination of employment discrimination on the basis of such grounds as race, religion, age, sex, or other grounds as determined by each party’s domestic laws; (viii) equal pay for men and women; (ix) prevention of occupational injuries and illnesses; (x) compensation in cases of occupational injuries and illnesses; and (xi) protection of migrant workers.

⁵² Art 5 North American Agreement on Environmental Cooperation (NAAEC); Art 3 NAALC. They must also publicize their laws and provide for private party enforcement of these laws before impartial tribunals.

⁵³ Lorand Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements.” *Legal Issues of Economic Integration* 40, no. 4 (2013): 297, 735

unions across Europe who pressured their representatives to support the proposal. Opposing forces of the idea of social clauses in trade agreements rose all over the world, lead by the vocal position of the Indian government who hosted the non-aligned countries in a summit organized by the labour minister and that gave origin to the Delhi Declaration⁵⁴, a statement of political will in which 85 countries proclaimed being “deeply concerned... about the enforcement of labour standards through the imposition of a social clause”⁵⁵. The Indian government and trade unions were aligned in their opposition towards social clauses.

The opposition of Indian trade unions was mostly based on social clauses’ incompatibility with art 19(3) of the ILO Constitution and fears of disguised protectionism⁵⁶. Contrarily, other unions, particularly those related to the communist-leaning World Federation of Trade Unions, saw social clauses as a new form of imperial capitalism alongside with the whole project of the WTO.⁵⁷ Furthermore, some unions were still skeptical about social clauses due to the lack of consultation in its formulation⁵⁸. In an attempt to try to overcome this north-south division, the International Confederation of Free Trade Unions (ICFTU) established a Task Force on Trade, Investment and Labour standards in 1998 with the intention of involving unions in developing countries in the cause of labour clauses, of which resulted a proposal, similar to the one that the Trade Union Advisory Committee would later present to the OECD, that tried to include with social clauses a system through which any violations of labour standards should be determined by a WTO-ILO advisory committee and would have as a result remedial processes centered on financial and technical aid. The proposal, allegedly, would prevent protectionist ends. Although the proposal did not come to life, it resulted in some trade unions coming in support of social clauses, such as the Confederation of Trade Unions and the Congress of South African Trade Unions.

A lack of consensus in the context of the WTO regarding social clauses and the opposing position of stakeholders moved further developments to the hands of regional and national policy making. It is to be mentioned that the North-South divisions were also

⁵⁴ Venkata Ratnam, "India and International Labour Standards." *Indian Journal of Industrial Relations* 35, no. 4 (2000): 461-85

⁵⁵ Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Milton: Taylor & Francis Group, 2020), 24

⁵⁶ For the developed argument, see Ratnam, C. S. Venkata, "India and International Labour Standards.", *Indian Journal of Industrial Relations* 35, no. 4 (2000): 461-85.

⁵⁷ Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Milton: Taylor & Francis Group, 2020) 24

⁵⁸ Ibis

among civil society, with the most notable example being the “Third World Intellectuals and NGOs Statement against Linkage”, a declaration signed by neoclassical economists and representatives of social groups in opposition to the inclusion of social issues into the scope of the WTO.

3.3. The position of the ILO

Generally, the position of the ILO towards labor rights provisions in Trade agreements has been a positive and supportive one. The main public document assessing labour provisions is the 2016 Assessment of Labour Provisions in Trade and Investment Arrangements⁵⁹, in which trends and main concerns are addressed on the basis of a quantitative assessment of 260 trade agreements reported to the WTO by the end of 2014 - including concerns of labour provisions being envisaged as protectionist measures. Some attention should be directed to this study, given that it represents an important contribution in the research of this issue and it constitutes a document of reference for many of the afterwards reports within the ILO.

Firstly, the ILO states in its Handbook on assessment of Labour Provisions in Trade and Investment Arrangements⁶⁰ that the organization has been involved/ is available to provide advice and technical expertise concerning labour provisions and in relation to member states obligations within the system of the ILO, with its mandate being based on a number of legal instruments within the system of the WTO. In this context, it is generally stated that “member States affirm their commitment to international labour standards within the context of trade, stressing that labour standards should not be used for protectionist trade purposes; that the comparative advantage of any country should in no way be called into question; and that the violation of fundamental principles and rights at work cannot be invoked or used as a legitimate comparative advantage”⁶¹. The classic case-study of the ILO meddling into issues concerning labour provisions was in 2000, when the US banned all trade with Myanmar on the basis of systematic use of forced labour and after the ILO having requested its Member States to ensure their relations with

⁵⁹ International Labour Organization, “Assessment of Labour Provisions in Trade and Investment Arrangements”, *Studies on Growth With Equity* (Geneva: ILO, 2016)

⁶⁰ “Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements”, International Labour Organization, European Commission and Flanders State of Art, accessed April 16 2021, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_564702.pdf

⁶¹ *Ibid*, 1

the country where not perpetuating the use of forced labour, and in line with the recommendations of one of the Comissions of Inquiry.

Moreover, some conclusions of the study are important for the ILO to take a firm position as a key consultee stakeholder on the development of such provisions. Firstly, it was concluded that labour provisions are directly related with increasing labour market access, in specific for working age women (1) and, on the basis of country evidence, reducing the gender wage gap (2)⁶². In the second case, the evidence is based on the case study of Cambodia's textile sector which was entailed by a Trade Agreement with the US, and was backed by the supporting action of the ILO on its monitoring program, with the astonishing result of gender gap payment being reduced by 80 percent in the textile sector. Secondly, the organization concluded that labour provisions in trade agreements do not have a negative impact on the amount of trade flows. In fact, trade agreements with labour provisions are suggested to increase trade by 28 per cent while trade agreements without the same clauses increase trade by 26 per cent⁶³. Lastly, it was settled that there are different factors that contribute to a positive outcome – among which legal reforms, monitoring, capacity-building and stakeholder involvement an essential one.

It seems that the ILO has been reaffirming a firm position that contrasts with the general position of trade union's from the global south- labour provisions *can be* something very positive for the state of labour rights worldwide and the organization is available to get involved in their elaboration. Mostly, the conclusions directly reply to some of the fears of disguised protectionism and disincentives on the world trade. It should be also mentioned, that the ILO benefited form the social clauses debate in a sense, as its institutional sphere of workers' rights – namely, the core labour standards and the notion of Decent Work- has been mainstreamed and embedded when defining the scope of social clauses by stakeholders.

3.4 Legitimizing the Integration of Social issues into Trade Agreements

While most of the WTO agreements include rights to regulate for public policy purposes, the question if a member state can regulate to protect social values outside its borders it's not clear. We defend that if we are to take seriously human rights as the

⁶² *Ibid*, 2, 3, 4

⁶³ *Ibid*, 3

framework for shifting from a market centered economy to a rights-based economy, the promotion of universal labour standards has to be an obligation that goes beyond borders and is entailed in solidarity efforts. The next lines will present the discussion and briefly develop a legitimization discourse.

Firstly, it is understandable that social clauses are received with suspicion. Afterall, with social clauses states are not concerned about the conservation of certain values internally, but they are rather trying to get other governments to implement social values in different jurisdictions. For many, to include “nosy preferences”⁶⁴ in trade agreements constitutes a mean for protectionist aims, in face of fears of social and environmental “dumping”. On the other hand, the content of such clause is always related to the domestic interests or values of the member state who conceived it, being not absolutely detached from the protection of important values at home. As an example, labour rights clauses may be a response to growing consumer awareness and demand for fair working conditions for the ones who produce their goods⁶⁵, or even a reaction to emerging groups who question the sustainability of economic globalization and further stand against global capitalism. These considerations might be relevant when assessing the compatibility of social clauses with the commitments under GATT, specifically its feasibility under the “public morals” exception provision⁶⁶.

Secondly, it seems that this discussion outward disregards the nature of the values to be protected by states. In fact, labour standards reflect universally recognized rights echoed at the international level, that bind members states of the WTO with obligations; they are not only mere aspirations or moral discourses. Taking a stand against importing products that result from child or forced labour does not simply reflect “preferences”, but is a result of a worldwide agenda to end certain violations of rights that are universally recognized as such- the Human Rights agenda. Within this view, one could say that even the norms produced by the WTO should be conditioned “together with the context... (by)

⁶⁴ Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Oxford:Hart Publishing, 2015), 31

⁶⁵ This is the case, for example, of advocacy groups speaking in behalf of consumers, as seen in the student-led campaigns against sweatshop conditions in the apparel industry. Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Milton: Taylor & Francis Group, 2020) 31

⁶⁶ Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Oxford:Hart Publishing, 2015), 32

any relevant rules of international law applicable in the relations between the parties”⁶⁷, even if the GATT or other relevant law under the WTO does not entail a conflict clause explicitly expressing the obligation to respect other international human rights related commitments.

While dispute-settlement mechanisms within the WTO would definitely have to take into considerations such argument when states are trying to guarantee compliance with international human rights law inside their jurisdiction, it is harder to argue that social clauses with the aim of promoting human rights outside a state’s territorial jurisdiction are a means for a state to comply with its obligations under international law. On the one hand, although the idea of extraterritorial obligations towards individuals outside the sovereign borders of a state arising from human rights law are being brought more and more frequently before international and domestic international courts⁶⁸, some still dispute its assertiveness. Two questions specifically arise from the current debate: *are state obligations restricted to its domestic territory or do they go beyond its geographical sphere? Can states be complicit in human rights violations committed by other states or other non-state actors?*⁶⁹

On the other hand, in its General Comment on the Right to Just and Favorable Conditions of Work, the Committee on Economic, Social and Cultural Rights affirms

⁶⁷United Nations Conference on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 331 UNTS 1155, art 31.3 c)

⁶⁸ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law Principles and Policy* (Oxford: Oxford University Press, 2011), 1

⁶⁹ Sigrun Skogly, "Regulatory Obligations in a Complex World.", *Building a Treaty on Business and Human Rights* (Cambridge University Press, 2017) 318-45, :

For a restatement of international human rights law in line with extraterritorial obligations of states, see the Maastricht Principles on States’ Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights (Maastricht Principles) from September 2001, www.etoconsortium.org/ ;

Some of the referencing literature on this matter mentioned in Skogly, Sigrun "Regulatory Obligations in a Complex World." In *Building a Treaty on Business and Human Rights* (Cambridge University Press, 2017) 318-45, 319 : M. Gibney, K. Tomasevski and J. Vedsted-Hansen, ‘Transnational State Responsibility for Violations of Human Rights’ (1999) 12 Harvard Human Rights Journal 267; F. Coomans and M. T. Kamminga, *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia, 2006); R. Wilde, ‘Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights’ (2005) 26 Michigan Journal of International Law 739; M. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007); R. McCorquodale and P. Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 40 Modern Law Review 598; M. Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); M. Gibney and S. Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010); M. Langford et al., *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013)

that: “state parties should also require respect for the right to just and favourable conditions of work by individuals and enterprises based extraterritorially with which they conduct commercial transactions”⁷⁰, in line with article 6 of the UN Guiding Principles on Business and Human Rights, and later expresses:

“States parties should ensure that the right to just and favourable conditions of work is given due attention in the conclusion and implementation of international agreements, including in bilateral, regional and multilateral trade and investment agreements. Similarly, States parties should ensure that other international agreements do not negatively affect the right to just and favourable conditions of work, for example, by restricting the actions that other States parties could take to implement the right.”⁷¹

Even if one is to interpret this last statement as not suggesting that the International Covenant on Economic Social and Culture Rights on it’s Right to Work entails extraterritorial obligations, social clauses in Trade can be seen as means to facilitate the compliance of the exporting state with its international obligations under international human rights law. Further, “where such measures promote solidarity between states, they should be considered as valid in principle”.⁷²

This means that an international general interest in the respect for Human Rights should be enough link for such clauses to be included into Trade agreements. Although not all social clauses that aim extraterritorial compliance with human rights should be legitimated under the WTO system with the simple link of encouraging respect for human rights universally, they should also not be discarded in the first place. Mostly, there are different issues and values to be balanced when formulating such judgment within the WTO, but ultimately a global economy that enshrines the rights of everyone as frameworked by the human rights agenda in the long term should be envisioned.

⁷⁰ UN Committee on Economic, Social and Cultural Rights, “General comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)”, (2016) UN Doc E/C.12/GC/23, para 69

⁷¹ Ibid, para 72

⁷² Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Oxford:Hart Publishing, 2015), 35

4. Labour Rights and Trade in the European Policy

With the failure of the World Trade Organization to bring labour rights into the scope of its enforcement mechanisms and an international arena where stakeholders were divided, some trading players from the global north sought to introduce a link between international trade and labour standards in their own policies, such as Canada, the USA or the EU.

The EU is the largest trading block in the world and has historically used its leverage to promote a set of values. The following chapter will bring an overview of the integration of labour provisions into Free Trade Agreements in the context of the European Union's Trade policy, by contextualizing labour provisions in the constitutional framework of the EU and summarizing its main obligations and monitoring mechanisms. It will also touch upon the Commission's Strategic Plan for 2020-2024.

4.1. The labour-trade linkage through Human Rights clauses and Trade and Sustainable Development Chapters

Human rights clauses have been included in EU trade agreements since the 1990's, with the first properly effective human rights clause appearing in the 1990 Argentina-EU cooperation agreement⁷³. The shaping of the external action of the EU towards a values-based action has been formally announced in 1991⁷⁴ and in 1995 the EU Council proclaimed a concrete policy of adopting human rights clauses in all future cooperation and trade agreements⁷⁵. In the same year, the EU included labour provisions in its unilateral Generalized System of Preferences (GSP) with developing countries, in a first stage through a sanctioning system and since 1999 over the inclusion of special incentives for countries that comply with the ILO core labour standards (which later became the GSP+ scheme)⁷⁶. These developments resulted in the tightening of the labour-trade linkage through both human rights clauses and labour provisions. The Treaty of

⁷³ Lorand Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements", *Legal Studies Research Paper Series* no. 24/2012 (September 2012): 2

⁷⁴ Commission, "Communication on Human Rights, Democracy and Development Cooperation Policy", COM (91), 6; Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development, 28 Nov 1991

⁷⁵ Commission, "Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries" COM (95) 216

⁷⁶ James Harrison, Mirela Barbu, Liam Campling, Franz Christian Ebert, Deborah Martens, Axel Marx, Jan Orbie, Ben Richardson, and Adrian Smith. "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda." *World Trade Review* 18, no. 4 (2019): 635–57, 638

Lisbon in 2007 would mark a new era, with its article 21 (1) requiring EU's external action to respect the principles of "democracy, the rule of law, the universality and indivisibility of HR and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and... the principles of the UN charter and IL" and resulting in a new generation of Free Trade Agreements in the context of a strategy for promoting sustainability.

Right after the Lisbon Treaty, Sustainable Development chapters became a standard component of Free Trade Agreements, starting with the EU-Cariforum Economic Partnership Agreement. The aim of these chapters is to "to maximize the leverage of increased trade and investment on issues like decent work, environmental protection, or the fight against climate change in order to achieve effective and sustainable policy change"⁷⁷, and they now serve as a template for future negotiations. Essentially, they have been endorsed with a communication in 2002 from the European Commission in which the EU's Sustainable Development Strategy is called to "maximize the benefits of globalization while minimizing the costs"⁷⁸ in an effort to *harnessing globalization*. Further, the principle of sustainable development that is the basis of a coherent plan of action for the European Commission in different fields, has never been posed as a concrete obligation for states: so far, none of the agreements contain the chance of violating the "principle of sustainable development"⁷⁹; they do contain, nevertheless, a specific obligation to protect and promote labour and environmental standards.

A first problem arises with the inclusion of labour provisions in Sustainability Chapters concerning its compability with the existing article safeguarding human rights. Are labour issues excluded from the scope of human rights clauses? From a material point of view, there can be significant overlap between both provisions, as labour standards are recognized as human rights within the European jurisdiction.⁸⁰ The practical

⁷⁷ Commission, *Non Paper of the Comission Services: Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*, 1

⁷⁸ Commission , "Communication from the Comission to the Euroean Parliament, the Council, the Economic and Social Committee and the Committee of the regions: Towards a global partnership for sustainable development" COM 82, 7

⁷⁹ Lorand Bartels, *ibidem* , 11

⁸⁰ Core labour standards are recognized as covered by standard human rights clauses in the European Commission Communication on Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization, COM (2001) 416 , 12. There are different sources at the European level that acknowledge the right to work and the right to decent work (being its corollary) as fundamental rights and/or human rights. In the present paper we take the position of recognizing labour rights as human rights,

consequences of this question are significant, as for a violation of labour standards provisions the conduct can't be subjected to the conventional dispute settlement or thwarted by suspension of the trading activity, while for human rights clauses it can. At the same time, the problem gets more complex if we consider article 21 of the TEU that poses an obligation on the EU to treat all human rights as indivisible (and therefore equal⁸¹), making the current differential treatment from the EU- that comes with consagrating more sturdy mechanisms for human rights violations and weaker ones for labour provisions- a possible violation of an obligation from EU law.⁸²

4.2. Obligations under TSD Chapters and Labour Provisions

Under sustainable chapters, the minimum obligations agreed upon are usually the implementation of certain multilateral labour standards previously ratified, and obligations on the parties not to lower levels of protection and to enforce labour legislation, which constitutes a guarantee against retrogression. Thus, some trade agreements contain a clause preventing abuse, such as the EU-Central America FTA that states:

“labour standards should never be invoked or otherwise used for protectionist trade purposes and... the comparative advantage of any Party should not be questioned”⁸³

If the idea of obligations requiring parties not to undermine existing labour legislation might be of added value – depending on its effectiveness, which is still to be analyzed in this paper- obligations centered on international standards don't seem to add nothing fundamentally new. In fact, as far as the ILO core labour standards are concerned, they are already binding on all parties who are member states of the organization. In this

although the discussion is ongoing. For an introduction on the discussion, see for example, Virginia Mantouvalou, “The Protection of the Right to Work Through the European Convention on Human Rights.” *Cambridge Yearbook of European Legal Studies* 16 (2014): 313–32, 316 or Idem, “Are Labour Rights Human Rights?” *European Labour Law Journal* 3, no. 2 (June 2012): 151–72. For a solid perspective on labour rights being human rights, see Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime”, *European Journal of International Law* 15, (June 2004): 457–521

⁸¹ In the website of the European Parliament, it is stated: “In Article 21, the EU endorses the principle of the ‘indivisibility of human rights and fundamental freedoms’, committing itself to considering economic and social rights to be as important as civil and political rights;” “Human Rights”, European Parliament, accessed May 6, 2021, <https://www.europarl.europa.eu/factsheets/en/sheet/165/human-rights>

⁸² Lorand Bartels, *ibidem*, 18

⁸³ Article 286 of the EU-Central America FTA(2012) L 346/ I/3

sense, these provisions “are not as original as they seem”⁸⁴. Most importantly, is the transposition of obligations already binding through ILO instruments in trade agreements harmful in any way?

A first concern is the possibility of diluting standards that comes with the integration of labor standards into the sphere of international economic law. The argument developed by some⁸⁵ focuses on the idea that entrenching labor standards into trade agreements will instrumentalize the first to achieve economic policy objectives and create fuzziness over the very meanings of labour standards as part of hard-won political struggle. This idea is particularly enhanced when some preeminent academics advocate for a human right to free trade⁸⁶ and a “fundamental realignment of international human rights law in order to give appropriate priority to what they call economic liberties”⁸⁷. In fact, if for the ones who are to apply labour standards in trade agreements the so-called “economic freedoms” appear to have the same value as human rights, we might endanger detaching those rights “from their foundations in human dignity”⁸⁸ as they “would instead be viewed primarily as instrumental means for the achievement of economic policy objectives”⁸⁹.

Is this the case in the EU, where economic fundamental rights have occupied a central place? The answer will fundamentally depend on how effective these provisions are and on the mechanisms that implement them. Nevertheless, through a first analysis of the core obligations under labour provisions in FTA, it seems that human rights clauses and labour provisions in sustainable development chapters are simply mechanisms that enable the EU to comply with its obligations under the Treaty of Lisbon and article 21.⁹⁰ Thus, there is a significant risk of labour provisions shifting the locus of action from structural sustainability problems in Free Trade Agreements.

⁸⁴Lorand Bartels, *ibidem*, 14

⁸⁵ See, for example, Ciaran Cross, “Legitimizing an Unsustainable Approach to Trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements”, *International Centre for Trade Union Rights* (September 2017)

⁸⁶ See, for example, Ernst Ulrich Petersmann, “Time for a United Nations ‘global compact’ for integrating human rights into the law of worldwide organizations: lessons from European integration”, *European Journal of International Law* 13 No. 3 (2002): 621–650

⁸⁷ This is Philip Alston’s description of Petersmann and others view in Philip Alston, “Resisting the Merger of Acquisition of Human Rights by Trade Law: A Reply to Petersmann”, *European Journal of International Law* 13 No. 4 (2002): 815-844, 843

⁸⁸ Philip Alston, *ibidem*, 843

⁸⁹ Philip Alston, *ibidem*, 843

⁹⁰ Lorand Bartels, *ibidem*, 17

4.3. Monitoring and Dispute Settlement mechanisms

The typical monitoring mechanism for the sustainable development chapters is bilateral committees⁹¹. They hold bilateral meetings and contain organs that are accompanied by civil society mechanisms- ranging from advisory groups to bilateral meetings of civil society groups. Examples of bilateral committees with the aim of approaching sustainable development issues are the Trade and Development committee established by the EU-Cariforum agreement⁹² with a wide material scope of action or the Trade and Sustainable Development Board for the EU-Central America agreement.⁹³

Having said this, none of the sustainable development chapters allows for the parties to enforce the obligations under sustainable development chapters by suspension of preferences, meaning, sanctions. Similarly, sustainable development chapters do not fall under dispute settlement procedures established under the agreement⁹⁴, and have a self-contained system of dispute settlement that may vary according to the agreement. For this reason, the ILO describes the EU system as of having promotional provisions since they “do not link compliance to economic consequences but provide a framework for dialogue, cooperation and/or monitoring”.⁹⁵

This is also one of the major critiques of the Sustainable Development Chapters, namely, the idea that provisions lack *teeth*⁹⁶, and one addressed by the European Commission in a previous non-paper⁹⁷. In the non-paper two options for discussion are set out: one that entails enforcement of labour and environmental commitments on the basis dialogue and cooperation (in line with the current approach) and a second option entailing enforcement through sanctions, in which sustainable development chapters are subject to dispute settlement. The discussion is on-going and shall be addressed later in this work.

⁹¹ Lorand Bartels, *ibidem*, 15

⁹² Art 20 of the EU-Cariforum FTA (2008) L 289/I/3

⁹³ Art 294/2 of the EU-Central America FTA (2012) L 346/ I/3

⁹⁴ The only exception to this is the EU-Cariforum agreement, in which the normal dispute settlement procedures apply but suspension of concessions is not allowed. – Lorand Bartels, *ibidem*, 16

⁹⁵ ILO, *Social Dimensions of FTA* (Geneva : ILO, 2013, revised edition in 2015) , 1

⁹⁶ See, for example, T&E, *Trade and Sustainable Development: A chance for innovative thinking* (Transport and Environment, 2017)

⁹⁷ European Commission *Non-paper of the Commission services Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)*, (2017), 5-9

4.4. The strategic Plan for 2020-2024

Concerns over the impact of trade and social issues have repeatedly been integrated in the different strategic plans for the last years.⁹⁸ Not surprisingly, in the DG Strategic Trade Plan for 2020-2024 the executive identifies an increased scrutiny from civil society and the needs to take into account “how the benefits trade brings are shared within society”⁹⁹, and that trade policy must support a “broader push for sustainable development and internationally set standards (labour, environment, climate protection, responsible resourcing)”¹⁰⁰. Explicitly concerning labour standards, the EU trade policy claims to be invested in “promoting international labour standards and human rights”¹⁰¹, with a special note on Ursula von der Leyen’s zero-tolerance approach towards child labour¹⁰². This assertion of will does not seem to bring anything new to the years-long political commitment with sustainable development, and goes in line with the obligations of the EU under the Treaty of Lisbon.

Also, the DG for Trade recognizes the on-going crisis of the multilateral trading system, with the WTO at its core, and reaffirms its commitment towards open trade and investment, concretely through leading the “reform of the World Trade Organization to preserve rules-based trade”, by its strengthening and preserving of a stable and predictable trading environment. This preliminary approach seems to reject any plans toward regionalization or protectionist agendas.¹⁰³ In the same line, a whole chapter is dedicated on reforming the WTO, with issues concerning disciplines on subsidies, digital trade, obligations of transparency and the reform of the dispute settlement.¹⁰⁴ There is no clear reference to the inclusion of social issues into the agenda of the WTO nor the inclusion of mechanisms to deal with the climate emergence, only a brief mention to sustainability

⁹⁸ In its strategic plan for 2016– 2020, for example, DG Trade recognizes the need to promote “sustainable economic, social and environmental conditions”, including through the use of “strong provisions to promote the respect of labour rights”. Directorate-general for Trade of the European Commission, *Strategic Plan 2016-2020* (Brussels: 2016), 9

⁹⁹ Directorate-general for Trade of the European Commission, *Strategic Plan 2020-2024* (Brussels: 2020), 5

¹⁰⁰ *Ibid*, 9

¹⁰¹ *Ibid*, 19

¹⁰² *Ibid*, 21

¹⁰³ See also the intervention of the Director of the DG Trade, Ignacio Garcia Bercero, in the “Virtual Eu Trade Policy Day”, panel on “Multilateralism as an engine of global recovery, Global megatrends, Role of multilateralism/global rules, WTO reform”, accessed May 6, 2021, <https://webcast.ec.europa.eu/virtual-eu-trade-policy-day>

¹⁰⁴ See also the remarks of Sabine Weyand, Director General for Trade, at the American institute for Contemporary German Studies at “EU Open Strategic Autonomy and the Transatlantic Trade Relationship”, EEAS homepage, accessed May 6, 2021, https://eeas.europa.eu/delegations/united-states-america/85321/eu-open-strategic-autonomy-and-transatlantic-trade-relationship_en

is made in a bullet point that could bring down the mood of most climate activists: “To enhance trade’s contribution to sustainability and a green recovery , the supply of goods and services and services contributing to climate change mitigation must be liberalized.”

5. Defining effectiveness and proposed methodology

The previous chapters brought an overview of the political and historical framework that led to the use of labour provisions as a policy instrument, as well as an analysis of the framing and implementing structures of labour provisions in the context of the EU. Some questions arose: 1) Do labour standards result weakened in content by being entrenched into FTA? and 2) Do labour provisions lack teeth?

To answer these remarks and the general research question focused on the effectiveness of labour provisions, two chosen cases of the EU- South Korea FTA (with an emphasis on the experience of the Korean automotive industry) and the EU-Vietnam FTA will now be paid attention to.

As previously mentioned, effectiveness serves as a normative element for addressing the success of labour rights provisions. It will be assessed on three grounds: 1) in terms of problem solving, meaning, as an indicator to evaluate if labour provisions in FTA operate to solve the problems they were developed to handle in the first place ; 2) in terms of behavioral change, by analyzing any positive new behavior of states, corporations and organizations operating in the chosen countries or with an influence on labour-related issues, and if they are doing things otherwise they would not do or ending prior patterns of behavior and 3) in terms of leading to constitutive change, that refers to the rise of social practices involving the expenditure of time, energy and resources within institutions, that absorb a sizable fraction of attention and resources of those participating and maybe even define its identity.¹⁰⁵

In order to do this, the next pages will start by considering the labour rights covered in the provisions contained in Sustainable Development Chapters and further determine its effects on two accounts: firstly, on legal reforms that occurred due to the labour provisions (*de jure* effects) and secondly, the substantive outcomes of such reforms (*de facto* effects). Besides, special attention will be given to the EU responsive action (or lack of it) and to internal dynamics between the European Parliament, the Council and the European Commission in handling crisis. For this, labour rights reports from authoritative sources will be taken into consideration and in order to understand

¹⁰⁵ According to Oran R. Young definition of effectiveness as problem solving, behavioral effectiveness and constitutive effectiveness. Oran R Young, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca; London: Cornell University Press, 1994), 143

stakeholder's perceptions of changes observed in law, in practice and in relation to social dialogue. Sustainable Impact Assessments (SIA) of the agreements will be examined as well as related academic work from experts. Conclusions will be drawn from the views of trade unions, officials representing EU institutions, private sector umbrella organizations and NGO's. In other words, this section of the paper aims to provide a comprehensive analysis of the perceptions of policy implementation from different stakeholders in order to conclude on how to strengthen effectiveness and provide a case-based critical assessment.

Finally, a *human rights-based approach* to the policy in practice will be included when suggesting how to improve effectiveness, entailing certain human rights principles, standards and norms (eg, participation and inclusion; non-discrimination and equality; accountability; interdependence and interrelatedness) and looking at how they have been (or should be) enshrined in the elaboration and implementation of such policies.

The method is limited. Firstly, it is not possible to assure causality of behavioral or structural changes regarding labour rights standards on one single element. In fact, it is not possible to isolate the effect of one trade agreement on the protection of labour rights, as social standards are influenced by many domestic and international factors. Secondly, it is an assessment based on existing literature- meaning, secondary sources- and not primary sources, which will be considered by taking into account the maximum stakeholders possible, allowing for 'triangulation'. Thirdly, the findings on the chosen case studies are not possible to generalize on the whole policy, as each agreement concerns a distinct reality with a specific framework. However, it will be possible to discuss and conclude on the reactions taken (specifically by EU authorities) to violations.

6. The Case of South-Korea

The case of the FTA between the EU and South Korea (EUVFTA) will be analyzed for the fact that it is the first and only FTA in which dispute settlement mechanisms have been triggered and the one where more energy has been invested on the TSD chapter.¹⁰⁶ It will allow for more incisive conclusions on the shortcomings of design of institutional mechanisms under the Sustainable Development Chapter based on their practice. Curiously, the FTA with South Korea was also the first to embody such policy for Sustainable Development, which will allow for comparison with clause's evolution in one of the most up-to-date treaty- the free trade agreement between the EU and Vietnam (EUVFTA).

6.1 Key Labour Provisions in the FTA

Labour provisions are inserted under chapter 13 that concerns "Trade and Sustainable Development". Article 13 can be divided into 3 parts: a first general expression of will that recognizes the link between trade liberalization and labour rights (article 13.1 to 13.3), a reference to chosen instruments of international law and ILO conventions (art. 13.4) and an article on monitoring mechanisms and dispute settlement procedures (art. 13.6).

The parties start by referring to chosen sources on international instruments such as the 2006 Ministerial Declaration of the United Nations Economic and the Social Council on Full Employment and Decent Work and praising the benefits of cooperation in trade related social issues¹⁰⁷. It follows that the objective of such provisions should not be the harmonization of labour standards but rather the strengthening of trade and cooperation in a way that promotes sustainable development, with a safeguard to the "right to regulate" domestic labour standards.¹⁰⁸ At the same time, a clause assures that labour standards will not be used for protectionist trade purposes and that the "comparative advantage" of countries will not be put into question.¹⁰⁹ Article 13.3 anticipates that the parties shall strive to improve each other's laws in light of the international standards that follow, clarifying that labour provisions in the EU-South

¹⁰⁶ James Harrison, Mirela Barbu., Liam Campling, Ben Richardson and Adrian Smith. "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters." *JCMS: Journal of Common Market Studies*, 57: 260– 277 (March 2019), 254

¹⁰⁷ Article 13.1 of the EU-Korea Free Trade Agreement (2011) L127/6

¹⁰⁸ Article 13.1/ 3 *ibid*

¹⁰⁹ Article 13.2/2 *ibid*

Korea FTA do not constitute an obligation to enforce labour standards but rather to progressively enroll best efforts to fulfil this standards (and once achieved, to keep increasing levels of protection)- an obligation of *means* rather than an obligation of *result*.

There are two material obligations that arise. On the one hand, there is an emphasis on the four core labour standards (freedom of association and the right to collective bargaining, elimination of forced and compulsory labor, the effective abolition of child labor and the elimination of discrimination in respect of employment and occupation), with the parties committing to their respect, promotion and realization.¹¹⁰ On the other hand, parties should implement ILO Conventions they have already ratified and make “continued and sustained efforts” to ratify “up-to-date” ILO Conventions.¹¹¹

When it comes to monitoring and implementation, there are four procedures named in the treaty: cooperation, institutional mechanism, government consultation and a panel of experts. The parties also commit themselves to “reviewing, monitoring and assessing” the impact of the implementation on sustainable development¹¹² and a Committee on Trade and Sustainable Development is created with officials from the administrations of the parties, which oversees the implementation of the chapter and cooperation activities undertaken¹¹³. More active bodies are the Domestic Advisory Groups (DAG’s), that comprise representatives of civil society, academia and other relevant stakeholders with the purpose of conducting “dialogue encompassing sustainable development aspects of trade relations between the Parties”¹¹⁴. In case of conflict, the parties can request government consultations¹¹⁵ and ultimately the constitution of a panel of experts who may draft a non-binding decision.¹¹⁶

Remarkably, arbitration procedures provided for the rest of the FTA clauses are excluded in matters of sustainable development. This same model concerning standards commitments and institutional mechanisms became adopted and applied, with variations, in subsequent EU FTA’s¹¹⁷, and was praised by the European Commission as “highly

¹¹⁰ Article 13.4/3 *ibid*

¹¹¹ Article 13.4/3 *ibid*

¹¹² Article 13.10 *ibid*

¹¹³ Article 13.12/3 *ibid*

¹¹⁴ Article 13.13 *ibid*

¹¹⁵ Article 13.4 *ibid*

¹¹⁶ Article 13.5 *ibid*

¹¹⁷ James Harrison, Mirela Barbu, Liam Campling, Ben Richardson and Adrian Smith. “Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters.” *JCMS: Journal of Common Market Studies*, 57: 260– 277 (March 2019), 261

ambitious in terms of substantive commitments and implementation and monitoring mechanisms”¹¹⁸.

Notably, not only the same “toothless” method is not applied to trade clauses, but also not to other non-trade issues, such as disputes over intellectual property rights, which suggests a predisposal to provide weaker enforcement to labour rights that can hardly be justified. In a research work elaborated by Liam Campling, James Harrison, Ben Richardson, Adrian Smith and Mirela Barbu, in which about 105 interviews were conducted in South Korea and the EU with government representatives, trade unions, employer associations and European Commission officials, several interviewees from Brussels have confirmed that “negotiators from the European Commission had included a TSD chapter primarily as a result of pressure from the European Parliament, supported by organized civil society groups and European-level trade unions, and as such saw the inclusion of labour standards as a narrow textual requirement and thus did not pursue an aggressive pro-labour agenda”¹¹⁹. The fact that the inclusion of labour standards in the FTA was a “ticking box” for European negotiators contributed to South Korea (that had received the idea of labour-trade linkage with suspicion) successfully demanding the removal of any immediate obligation to ratify all fundamental ILO Conventions.¹²⁰

¹¹⁸ Commission Services Position Paper, “Trade Sustainability Impact Assessment of the Free Trade Agreement between the Eu and the Republic of Korea” (Brussels 2010), 8

¹¹⁹ Liam Campling, James Harrison, Ben Richardson, Adrian Smith and Mirela Barbu, (2021), “South Korea's Automotive Labour Regime, Hyundai Motors' Global Production Network and Trade-Based Integration with the European Union” *British Journal of Industrial Relations*, 59: 139-166, 152

¹²⁰ Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Milton: Taylor & Francis Group, 2020), 153

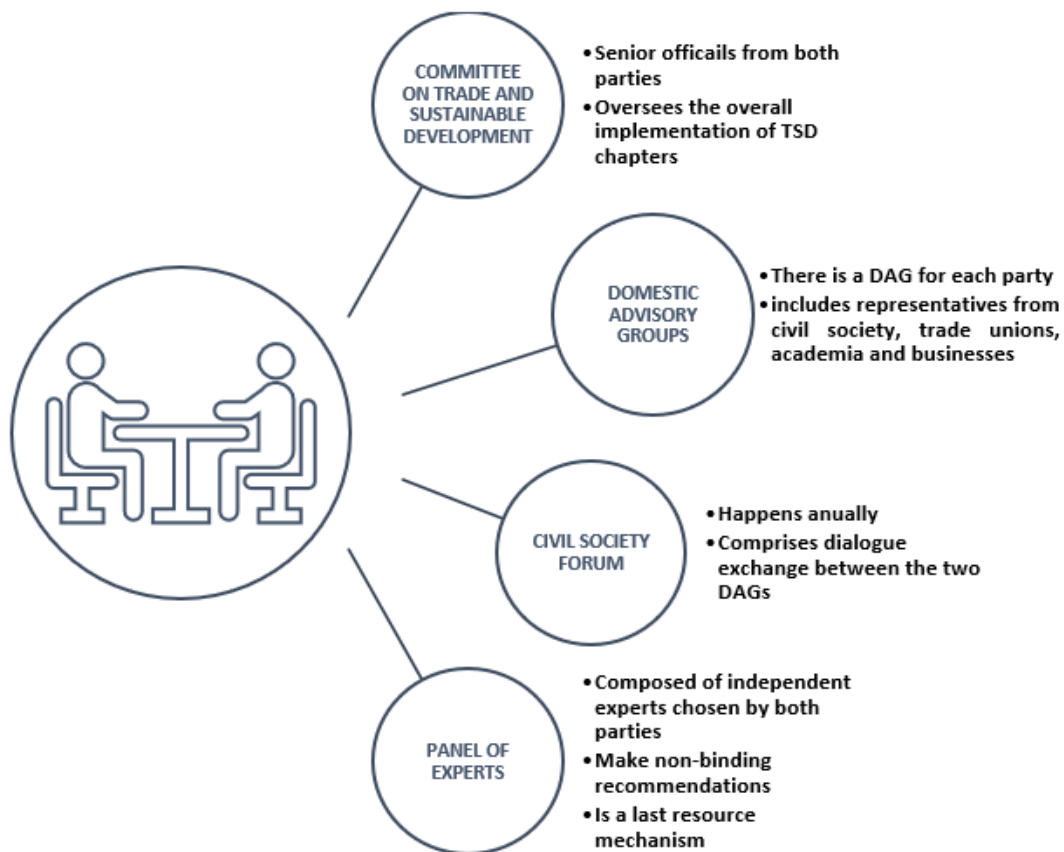


Figure 1- Monitoring Mechanisms of the TSD Chapter in the EUKFTA.

6.2. Previous State of Affairs and Legal Reform

By 2009, when the drafting of the agreement was finished and after 3 years of negotiations, South Korea was safely considered a developed economy after several years of economic growth¹²¹. It is a member state of the OECD and was stamped as a “flexible labour market”¹²², having the third lowest unemployment rate in the OECD by the time (surpassed only by Luxembourg and Switzerland)¹²³. On the other hand, the unionization rate was extremely low, being by the then than 11 percent, with three quarters of union members being employed in large firms hiring 3000 or more employees¹²⁴. The

¹²¹ IBM Belgium in association with DMI, Ticon, & TAC, *Trade Sustainability Impact Assessment of the EU-Korea FTA : Draft Final Report* (Brussels, 2008), 164

¹²² *ibid*, 16

¹²³ Wonbo Lee, *Understanding Korea's Labour Relations* (Seoul: Korea International Labor Foundation, 2007)

¹²⁴ IBM Belgium in association with DMI, Ticon, & TAC, *Trade Sustainability Impact Assessment of the EU-Korea FTA : Draft Final Report* (Brussels, 2008), 73

Sustainability Impact Assessment (SIA) carried by a consortium of independent consultants also noted that the official policy of market opening to globalization since the 1990's has also shifted the paradigm of workers becoming irregular workers since the mid- 90's , and earning on average half of a regular worker's wage and typically not being covered by statutory welfare policies.¹²⁵ Notably, the Human Development Index for Korea in 2007 was of 0,912 a brighter number than the one of some European member-states such as Portugal (0,904) and Slovenia (0,910).

Despite the optimistic figures of the Korean “labour market” that surpassed some of the European member-states data, there might have been good reasons for Korea to fear imposing obligations with stronger monitoring mechanisms in the text of the treaty as in other existing models of Free Trade Agreements¹²⁶. Firstly, by 2009 South Korea had only ratified 4 of the 8 fundamental conventions, entering the FTA without the political commitment to respect the right to association, collective bargaining and the prohibition of forced labour.¹²⁷ In the wider system of ILO instruments, South Korea had ratified 28 conventions and protocols out of 90, having 4 of them taken place during the eight rounds of talks that led to the signature of the treaty¹²⁸. Without at least the commitment to ratify the convention on freedom of association, the question of a transparent participation by trade unions in the Domestic Advisory Group arises beforehand. In fact, if not predictable, the representativeness and independence of Korean

¹²⁵ *ibid*, 73. This issue was also addressed in the OECD Economic Survey, Korea from 2012 , that states that "non-regular workers face low wages, unstable employment, low employment protection and weak coverage by the social safety net and active labour market policies"

¹²⁶ According to a study driven by James Harrison et al. based on field interviews, “Korean negotiators successfully demanded fewer references to international standards and the removal of any immediate obligation to ratify all fundamental ILO conventions”, James Harrison, Mirela Barbu., Liam Campling, Ben Richardson and Adrian Smith. “Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters.” *JCMS: Journal of Common Market Studies*, 57: 260– 277 (March 2019), 265 ; The US and Canada comprise examples of countries with a more robust policy concerning labour clauses in Free Trade Agreements. In fact, the only labour dispute to ever reach arbitration is brought by the US against Guatemala and has been controversially instrumentalized by the European Commission to show the ineffectiveness of such dispute settlement for labour clauses. Ciaran Cross, *Anchoring climate and environmental protection in EU trade agreements*, (Berlin: PowerShift, 2020), 42

¹²⁷ Deborah Martens, Diana Potjomkina, Jan Orbie, *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?*, (Friedrich-Ebert-Stiftung South Caucasus Office 2020)

¹²⁸ “Ratifications for Republic of Korea”, ILO, accessed June 3, 2021, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103123

DAG members later revealed itself to be thorny issue, as addressed in a study by the Friedrich Ebert Stiftung last year¹²⁹.

On the other hand, in 2008 the International Trade Union Confederation (ITUC) issued a report pointing serious concerns over violations of the right to freedom of association and the right to collective bargaining, showing systematic harassment by government officials of trade unionists¹³⁰, evidence of public interference in union's activities and highlighting that many public workers still can't join a Trade Union¹³¹. In the same year, the president of the Korean Confederation of Trade Unions (KCTU) was arrested after organizing a general strike and a set of solidarity actions for workers from E-Land retail company¹³² and the president and vice-president of the Migrant Trade Union (MTU), an affiliate of the KCTU, were deported after political tensions, going against the South Korean National Human Rights Commission (NHRC) decision to stop the deportation¹³³. It is to mention that according to a survey by the Joint Committee with Migrants in Korea, 26.8% of migrant workers experienced physical abuse and about 14% reported being sexually abused, being migrant workers in especially precarious situation¹³⁴. In the same line, a Human Rights Watch report from 2013 noted that the

¹²⁹ Deborah Martens, Diana Potjomkina, Jan Orbie, *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?*, (Friedrich-Ebert-Stiftung South Caucasus Office 2020), 20

¹³⁰ Other examples of harassment were presented in the EU Domestic Advisory Group under the EU-Korea Free Trade Agreement "Opinion on the Fundamental Rights at Work in the Republic of North Korea. Identification of areas of action" (Brussels 2013), 3:

"(...) For example the government has refused three times to grant the Korean Government Employees Union (KGEU) recognition. KGEU faced aggression when its members tried to convene in its inaugural assembly: banners were removed; access to KGEU's website and intranet was interrupted; foreign participants were denied entry to the country; and KGEU faced a general prohibition of any activity from sending letters to holding meetings and organising events."

A joint report from Korean NGOs titled "NGO Report on the Situation of Freedom of Opinion and Expression in the Republic of Korea since 2008" from 2010 also reveals that the government has managed to hack and track financial transactions, email and mobile phones of 800 officials of the Korean Teachers' Union (KTU).

¹³¹ International Trade Union Confederation (ITUC), "Internationally Recognized Core Labour Standards In the Republic of Korea. Report for the WTO General Council Review of the Trade Policies of Korea" (Geneva, 2008);

The last point was also highlighted in the EU Domestic Advisory Group under the EU-Korea Free Trade Agreement "Opinion on the Fundamental Rights at Work in the Republic of North Korea. Identification of areas of action" (Brussels 2013) , 3

¹³² "Korea: ITUC Condemns Arrest of KCTU President", ITUC, last accessed June 3 2021, <https://www.ituc-csi.org/korea-ituc-condemns-arrest-of-kctu>

¹³³ "Korea: Migrants Trade Union's leaders deported", ITUC, last accessed June 3 2021, <https://www.ituc-csi.org/korea-migrants-trade-union-leaders>

¹³⁴ EU Domestic Advisory Group under the EU-Korea Free Trade Agreement "Opinion on the Fundamental Rights at Work in the Republic of North Korea. Identification of areas of action" (Brussels 2013), 10 ; Also, "Migrant workers treated like "slaves" in South Korea's agricultural industry", ILO Asia Pacific Network, last accessed Jun 3 2021, <https://apmigration.ilo.org/news/migrant-workers-treated-like-slaves-in-south-koreas-agricultural-industry>

“country’s independent labor unions advocate workers’ interests, organizing high-profile strikes and demonstrations that sometimes lead to arrests.”, although “human rights groups, social welfare organizations, and other NGOs are active and generally operate freely”.¹³⁵ By 2009, child and forced labour were not considered to be widespread practice phenonema with the Korean state effectively enforcing laws to prevent such situations. On matters of discrimination and equal remuneration, there were challenges concerning female participation in the labour force (which was only 50%¹³⁶), being the gender pay gap of 34% for work of equal value¹³⁷, although the government has enhanced measures to tackle the issue.¹³⁸

The celebration of the FTA had no impact on the existing violations of human rights. Afterall, if the EU was willing to celebrate the FTA despite of the alarming reports and recent violations, with vague and poorly drafted labour clauses, why should the Korean government feel intimidated in any way? During the first five years of implementation of the FTA, the Korean government was accused of cracking down on trade unions in a way that undermined freedom of association and the right to collective bargaining, which lead to complaints delivered to the ILO in 2013 and 2015 by domestic and international trade unions. This is claimed to go in line with President Park Geun-hye’s administration (2013-2017) that actively pursued the weakening of labour law. After the impeachment of the former conservative president (2016), the new government announced themselves to be “labour-friendly” and a first compromise to ratify the ILO core conventions was set. In practice, the ratification was to come 4 years after and the deterioration of fundamental rights continued, although harsh repression of Unions was no longer taking place.¹³⁹

In 2016 two cooperation projects related to labour issues were being elaborated under the EU-Korea FTA, centered on the Implementation of ILO Convention 111 on

¹³⁵ “Freedom in the World 2013- South Korea”, [ecoi.net](https://www.ecoi.net/en/document/1344115.html), last accessed June 3 2021, <https://www.ecoi.net/en/document/1344115.html>

¹³⁶ International Trade Union Confederation (ITUC), “Internationally Recognised Core Labour Standards In the Republic of Korea. Report for the WTO General Council Review of the Trade Policies of Korea” (Geneva, 2008), 8

¹³⁷ *ibid*

¹³⁸ The Equal Employment Act, for example, forbids discrimination against women in hiring and promotion. Also, there is a public fund established for victims of gender-based discrimination to ensure compensation. Source: EU Domestic Advisory Group under the EU-Korea Free Trade Agreement “Opinion on the Fundamental Rights at Work in the Republic of North Korea. Identification of areas of action” (Brussels 2013), 10.

¹³⁹ “FTA labour provisions useless without trade union action, says Korean unionist”, [bilaterals.org](https://www.bilaterals.org/?fta-labour-rights-provisions), last accessed June 4 2021, <https://www.bilaterals.org/?fta-labour-rights-provisions>

discrimination and corporate social responsibility in the EU and East Asia¹⁴⁰. Accordingly, the cooperation project resulted in a comparative study of the implementation of ILO Convention 111 in Korea and EU Member States, providing a number of practical policy suggestions to enhance the compliance with the Convention's obligations.¹⁴¹, and a final report of the joint study concluded that additional efforts are still needed to combat discrimination, specifically through education initiatives,¹⁴² although concrete measures are still to be observed in Korea.

Overall, the direct impact of the EU-Korea FTA was neutral when it comes to legislative changes until 2021¹⁴³, when Korea signed three ILO fundamental conventions in response to the final report from the Panel of Experts in 2020. Still, Korea engaged in several “whitewashing” events, such as delivering a motion to the parliament to ratify the ILO Convention, while at the same time introducing an amendment bill that takes away newly acquired rights.¹⁴⁴ In 2015, the government of South Korea had responded to EU pressure to ratify Core ILO Conventions by claiming that "For the unratified fundamental conventions, some of their provisions do not conform to the current domestic laws and situation, making it difficult to create conditions for ratification in Korea", and that "as a country's laws and systems, particularly labour laws, should reflect its socially and economically unique characteristics and be based on tripartite agreements, it is not easy to improve domestic laws and systems within a short period of time."¹⁴⁵, which, as recognized by EESC, “is not in line with the stipulations of Article 13.4.3 and the TSD chapter in general”¹⁴⁶.

This doesn't come as a surprise considering that the Korean government was very hard to be held accountable by the Korean DAG. In fact, the government is considered to

¹⁴⁰ “Answer given by Ms Malmstrom on behalf of the Commission”, European Parliament, last accessed June 4 2021, https://www.europarl.europa.eu/doceo/document/E-8-2016-007009-ASW_EN.html

¹⁴¹ Commission Director-General for Trade, “A comparative study of the implementation of ILO Convention 111 in the Republic of Korea and the Member States of the European Union” (Brussels 2016),⁷

¹⁴² Civic Consulting and Ifo Institute, *Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea* (Brussels, 2017), 205

¹⁴³ In 2018, the Evaluation of the Implementation of the FTA report concluded that the impact of the FTA on human rights was neutral, except for the right to food as there was a general reduction of prices. Civic Consulting and Ifo Institute, *Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea* (Brussels, 2017), 244

¹⁴⁴ Deborah Martens, Diana Potjomkina, Jan Orbie, *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?*, (Friedrich-Ebert-Stiftung South Caucasus Office 2020), 36

¹⁴⁵ Dumitru Fornea (Rapporteur), *Opinion of the European Economic and Social Committee On the EU-Korea Free Trade Agreement – Trade and Sustainable Development Chapter* (Brussels, 2017), REX/479-EESC-2017-2894

¹⁴⁶ *Ibid*

be “pretty difficult to get in contact with” and the Korean DAG was hardly recognized by the government. An event illustrative of this dynamic is the non-inclusion of the Korean Confederation of Trade Unions in the DAG initially, one of biggest trade unions in South Korea, which was object of criticisms but easily solved by conversations led by the EU DAG¹⁴⁷. Some Korean officials have also stated that government representatives would attend Korean DAGs and monitor what is said, without intervening or participating.¹⁴⁸

All things considered, freedom of association and the right to collective bargaining were not assured by the time of signature of the EU-Korea FTA and are still the most neglected core labour rights in South Korea. In 2019 South Korea was labeled as “no guarantee of rights”¹⁴⁹ concerning labour rights by the ITUC, and human rights groups and other NGOs were considered to face political pressure from the government when criticizing public authorities or other powerful stakeholders by Freedom House in 2020¹⁵⁰. Surprisingly, the functioning of different treaty mechanisms and a major campaign by trade unions lead to the signature of ILO Conventions 87, 98 and 29 (concerning Freedom of Association and Protection of the Right to Organize, Collective Bargaining and Forced Labour) in March 2021, which will be paid attention to in closer detail.

6.2.1. The dispute over Freedom of Association and the right to Bargain Collectively

Although the Korean representatives managed to reduce the references to international labour standards and to remove an obligation to ratify ILO core conventions from the text of the treaty¹⁵¹, the repression of trade unions would not be a forgotten topic

¹⁴⁷ James Harrison, Mirela Barbu, Liam Campling, Ben Richardson and Adrian Smith. “Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters.” *JCMS: Journal of Common Market Studies*, 57: 260– 277 (March 2019), 269

¹⁴⁸ Deborah Martens, Diana Potjomkina, Jan Orbie, *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?*, (Friedrich-Ebert-Stiftung South Caucasus Office 2020), 53

¹⁴⁹ International Trade Union Confederation, *2020 ITUC Global Rights Index*, Brussels: General Secretary, 2020. Accessed July 12, 2021.

https://www.uniontounion.org/sites/default/files/additional_info_files/ituc_globalrightsindex_2020_english_version4_singlepages.pdf

¹⁵⁰ “Freedom in the World 2020: South Korea”, Freedom House, last accessed July 12, 2021, <https://freedomhouse.org/country/south-korea/freedom-world/2020>

¹⁵¹ James Harrison, Mirela Barbu, Liam Campling, Ben Richardson and Adrian Smith. “Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters.” *JCMS: Journal of Common Market Studies*, 57: 260– 277 (March 2019), 265

for the EU and Korean DAG's, who kept labour rights high on the agenda.¹⁵² After having elaborated an opinion concerning serious and widespread violations of the right to freedom of association and to collective bargain¹⁵³, the EU Domestic Advisory Group (DAG) sent two letters in 2014 and 2016 to the trade commissioners De Gucht and Malmstrom requiring the triggering of intergovernmental consultations in light of serious breaches of the Sustainable Development Chapter¹⁵⁴, following the incarceration of the president of one of the main Korean trade unions (KCTU). The letter from 2016 had also the institutional strength of a concerning report from the UN Special Rapporteur on Freedom of Assembly and Association following a mission to Korea¹⁵⁵, a press release from the UN Working Group on Business and Human Rights¹⁵⁶ that included labour rights violations in Korea and a decision from the ILO Committee on Freedom of Association on the basis of a new law that weakens labour protection¹⁵⁷. Despite the deteriorating situation in Korea, these letters did not lead to a prompt action of the commissioners, and only after a resolution from the European Parliament in 2017 demanding the commission to launch consultations the dispute settlement mechanism was activated.

The process was lengthy and unsatisfying, illustrating the problems of the politization of institutional mechanisms for the Sustainable Development Chapters. The European Commission only triggered the consultation mechanism in December 2018 and because “the consultations did not lead to the matters being satisfactorily addressed and this failed to settle all the issues raised by the EU”¹⁵⁸, the EU demanded in July 2019 the launching of a Panel of Experts, which started its work in July 2019. Importantly, the

¹⁵² Deborah Martens, Diana Potjomkina, Jan Orbie, *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?* (Friedrich-Ebert-Stiftung South Caucasus Office 2020), 52

¹⁵³ Domestic Advisory Group under the EU-Korea Free Trade Agreement, “Opinion on the Fundamental rights at work in the Republic of Korea, identification of areas for action” (Brussels, 2013)

¹⁵⁴ “EU DAG letter to Commissioner Malmstrom_signed by the Chair and Vice-Chairs”, Epsu.org, accessed June 25, 2021, https://www.epsu.org/sites/default/files/article/files/EU%20DAG%20letter%20to%20Commissioner%20Malmstrom_signed%20by%20the%20Chair%20and%20Vice-Chairs.pdf, 1

¹⁵⁵ UN Human Rights Council, “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea” (2016), UN Doc A/HRC/36/40

¹⁵⁶ “South Korea expected to show concrete leadership on business and human rights, says UN expert group”, OHCHR, last accessed June 24 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20042&LangID=E>

¹⁵⁷ Case No 3138 (Republic of Korea) - Complaint date: 18-JUN-15, ILO, last accessed June 24 2021, https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:3247234

¹⁵⁸ European Union, “Request for the establishment of a Panel of Experts by the European Union”, (Brussels, 2019)

ETUC, ITUC, the International Federation for Human Rights and ultimately the EESC¹⁵⁹ have elaborate critics to the EU for limiting the list of breaches it aims to address through the dispute settlement procedure. The final report from the panel of experts with non-binding recommendations, that considered delivers of *amicus curiae* briefs, was brought in January 2021 (although it was expected to be delivered by March 2020) and found that South Korea should change their national laws to comply with treaty obligations. Concerning the ratification of ILO Conventions, it stated that “the fact that Korea has yet to ratify four fundamental ILO Conventions does not in itself serve as evidence of its failure to comply with the EU-Korea FTA”¹⁶⁰, adding that the provision in the FTA was “aiming for an effort, not result.”¹⁶¹. For this, the decision was praised as a victory by the EU and the Korean government.¹⁶²

The decision that contributed to the ratification of the three aforementioned fundamental ILO conventions but from which the practical effects are still to be seen, came after 7 years of the first letter from the EU DAG requesting the EU to take action, and after nearly 5 years of the European Commission ignoring DAG’s requests. In the meanwhile, the European Commission emitted an assessment of the FTA’s first five years of implementation in 30 June 2016, in which it concluded that the FTA had “worked very well”¹⁶³ and barely mentioned the labour rights situation in South Korea¹⁶⁴; just 5 days after, the President of the Korean Confederation of Trade Unions (KCTU) was sentenced to five years in prison for organizing “illegal demonstrations”.¹⁶⁵

¹⁵⁹ Deborah Martens, Diana Potjomkina, Jan Orbie, *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?*, (Friedrich-Ebert-Stiftung South Caucasus Office 2020), 51

¹⁶⁰ Laurence Boisson de Chazournes, Jaemin Lee and Jill Murray, “Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts”, 75

¹⁶¹ *ibid*

¹⁶² “FTA labour provisions useless without trade union action, says Korean unionist”, [bilaterals.org](https://www.bilaterals.org/?fta-labour-rights-provisions), last accessed June 4 2021, <https://www.bilaterals.org/?fta-labour-rights-provisions>

¹⁶³ Commission, “Report from the Commission to the European Parliament and the Council: Annual Report on the Implementation of the EU-Korea Free Trade Agreement”, COM/2017/0614 final, 12.

¹⁶⁴ Ciaran Cross, “Legitimizing an Unsustainable Approach to Trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements”, *International Centre for Trade Union Rights* (September 2017), 1.

¹⁶⁵ International Federation for Human Rights (FIDH), *Urgent Appeal - South Korea: Arbitrary detention of Mr. Sang-gyun Han, president of the Korean Confederation of Trade Unions (KCTU)* (2015)

6.3. Stakeholder Assessment of the Impact of the FTA

The EU-Korea FTA has been regarded as the “success story with respect to dialogue”¹⁶⁶ by European representatives, at the same time as the Korean government has celebrated “winning” the dispute after the final report of the panel of experts in January 2021. Inevitably, the *success* of the treaty in promoting and protecting labour rights has been marked by the developments of the activities of the institutional mechanisms in the past years. On the contrary, a rather less politicized analysis will be briefly drawn, considering the discourse on the Sustainability Impact Assessment (SIA), some regards from the most recent post- assessment document on the impact of the FTA and views from trade unions and ngo’s.

On the one hand, the ex-ante impact assessment ordered by the European Commission to IBM in association with DMI, TAC and TICON and delivered in 2008 makes little or no mention to fundamental violations of core labor rights in South Korea. In fact, the analysis is mostly *economic* and not *rights-based*, with constant references to the flexible labour market in Korea. An early description of the “social context” in the document refers that “Korean trade unions have been independent and aggressive to the extent that labour management relations are one negative area among assessments of Korea’s competitiveness”¹⁶⁷, adding that “although there are differences in the institutional framework for labour markets between the EU and Korea, (and among EU member states) there are no serious issues with core labour standards and efforts to support the decent work agenda”¹⁶⁸. This view of the state of art of fundamental labour rights in South Korea goes against calls from different ngo’s as above mentioned and ignores the view of the trade unions themselves in the context of international structures. The economic discourse, which can be justified by the fact that the EU-Korea FTA was the first of its generation to incorporate Sustainable Development Chapters and no previous similar work has been developed in impact assessments, contributes to the subordination of social rights to trade.

¹⁶⁶ James Harrison, Mirela Barbu, Liam Campling, Ben Richardson and Adrian Smith. “Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters.” *JCMS: Journal of Common Market Studies*, 57: 260– 277 (March 2019), 264

¹⁶⁷ IBM Belgium in association with DMI, Ticon, & TAC, *Trade Sustainability Impact Assessment of the EU-Korea FTA : Draft Final Report* (Brussels, 2008), 20

¹⁶⁸ *ibid*

Furthermore, the approach was drastically different in the ex-post impact assessment of the impact of the FTA in 2018 delivered by the Civic Consulting and the Ifo Institute, in which a chapter on “Human and Labour Rights analysis” was added, and that is inserted in the context of a new generation of SIA’s more centered on a human rights analysis. In the report, a *rights-based approach* is clearly entailed, and although breaches of the right to peaceful assembly and to join trade unions are recognized and episodes of abuse are described, “it (was) not possible to distinguish the impact of the FTA from the pre-existing political context of the country, which was unfavorable to unions even before the start of the provisional application of the FTA.”¹⁶⁹ Also, most of the interviews for the report have stated that the “labour rights situation in Korea, particularly regarding the freedom of association and the right to join trade unions, have deteriorated since 2011”, which corroborates ITUC’s Global Rights Index of 2017, in which Korea was included among the 10 worst ranking countries for workers’ rights in the world for the first time.¹⁷⁰

Concretely, the Panel of experts final report from January 2021 was regarded as a victory in Brussels and in Seoul for the fact that, on the one hand, the panel recognized that the Trade Unions Act was in violation of international obligations, and on the other hand admitted that concerning the ratification of the core ILO conventions the FTA only obliged the parties to make a sustained effort, which took place although insufficiently. Still, in the context of South Korea, the dispute settlement has contributed to drawing attention on the linkage between trade and labour rights. Interviewees from the EU DAG for a study of Friedrich-Ebert-Stiftung Institute¹⁷¹ noticed that they have tried to empower civil society through the DAG: “for me, it’s a big achievement that the DAGs have created a platform for discussion and it has obliged the Korean government to acknowledge that trade unions and business and trade organisations are independent, because they are members of the Korean DAG”¹⁷², says a member of the Korean DAG. On another study conducted in 2018, EU officials interviewed have noticed that the “TSD chapter cannot undermine the overall objectives of the agreement” and another

¹⁶⁹ Civic Consulting and Ifo Institute, *Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea* (Brussels, 2017), 234

¹⁷⁰ “ITUC Global Rights Index 2017: Violence and repression of workers on the rise”, ITUC CSI IGB, last accessed June 7 2021, <https://www.ituc-csi.org/ituc-global-rights-index-2017-18767?lang=en>

¹⁷¹ Deborah Martens, Diana Potjomkina, Jan Orbie, *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?* (Friedrich-Ebert-Stiftung South Caucasus Office 2020)

¹⁷² *ibid*, 53

representative stated that “Confrontation would lead to a backlash on behalf of Korea. We want to add investment protection into the agreement. If we took action under this chapter, we might lose benefits elsewhere. So we do need to think about the bigger context”.¹⁷³

Finally, the EESC has played a key role in line with the European Parliament for the triggering of the dispute resolution mechanism. In an opinion issued in 2017, it was made clear that “the implementation of the sustainable development aspects of the FTA, particularly labour issues, remains unsatisfactory”. Interestingly, it was also noted that “the civil society mechanisms in the Trade and Sustainable Development (TSD) chapter of the EU-Korea FTA have been strengthened continuously over the last five years; representativeness and balanced representation of stakeholders has improved significantly”¹⁷⁴.

When it comes to NGOs, they seem to be apprehensive of the true impact of the sustainable development chapter. Some organizations and trade unions, such as the ITUC, the ETUC and the International Federation for Human Rights have taken an active role in submitting contributions to the Panel of Experts, and in a communication after the announcement of the final report of the panel of experts, the general secretary of the ITUC, a confederation that represents trade unions in Korea and other countries, has stated : “This is a decisive moment, and the EU must seize it to begin laying the foundations for a just model of trade. The failure of past trade agreements to ensure fair production and trade with decent work have fueled the loss of trust in politics and the collapse of the multilateral trading system. There are promising signs of change, but now the European institutions’ new leaders need to deliver. If they are serious about addressing these structural issues, the international labour movement will work with them every step of the way,”¹⁷⁵

¹⁷³ Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Milton: Taylor & Francis Group, 2020) , 269

¹⁷⁴ Opinion of the European Economic and Social Committee (EESC), “Opinion on the EU-Korea Free Trade Agreement – Trade and Sustainable Development Chapter” (2018), OJ C 81/201, 3

¹⁷⁵ “Trade justice: historic opportunity as European Union calls for review of Korea’s neglect, ITUC-CSI.org”, last accessed at 24 June 2021, <https://www.ituc-csi.org/EU-Korea-FTA-labour?lang=en>

6.4 Conclusions

The EU-Korea FTA was the first and only in which the dispute settlement mechanism concerning social standards has been triggered. The effectiveness of the mechanisms based on cooperation and dialogue- and of the obligations enshrined in the text of the treaty- is limited but promising.

Firstly, labour rights obligations appear in the text of the treaty as vague and somehow contradictory. On the one hand, the parties only commit themselves to work towards the ratification of “fundamental” and other “up-to-date” ILO Conventions, and to implement Conventions they have already ratified, which might be even more absent of legal duties if considering the premise that countries are free to determine their own level of protection. The fact that the obligation to ratify core conventions is not an obligation of result and that States remain free to define their level of labour protection indicates that such clauses do not concern harmonization of labour standards to comply with universal human rights and that labour rights should not get in the way of commitments of market opening. On the other hand, these provisions don’t seem to add anything new to existing obligations under International Public Law. The only new element brought by the FTA is the cooperation procedures that can scrutinize the obligations under FTA, which have demonstrated to be problematic.

In fact, the labour clause is left out of the state-to-state dispute settlement mechanisms which ultimately leads to it being unenforceable. Notably, this power-dynamic is also reflected at the multilateral level where the WTO entails a strong international court (the Appellate Body) and the ILO can only assure core labour rights standards through cooperation and non-binding decisions. Further, the fact that the system is unable to impose respect for core labour rights without the oppressor’s autonomous consent, which was corroborated by the years of dialogue that did not improve the worker’s rights in Korea nor lead to the ratification of Conventions 87, 98 and 29, contributes to the weakening of the value of human and labour rights in the eyes of the stakeholders involved.

Besides, the Commission has made clear that the aim of labour provisions in the EU-Korea FTA is to mitigate the impact of the treaty¹⁷⁶, which means that the protection of labour rights under the FTA is subject to a causality effect. Not only this is extremely hard to prove, making the triggering of dispute settlement mechanisms even harder, but can also be insufficient if we consider the recently discussed obligations of states to promote and protect human rights extra-territorially when they are in a special position of influence.

Considering the practical implementation of the social clause in the EU-Korea FTA, the collaboration of the European Parliament in promoting sustainable development has been key. Notably, the European Parliament was pushed by civil society representatives in Brussels to pass the resolution that led to the European Commission turning to the dispute settlement mechanism, which illustrates the importance of the democratic arm in Europe. Nevertheless, the resistance from the European Commission took too long to brake, which shows the need to strengthen the Commission's accountability towards civil society.

Another question is the need for empirical research on whether and how civil society representatives can have a more effective role in promoting social rights within the implementing mechanisms set up in the EU Free Trade Agreements. The EUKFTA has proved positive in involving civil society with DAG's, which for the Korean side has meant the recognition of organizations and trade unions in the eyes of the government. Nevertheless, the lack of prioritization of social standards by the Korean authorities has undermined the process of implementation, which is a predictable consequence of mechanisms based on dialogue and cooperation. Generally, the inclusion of civil society in the implementation of labour clauses has been seen by the International Institute for Labour Studies (IILS) as a way to increase effectiveness of the social provisions in trade¹⁷⁷, and research suggests that dialogue and consultation within implementing

¹⁷⁶ "The main flanking policy measures to mitigate negative and enhance positive social FTA impacts relate to the improvement of employment options, core labour standards and decent work principles, promoting employment participation, and promoting gender equality." Commission Services Position Paper, "Trade Sustainability Impact Assessment of the Free Trade Agreement between the Eu and the Republic of Korea" (Brussels 2010)

¹⁷⁷ Lore Van Den Putte, "Involving Civil Society in the Implementation of Social Provisions in Trade Agreements: Comparing the US and EU Approach in the Case of South Korea", *Global Labour Law Journal* 6(2) (May 2015) , 222

mechanisms contributes to enhancement of labour standards in partner countries for the fact that civil society involved learns from advocacy in the EU¹⁷⁸.

Finally, are labour provisions in the EU-Korea FTA effective? They could be regarded as valuable when it comes to influencing behavioral change of stakeholders different than the government, such as ngo's or trade unions. But in terms of leading to constitutive change and tackling issues of worker's rights violations, they have proved to be mostly ineffective and costly.

Perhaps a more holistic approach to sustainability of trade that is not only reduced to the sustainable development chapter should also be entailed. EU former Trade Commissioner Peter Mandelson has said that "Trade creates jobs and decent jobs lift people out of poverty", but according to the Sustainability Impact Assessment the expansion of Trade that comes with the EU-Korea FTA will not have a direct impact on levels of poverty, at least in the next decade. In fact, "the limited employment shifts that are anticipated to occur are unlikely to have either positive or negative effects on poverty" and "the most significant effects of the EU-Korea FTA are likely to be to increase productivity and efficiency and to stimulate technological innovation in a number of sectors", which "could be useful in address(ing) the social challenges (...) with aging populations and contribute to addressing common global environmental challenges."¹⁷⁹ Do these gains overpass the inherent environmental cost of trading with a country so geographically far, with all its mechanisms and meetings that entail a carbon footprint probably bigger than their impact? Furthermore, in article 13.1 of the FTA, states reaffirm their commitments to "promoting the development of international trade in such a way as to contribute to the objective of sustainable development and will strive to ensure that this objective is integrated and reflected at every level of their trade relationship", but this words fall out of meaning when labour rights are negotiable or seen as economic indicators in the corresponding SIA; Maybe it would have been more interesting if in the Terms of Reference of the Impact Assessment the Commission had asked: What would a FTA between the EU and North Korea based on the principle of sustainable development as its primary objective and goal look like?

¹⁷⁸ *ibid*

¹⁷⁹ ¹⁷⁹ IBM Belgium in association with DMI, Ticon, & TAC, *Trade Sustainability Impact Assessment of the EU-Korea FTA : Draft Final Report* (Brussels, 2008), 29

7. The case of Vietnam

The EUVFTA is one of the most recent FTA celebrated by the EU, and constitutes a trade relation where the political cleavage between the two blocks is outstanding. The case of Vietnam will allow to draw conclusions on how the EU should address trade partners who do not share the same fundamental values in relation to labour rights and how labour provisions are effective in such cases.

7.1. Key Labour Provisions in the FTA

From a textual point of view, the structure of the EUVFTA in its chapter 13 is similar to the one from the EUKFTA. Concerning core obligations, commitments with Vietnam are less clear and weaker than with Korea; still, the implementing mechanisms remain the same.

On the one hand, the TSD Chapter provides that the parties *reaffirm their commitments* to “respect, promote and effectively implement the principles concerning fundamental rights at work”¹⁸⁰, as well as to “effectively implement in (their) domestic law and regulations and practice”¹⁸¹ ILO conventions previously ratified. Notably, there is no commitment to ratify other “up-to-date” ILO Conventions as there is in the EUKFTA, and the words used in relation to core labour standards are less robust: whereas the EUKFTA states that parties “commit to”, in the EUVFTA parties “reaffirm their commitments to” respect, promote and realize core labour rights. It seems that in the later agreement any hard obligations are even more uncertain than in the EUKFTA. Once again, even the obligation to ratify ILO fundamental conventions, which is the benchmark of the TSD chapter when it comes to labour rights, is dependent upon sustained efforts from the Vietnamese government.

On the other hand, the EU-Vietnam TSD Chapter provides for three different bodies similarly to the EUKFTA, that add to the designation of a contact point within the administration of each Party¹⁸². First, the Committee on Trade and Sustainable Development works under the umbrella of the Trade Committee and is composed of representatives of the government of each party. Secondly, the treaty comprises two Domestic Advisory Group’s (DAG’s), one representing each party of the treaty. The two

¹⁸⁰ Article 13.4/2 of the EU-Vietnam Free Trade Agreement (2020) L186/63

¹⁸¹ Article 13.4/4 of the EU-Vietnam Free Trade Agreement (2020) L186/63

¹⁸² Article 13.15 of the EU-Vietnam Free Trade Agreement (2020) L186/63

DAGs should meet at least once a year on a so called Joint Civil Forum that fosters dialogue on the Chapter and should include different stakeholders. Finally, the Panel of Experts is the institutional mechanism that ultimately examines and decides on disputes between the parties. Similar to the EUKFTA, in case of a dispute arising, the default process for its resolution starts with government-to-government consultations, and if after a certain time frame the issue is still in place, the Trade Committee can advise on a solution on the matter. If needed, ultimately, the establishment of the Panel of Experts may be activated.

Moreover, the Domestic Advisory Groups should contain “ independent representative organisations, ensuring a balanced representation of economic, social and environmental stakeholders, including, among others, employers' and workers' organisations, business groups, and environmental organisations”¹⁸³, which can be hard to imagine in a country like Vietnam which is a one party state where “freedom of expression, religious freedom and civil society activism are tightly restricted”¹⁸⁴. Additionally, the only legally recognized trade union in the country and deeply connected to the government, the Communist Party of Vietnam, considers civil society “in the western sense as an “evil force”¹⁸⁵ that pursues the undermining of Vietnamese society. Possibly this is the reason why, on the contrary to the EUKFTA, the text of the treaty reaffirms that it is solely the responsibility of Vietnam to appoint its members of the DAG¹⁸⁶. In relation to this, another decisive difference to the text of the EUKFTA is that in the case of Vietnam “new or existing domestic advisory groups will be consulted”¹⁸⁷, whereas in the EUKFTA, such institutional body has to be constituted afterwards¹⁸⁸, which might be an easy way for the Vietnamese government to choose organizations close to the party and officially considered representative of civil society without having to justify how any organization would not be independent as required in the agreement.

Finally, the labour provisions in the treaty with Vietnam also seem to break expectations when compared to previous recent agreements by excluding certain

¹⁸³ Article 13.15/4 of the EU-Vietnam Free Trade Agreement (2020) L186/63

¹⁸⁴ “Vietnam”, Freedom House.org, last accessed June 24 2021, <https://freedomhouse.org/country/vietnam>

¹⁸⁵ Mai Ha Thu, Erwin Schweißhelm, “Labour rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement”, *Institute for Political Economy Berlin*, Working Paper no 135/2020 (March 2020), 6

¹⁸⁶ Article 13.5/4 of the EU-Vietnam Free Trade Agreement (2020) L186/63

¹⁸⁷ Article 13.12./4, *ibid*

¹⁸⁸ Article 13.12 of the EU-Korea Free Trade Agreement (2011) L127/6

standards that seem to be already part of the model. In fact, the Free trade Agreements with Canada or Mercosur both contain more far-reaching labour obligations. Concretely, art. 4 of the EU-Mercosur FTA includes the safeguarding of standards regarding health and safety at work, compensation for illness or injury and decent wages, as well as efforts to ensure labour inspections and administrative and judicial mechanisms in case of violation of these rights. The non-inclusion of these otherwise considered labour provisions is even more problematic concerning the rights related to social protection. In the Framework of the Trade and Sustainability Impact Assessment for the EU-ASEAN FTA the Commission noticed that it is expected that agriculture in Vietnam, the biggest sector in the country, would be severely impacted by unemployment as a result of the agreement¹⁸⁹, and Vietnam has not ratified ILO Conventions 102 on Minimum Standards in Social Security or 168 on Employment Promotion and Protection Against Unemployment¹⁹⁰, meaning that access to social protection ranges from “limited to inexistent”¹⁹¹.

7.2.Previous State of Affairs and Legal reforms

The EU-Vietnam Free Trade Agreement comes in the context of 30 years of diplomatic relations between the two countries and according to the EU commission is “the most ambitious and comprehensive FTA that the EU has ever concluded with a middle-income country” and “sets a new benchmark for Europe’s engagement with emerging economies”¹⁹².

We assume the former EU Commissioner for Trade Cecilia Malmstrom was referring to the great economic impact of the FTA which is notorious in the case of the Vietnam, since it will reduce by 99 percent import duties on Vietnamese goods just in the first seven years of enforcement and counterbalance the economic and political impact of China in

¹⁸⁹ European Commission, “Commission Services' Annex on Vietnam to the Position Paper on the Trade Sustainability Impact Assessment of the Free Trade Agreement Between the EU and ASEAN” (Brussels: 2016), 1

¹⁹⁰ “Ratifications for Viet Nam”, ILO, last accessed June 24 2021, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::p11200_country_id:103004

¹⁹¹ International Trade Union Confederation, *2019 The World’s Worst Countries for Workers*, (Brussels: General Secretary, 2020); also ECORYS, IIDE, CATIF, IT IS, CES , *Mekong and PT Inaon Luhur Pertiwi, Trade Sustainability Impact Assessment for the FTA between the EU and ASEAN*, (Brussels: 2008), TRADE07/C1/C01 – Lot 2 ,88-89

¹⁹² EU-Delegation to Vietnam, “Guide to the EU-Vietnam free trade agreement” (March 2019), 6

the country.¹⁹³ Contrarily, labour provisions are not as ambitious and are even weak when compared to previous standards established with the country. In fact, in the text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed by Vietnam in January 2019 the parties agree to adopt and maintain the ILO Core Labour Standards as well as “acceptable conditions of work with respect to minimum wage, hours of work, and occupational safety and health in its laws and practices”¹⁹⁴ and even foresee the possibility for civil society to make submissions to the Labour Council of each government alongside with trade sanctions to address violations. The model in the CPTPP is far from being a desirable model when it comes to the protection of labour rights, but the fact that it is bolder than the EUVFTA should, to say the least, embarrass EU officials who have pledged a “value-based” trade policy for more than a decade now.

Furthermore, the inconsistency of the agreement in light of EU’s Trade Policy is wider than the content of the labour provisions per se. Vietnam is considered an authoritarian state and political resistance is violently repressed. In the last years, at the same time the country embraced the free market approach and is seeking investment and economic growth, silencing of dissident voices and organizations has increased¹⁹⁵. While the number of prisoners of conscience has been rising in the past years, in 2020 a record high number was reported by Amnesty International¹⁹⁶, with many of the victims being labour rights activists who are subjected to arbitrary and mass arrests that can often lead to torture¹⁹⁷. The topic of worker’s rights is particularly sensitive in Vietnam, with working conditions being poor, access to social protection limited or inexistent and migrant workers being subject to forced labour and legally excluded from joining trade unions¹⁹⁸.

¹⁹³ Mai Ha Thu, Erwin Schweißhelm, “Labour rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement”, *Institute for Political Economy Berlin*, working Paper no 135/2020 (March 2020), 17

¹⁹⁴ Ibid, 21

¹⁹⁵ “Vietnam Wants Western Politicians, Not Western Politics”, *Foreign Policy*, last accessed June 24 2021 <https://foreignpolicy.com/2019/02/27/vietnam-wants-western-politicians-not-western-politics/>

¹⁹⁶ “Vietnam steps up online crackdown, jailed activists at record high – Amnesty”, *Reuters*, last accessed June 25 2021, <https://www.reuters.com/article/vietnam-security-socialmedia-idUSKBN28A2GC>

¹⁹⁷ International Trade Union Confederation, *2019 The World’s Worst Countries for Workers*, Brussels: General Secretary, 2020. Accessed June 24, 2021. <https://www.ituc-csi.org/IMG/pdf/2019-06-ituc-global-rights-index-2019-report-en-2.pdf>

¹⁹⁸ “Vietnam”, *ITUC-csi.org*, last accessed June 24, 2021, <https://survey.ituc-csi.org/Vietnam.html?lang=en#tabs-2>

In 2011 Human Rights Watch published a shocking report¹⁹⁹ describing how children struggling with drug addiction were being tortured and subject to forced labour through “labour therapy” programs, which was followed up by a 2014 report from International Labour Rights Forum²⁰⁰. Also, internet is under surveillance and freedom of speech, association and assembly is highly undermined²⁰¹ and although the laws in Vietnam tend to recognize different freedoms and rights – such as the right to freedom of association, the prohibition of anti-union discrimination or the right to strike- in practice they do not provide adequate means for protection or strictly regulate it. ²⁰² At the same time, the Vietnam General Confederation of Labour (VGCL) is the only legally recognized trade union in Vietnam and remains strongly linked to the Communist Party of Vietnam (CPV) and the Government²⁰³. When asked about the issue of freedom of association, a representative of the VGCL has stated that “the VGCL does not hold an official opinion on freedom of association. You will not find anything in writing. We follow the Party’s line on the issue.”²⁰⁴ Only a few ngo’s operate in Vietnam due to the harsh repression from the government. ²⁰⁵

In light of this, 18 European and Vietnamese ngo’s addressed a letter to the European parliament to postpone its approval of the EUVFTA, urging the parliament to use the existing leverage until human rights benchmarks are met²⁰⁶. Moreover, the European Parliament had assessed the human rights situation in Vietnam in at least three different occasions²⁰⁷ through different resolutions expressing deep concerns about abuses perpetrated by the government concerning a diverse set of human rights; despite them, the European Parliament issued in 12 February 2020 its consent for the conclusion of the

¹⁹⁹ “The Rehab Archipelago: Forced Labor and Other Abuses in Drug Detention Centers in Southern Vietnam”, Human Rights Watch, last accessed June 24 2021, <https://www.hrw.org/report/2011/09/07/rehab-archipelago/forced-labor-and-other-abuses-drug-detention-centers-southern>

²⁰⁰ “Vietnam’s Forced Labor Centers”, International Labour Rights Forum, last accessed June 24 2021, <https://laborrights.org/publications/vietnams-forced-labor-centers>

²⁰¹ “Vietnam”, ITUC-csi.org, last accessed June 24, 2021, <https://survey.ituc-csi.org/Vietnam.html?lang=en#tabs-2>

²⁰² *ibid*

²⁰³ Mai Ha Thu, Erwin Schweißhelm, “Labour rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement”, *Institute for Political Economy Berlin*, working Paper no 135/2020 (March 2020), 24

²⁰⁴ *Ibid*, 24

²⁰⁵ *Ibid*, 28

²⁰⁶ “Eighteen NGOs call on European Parliament to postpone approval of EU/Vietnam trade agreements”, Agence Europe, last accessed June 24 2021, <https://agenceurope.eu/en/bulletin/article/12363/26>

²⁰⁷ European Parliament Resolution P8_TA(2016)0276 of 9 June 2016 on Vietnam ; European Parliament Resolution P8_TA(2017)0496 of 14 December 2017 on freedom of expression in Vietnam ; European Parliament Resolution P8_TA(2018)0459 of 15 November 2018 on Vietnam.

FTA.²⁰⁸ The European Commission received well the consent, emphasising that labour provisions in the FTA are “strong, legally binding and enforceable”²⁰⁹. At the same time, the EU-Vietnam Human Rights Dialogue is another instrument in the context of the EU-Vietnam cooperation and is led by the EU Delegation in Hanoi²¹⁰, and is deemed by Human Rights Watch has “bringing no results”²¹¹.

In 2014, the FIDH and the Vietnam Committee on Human Rights (VCHR) addressed a complaint²¹² to the European Ombudswomen in which the organization claimed that a human rights impact assessment should have been conducted before the approval of the EUVFTA²¹³, supported on legal obligations arising from the Treaty of Lisbon, the Commission’s approved strategy from 2009 and 2011, and the positions from European Parliament and the Council. The former EU-Ombudswomen, Emily O’Reilly recognized in March 2016 in a non-binding decision that the absence of such human rights audit constituted mal-administration and a breach of article 21 of the Treaty of Lisbon²¹⁴. However, the European Commission did not conduct such impact assessment.

Despite the fact that the European Commission did not take an active approach in face of the Vietnamese government’s flagrant violations catalogue, a few remarkable legal changes took place since the negotiations of the agreement. Firstly, in June 14th 2019 the National Assembly of Vietnam approved the ratification of ILO Convention 98 on the Right to Organise and later on the 8th of June 2020 ILO Convention 105 on Abolition of Forced Labour alongside with the EU FTA, leaving only one of the 8 fundamental ILO conventions to be ratified. On November 20, 2019 the National Assembly of Vietnam

²⁰⁸ European Parliament resolution P9_TA(2020)0027 of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Vietnam.

²⁰⁹ “Commission welcomes European Parliament’s approval of EU-Vietnam trade and investment agreements”, European Commission, last accessed June 24 2021 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2114&title=Commission-welcomes-European-Parliaments-approval-of-EU-Vietnam-trade-and-investment-agreements>

²¹¹ “Vietnam: events of 2020”, Human Rights Watch, last accessed June 24 2021, <https://www.hrw.org/world-report/2021/country-chapters/vietnam>

²¹² “EU-Vietnam: FIDH and VCHR submit a Complaint to EU Ombudsperson”, FIDH, last accessed June 24 2021 <https://www.fidh.org/en/region/asia/vietnam/eu-vietnam-fidh-and-vchr-submit-a-complaint-to-eu-ombudsperson>

²¹³ Notably, The European Parliament also adopted a resolution on 17 April 2014 urged the Commission to carry out a human rights impact assessment “in line with the guiding principles of the UN Special Rapporteur on the right to food”. European Parliament resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement (2013/2989(RSP)).

²¹⁴ See the overview of the case at: “The Commission’s failure to carry out a human rights impact assessment of the envisaged EU-Vietnam free trade agreement”, European Ombudsman, accessed July 12 2021, <https://www.ombudsman.europa.eu/en/opening-summary/en/54682>

also adopted a revised labour code that enhanced milestone changes in respect to freedom of association. According to the ILO, the “most important change in the revised Labour Code, comprising 17 chapters with 220 articles, is the ability of workers in enterprises to exercise their rights to form or join a representative organisation of their own choosing.”²¹⁵ Still, new trade unions have to ask permission from authorities to operate and exercise rights such as organising strike actions.²¹⁶ If a correlation of causality between the new legislative reforms and Vietnam’s opening to international economy and the signature of the FTA with the EU cannot be assured, the practical effects of such changes are still to be seen.

7.2.1. Practical Enforcement of Legislation

The legislative changes allowed Vietnam to be one of the few countries in the world in which the overall state of labour rights improved in 2020 according to the ITUC, with systemic violations of rights declining, although still maintaining its position among the worst countries regarding labour standards in the world. On the other hand, some more sceptical voices distrust the legal changes of the Labour Code that allows for workers to “exercise their right to form or join a representative organisation of their own choosing, which does not have to be affiliated to the Vietnam General Confederation of Labour”²¹⁷.

The criminal code of Vietnam still limits freedom of expression and behaviours considered as contrary to the interests of the state, namely joining organisations, and thus independent labour unions; also, freedom of expression is highly limited to the interests of the state.²¹⁸ Some also doubt that the government will actually allow for there to be other legally recognized trade unions, such as Vũ Quốc Ngữ from the ngo Defend the Defenders, who has stated: “Unless the Communist Party wants to carry out far-reaching political reforms, it will not allow the formation of independent unions that would

²¹⁵ “ILO applauds Vietnam’s adoption of revised Labour Code”, Vietnam+, accessed June 24 2021, <https://en.vietnamplus.vn/ilo-applauds-vietnams-adoption-of-revised-labour-code/164081.vnp>

²¹⁶ “Vietnam”, ITUC-csi.org, last accessed June 24, 2021, <https://survey.ituc-csi.org/Vietnam.html?lang=en#tabs-2>

²¹⁷ “Revised Vietnamese Labour Code to Help Everyone Gain Fair Shares of Economic Growth”, ILO, last accessed June 24, 2021, https://www.ilo.org/hanoi/Informationresources/Publicinformation/newsitems/WCMS_729339/lang-en/index.htm

²¹⁸ Arts 109, 116-118. Full text (in English) at <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn086en.pdf> last accessed July 14 2021

threaten its political monopoly”²¹⁹. To the moment, there are no other legal trade unions beside the Vietnam General Confederation of Labour (VGCL).

7.3 Stakeholder Assessment of the Impact of the FTA

Different organizations engaged in the protection of worker’s rights have expressed serious concerns at the early stage of negotiations. As mentioned, Vietnamese and international organizations have written open letters to the European Parliament to urge MEPs to postpone their consent over the FTA until certain conditions are met, which was not fruitful. Other independent organizations in Vietnam raised fears that a proper civil society mechanism to implement the mechanisms in the TSD Chapter is politically hard to achieve.²²⁰ As for the content of the labour provisions themselves, Human Rights Watch has described them as vague and non-enforceable²²¹ and the ETUC specifically stated to be concerned over the fact that the “Sustainable Development (TSD) chapter of the EU-Vietnam FTA does not contain a mechanism to effectively enforce an obligation to respect these conventions in law and in practice”.²²² Contrarily, the VGCL stands in favour of the agreement and did not speak publicly about its relation to labour rights, which does not come as a surprise since it is mainly composed of communist party’s bureaucrats.²²³

7.3 Conclusions

The EUVFTA has shown to be ill equipped when it comes to promoting and effectively protecting labour rights, even if compared to the EUKFTA. Most importantly, it has brought to the table a more preeminent question that needs to be addressed before

²¹⁹ “Is there a glimmer of hope for Vietnamese workers?”, Equal Times, last accessed June 24 <https://www.equaltimes.org/is-there-a-glimmer-of-hope?lang=en#.YMy2uWgzZPY>

²²⁰ These are the Human Rights Space (HRS) and iSee (Institute for Studies of Society, Economy and Environment in a non-published report from 2017 on the implications of the EVFTA on civil society organisations in Vietnam asked by the European Embassy in Vietnam. Mai Ha Thu, Erwin Schweißhelm, “Labour rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement”, *Institute for Political Economy Berlin*, working Paper no 135/2020 (March 2020)

²²¹ “Vietnam: events of 2020”, Human Rights Watch, last accessed June 24 2021, <https://www.hrw.org/world-report/2021/country-chapters/vietnam>

²²² “ETUC position on the EU-Vietnam Free Trade and Investment Protection Agreements”, ETUC.org, last accessed June 24 2021, <https://www.etuc.org/en/document/etuc-position-eu-vietnam-free-trade-and-investment-protection-agreements>

²²³ Mai Ha Thu, Erwin Schweißhelm, “Labour rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement”, *Institute for Political Economy Berlin*, working Paper no 135/2020 (March 2020), 28

future negotiations concerning the sustainability of negotiating with partners who do not share the same values on democracy and pluralism.

To start with, the EUVFTA falls into the same political mistake as in the case of the EUKFTA of not providing labour rights with strong and enforceable dispute resolution mechanisms. Also, the dispute resolution entailed in the text of the agreement opens no space for claims brought by private stakeholders, which appears directly in contrast with the Investor Dispute Settlement Mechanisms (ISDS) in the EU-Vietnam Investment Protection Agreement signed in June 2019, which foresees international courts before which companies can bring claims against parties of the agreement. Once again, the fragile provisions in respect to implementation of labour rights reflect a subjugation of these to trade interests reflected in other chapters of the agreement and might even contribute to weakening of their strength as universally recognized human rights. At the same time, the absence of strong legal commitments do not ensure the protection of labour rights in line with the high-level labour rights the EU should promote in its external policy, especially considering the economic leverage of the EU over Vietnam before the agreement.

This issue is closely linked to the constitution of the DAG's. The European Commission seems to hold to the idea that DAG's are composed of "independent representative organisations", meaning independent civil society groups in Vietnam. But this is hard to believe in the political context of Vietnam's autocratic regime, and so a serious and effective monitoring of the TSD chapter by social stakeholders as foreseen in the agreement is undermined. Furthermore, the DAG's overall role is also to be reflected upon, as the text of the agreement entails that DAG's can submit recommendations and views to the parties, but there is no obligation on the parties to follow up on these. In the same way, DAG's are only included in the Panel of Experts mechanism if the chosen experts decide in such way.

All things considered, it seems that in the case of Vietnam the purpose of this mechanism is simply to publicly and politically support the FTA. It is hard to suppose that the European Commission truly believes that the mechanism will be effective considering Vietnam's political framework, so we can only assume that the DAG and even all the TSD chapter are ticking boxes to reassure the democratic validity of the agreement.

A brief note should also be made on the role of the European Parliament. If in the case of Korea it was a fundamental player in upholding labour rights and triggering mechanisms, in the case of Vietnam it is a shame that it did not have a more persistent and consistent voice in upholding the idea that Vietnam should have addressed certain blatant human rights violations before the signing of the agreement. Without such, the European Parliament approved a TSD chapter that is empty of practical application in a partner country where dissident stakeholders are violently repressed. For this reason, we defend that where trading partners have authoritarian regimes in place and do not share the core political values of the EU ex-ante conditionality on key elements should be requisite. Passing agreements where the most basic spaces for dialogue that can allow for progress and influence in enhancing labour rights are inexistent or fraudulent means ignoring years of a progressively build approach to value-based trade, and admitting that core values are dispensable when economic interests are appealing.

Finally, it is hard to assess if the legislative changes and even the signature of two core ILO conventions will conduct to an easing of repression. Still, they represent a positive possible outcome of the agreement and an opportunity for the EU to remind Vietnam of its intrinsic obligations in the times that follow.

8. Strengthening Effectiveness

Using the European market leverage to encourage trading partners to implement effective environmental and social standards has proved not only to be an ethical imperative but also a legal obligation under the constitutional framework of the EU. Too, the CESCR has emphasized that “States parties should ensure that the right to just and favourable conditions of work is given due attention in the conclusion and implementation of international agreements, including in bilateral, regional and multilateral trade and investment agreements” and that “States parties should ensure that other international agreements do not negatively affect the right to just and favourable conditions of work”²²⁴. However, the phenomenon of labour rights provisions in EU FTA’s has resulted in more frustration than reforms, whether because of Commission’s overt preference for the so-called “cooperative approach”, the extensive and unclear design of obligations in the text of the FTAs or because of the lengthy and “toothless” functioning of the monitoring mechanisms.

We propose a reform of labour rights provisions in free trade agreements with the aim of enhancing three goals in line with human rights principles: to wider and empower stakeholder participation and inclusion, to ensure accountability for labour rights violations and to guarantee that the trade deal itself *does no harm*. Furthermore, for the EU to have a realistic and serious Trade Policy that tackles issues of labour rights, violations need to be addressed in a less politically conforming way and the whole text of the trade agreement should be put in the service of sustainable development. In fact, the core text of the trade agreement may be no less decisive in enabling sustainable development, and therefore labour rights, as the TSD chapter itself.

Furthermore, labour provisions should be designed in a way that encompasses the problem of historical and global (in)justice that has contributed to existing social inequalities. This means that the EU should take into account development asymmetries when it is the case and be intransigent when there is blatant and deliberate suppression of core labour rights. In this respect, a clear distinction between core labour rights that create obligations on the state to refrain from acting- such as freedom of association or the right

²²⁴ UN Committee on Economic, Social and Cultural Rights, “General comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)”, (2016) UN Doc E/C.12/GC/23, 19

to collective bargaining- should be made upon other rights such as most of those that derive from the ILO Decent Work agenda and that might be progressively achieved. Considering development asymmetries, mechanisms that target companies' violations should be brought to attention in contexts where targeting countries might contribute to impairing their growth²²⁵. Moreover, sustainability and particularly social rights, are also a problem within the EU, and FTA standards apply in both directions.

Different emerging instruments that strengthen the links between market access and progress in the protection of labour rights will be briefly touched upon. Finally, in line with an holistic approach that asks the fundamental question of how to put trade in service of sustainable development, the success of labour provisions is also dependent on processes such as impact assessments or trade due diligence.

8.1. Clarifying Obligations

Often in literature scholars make the case that compliance with provisions is hindered by the lack of clearness of the standards in the agreement, and assume that robust labour standards in the text of the agreement would be impossible. But the fuzziness through which obligations are presented in FTAs is only commensurate with the attention and relevance European technocrats have been giving to sustainability- which is unsatisfying giving the democratic urge behind it.

There are usually two groups of obligations in FTA: obligations based on existing international agreements and obligations related to existing domestic legislation. The first ones encompass an obligation to ratify specific international conventions if not done yet²²⁶ and an obligation to *respect, promote, and realize* fundamental principles. As for the obligation to ratify certain ILO conventions, the problem is that it is formulated as a “best effort” obligation²²⁷, which can lead to hurdles. In the ruling of the EU-Korea dispute by the panel of experts, the EU’s complaint that Korea had violated its “continued and sustained efforts” to ratify core conventions was rejected on the basis that the FTA only imposes an obligation to apply best efforts with no agreed time frame for

²²⁵ Olivier De Schutter, *Trade in the Service of Sustainable Development : Linking Trade to Labour Rights and Environmental Standards*. (Oxford: Hart Publishing, 2015), 174

²²⁶ See, For example, art. 13.4(3) EU-Vietnam FTA(2020) L186/63 and Article 13.4 EU-Korea FTA (2011) L127/6

²²⁷ See, for example, Article 13.4(3) EU–Vietnam FTA (2020) L186/63 and Article 13.4 EU–Korea FTA (2011) L127/6

ratification²²⁸. This was praised as a political victory by Korea, which puts the seriousness of TSD chapters in doubt.

A political alternative would be for the EU to have a more stringent role before ratification and to insist on partners to ratify core ILO conventions, or at least to have a voting in their democratic decision-making organs before the signing of the agreement. This partially happened with Vietnam, where diplomatic pressure led to the signature of ILO Convention 98 on collective bargaining in June 2019²²⁹. Additionally, a roadmap to tackle some of the most prominent violations in light of the 8 core ILO conventions with a consistent follow-up to ensure compliance should be drawn, and for this the European Parliament should play a proactive role. For example, in a resolution the European Parliament called on Vietnam to present an “ambitious roadmap for the eradication of child labour by 2025 and to eliminate forced labour, modern slavery and human trafficking by 2030”²³⁰. This would be the least reasonable political pressure- and still far from sufficient- to put on trading partners such as China when considering issues such as forced labour among Uyghur communities and the recent investment deal concluded in December 2020 but not yet adopted.

As for the obligation to entail certain international principles even if the corresponding convention has not been ratified, it should have a central importance in the set of labour provisions in TSD chapters. In fact, the aforementioned panel decided that Korea had infringed the principle of freedom of association, which substantiates a key ILO Declaration²³¹ and therefore is inherent to ILO membership, even if Korea had not ratified ILO Convention 87²³², demonstrating that this provisions are more than soft law but binding obligations. Although this decision can have important implications for future cases, the wording of the text needs to be more incisive, meaning that there should be a clear obligation to respect core labour standards which is not formulated with soft words

²²⁸ Laurence Boisson de Chazournes, Jaemin Lee and Jill Murray, “Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts”, 74 and 77

²²⁹ See Commission, “Report on the Implementation of EU Trade Agreements”, COM (2020) 705 final, 29

²³⁰ European Parliament, “European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam” (06050/2019 – C9-0023/2019 – 2018/0356M(NLE))

²³¹ it is safeguarded in the ILO Declaration of Philadelphia (1944) and the ILO Declaration on Fundamental Principles and Rights at Work (1998)

²³² Laurence Boisson de Chazournes, Jaemin Lee and Jill Murray, “Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts”, 35

and does not depend on sustained efforts, and that is given a visible central role in the text of the TSD chapter.

On obligations related to domestic legislation, the parties are asked not to weaken domestic labour laws (non-regression) and not to fail in enforcing the same laws (non-enforcement). The main problem is that both the obligations are conditioned to a link with trade, which should be intended or shown upon factual impacts on trade. These two clauses need clarification. First of all, it is extremely hard to prove a link to trade, which makes the application of these provisions almost impossible. The concept of “trade-related” should be widely interpreted for them to be applicable, with an explicit reference being drawn on the text. Thus, the weakening and failure to enforce laws that materially legislate over core labour standards should not be dependent on a shown relation to trade, otherwise the previously mentioned obligation to respect and protect core labour standards would be emptied of meaning.

8.2. Including Civil Society and ensuring Accountability

The effectiveness of human rights protection in the context of economic globalization depends greatly on the capability of holders to claim their rights, which follows the logic of upholding individuals in the international order as subjects of international law and that are thus entitled to international rights. In this regard, the EU has not been effective in providing procedural guarantees- or even well-defined procedural channels - to rights holders and other private parties.

In November 2020 the European Commission announced a new “single entry point” at its services for private stakeholders to raise complaints about treaty violations, which includes TSD chapters²³³. Although apparently this might seem like a positive measure, it comes with no procedural guarantees in contrast with other mechanisms -such as the one for the protection of intellectual property rights in the EU Trade Barriers Regulation (TBR) that delivers certain procedural rights as the right to time-limited responses, in depth-investigations, and judicial control by the European Courts of specific legal assessments²³⁴- is rather weak. In fact, it doesn’t add much to the existing long-

²³³ Commission, “Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements” (Brussels, 2021)

²³⁴ Marco Bronckers and Giovanni Gruni, “Retooling the Sustainability Standards in EU Free Trade Agreements”, *Journal of International Economic Law* 24, n° 1 (March 2021): 35

standing complaints in the shape of letters from stakeholders that as we have seen in the Korea's case, are subject to the Commission's full discretion to address them.

Otherwise, the Domestic Advisory Groups, which are constituted by representatives of the European Economic and Social Committee, labour unions, employer federations, and civil society organizations²³⁵, are the only spaces where different stakeholders can deliver concerns over labour rights issues. The DAG's also meet in the so called Joint Civil Society Forum (CSF) for exchange and dialogue. Although this spaces have developed an important role in giving voice and providing a safe space for NGO's to develop and contact with more empowered NGO's elsewhere, which is particularly important if we consider the central role of bottom organizations in making human rights local and situation specific²³⁶, they have not been properly entitled with channels to address complaints.

At the same time, the current method of dispute settlement when it comes to the TSD chapter is downgraded by the fact that decisions from the panel of experts don't have a binding effect, different from all the other disputes over other provisions in the agreement. The context in which this *lex specialis* undermines the strength of labour rights in of free trade agreements has been already developed upon. Concerns over these issues have been raised by the European Parliament²³⁷ to which the European Commission responded with two non-papers in 2017²³⁸ and 2018²³⁹. Further, there is a growing consensus among scholars that it is undesirable for disputes arising under the SDC to have a differential treatment from the ones arising from all the other chapters of the FTA.²⁴⁰

²³⁵ Marco Bronckers and Giovanni Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements", *Journal of International Economic Law* 24, n° 1 (March 2021): 35

²³⁶ Feyter, Koen De. "Localizing Human Rights". In *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization*, edited by Wolfgang Benedek, Koen De Feyter, and Fabrizio Marrella. European Inter-University Centre for Human Rights and Democratisation, 67

²³⁷ European Parliament resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)). P8_TA(2016)0298, para 21(b) and (d).

²³⁸ European Commission, *Non-paper of the Commission services Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)* (2017)

²³⁹ European Commission, *Non-paper of the Commission Services Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements* (2018)

²⁴⁰ Marco Bronckers and Giovanni Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements", *Journal of International Economic Law* 24, n° 1 (March 2021): 36

8.2.1 A proposed Dispute Settlement Mechanism

In face of this, we suggest a robust monitoring and sanctioning system that increases institutional design effectiveness and ensures compliance with rules, by tackling the problems of 1) stakeholder inclusion and 2) enforcement. The proposed model is based on the design of the latest generation of Investment Arbitration applied in the investment chapters of the EUVFTA, the so called “investment court system”(ICS)²⁴¹ and follows the lessons learnt from the US FTA mechanisms for labour provisions.

The ICS is a “reformed” model of investor-state dispute settlement that aimed to respond to the critics and public concerns over the controversial Investor-State Dispute Settlement (ISDS) and can also be found in the EU investment chapters in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA)²⁴². The more elaborated model establishes a permanent court composed of specialists and experts from the the countries of the signatory parties and third countries and appellate tribunals. We believe this model could be of inspiration for an arbitration system that fits the SDC of FTA. Firstly, the model allows for a previously established panel with a member from a third state involved, which strengthens the legal character of the dispute and reduces politicization of the application of labour provisions. Secondly, the decisions from the arbitration panels are also binding to private parties and not only governments, which is specifically important in the case of labour provisions as companies are key actors in ensuring implementation (and non-violation) of standards, and tend to be more expeditious. Thirdly, such a mechanism would revert the perception that labour provisions are less important and subordinated to trade interests, which was already developed upon in this paper, by equipping them with an enforcement mechanism as strong as the one for investment norms. Further, ICS are subordinated to UNCITRAL transparency rules which leads to the publicity of procedural documents and hearings and the access by the parties to the other parties procedural documents and the possibility to do observations.

Concerning stakeholder involvement, a major issue would be the fact that with labour provisions the variety of potentially affected stakeholders is much more wider than

²⁴¹ Axel Marx, Franz Ebert and Nicolas Hachez “Dispute Settlement for Labour Provisions in EU Free Trade Agreements: Rethinking Current Approaches”, *Politics and Governance*, 5(4) (June 2017), 52

²⁴² Canadian Centre for Policy Alternatives, Corporate Europe Observatory, Friends of the Earth Europe, Forum Umwelt und Entwicklung and the Transnational Institute, “Investment Court System put to the test” (April 2016)

with investors (who are the only ones with legitimacy to file a complaint to the ISC). A first approach would be to allow any stakeholder possibly affected- meaning workers, trade unions, civil society organizations or companies- to be able to file a complaint; but this could lead to numerous application that could threaten the flowed functioning of the mechanism. Probably a minimal number of claimants would have to be established in the case of individual workers, and some objective admissibility criteria would have to be drawn upon. Another problem of guaranteeing private access to the system is the costs of such procedures that are “typically high”²⁴³ could exclude victims of abuses, specifically private individuals or non-profit organizations representing labour rights interests. In this regard, costs should be reduced by deciding a limit on arbitrator fees, ensuring no unnecessary expenses take place (such as travels that can be replaced by remote working when possible) or setting a previous common fund.

In conclusion, the biggest advantage of the ICS system is the fact that it would increase the enforcement of labour provisions and put away most of the politicized nature of their application.

8.2.1.1. Lessons from the US FTA labour provisions

The approached used by the US and Canada is known for having a stronger harm of enforcement when compared to the EU model. In most of US free trade agreements there is a formal procedure allowing for civil society to submit complaints, which is examined by a designated national office that can draw recommendations, and each party can forward the complaint to ministerial consultations on the matter and trigger the establishment of an arbitral panel²⁴⁴. In this way, private parties can not activate the arbitration process but only states can.

The model has not proved to be effective as desirable²⁴⁵. In fact, most of the complaints have been terminated or resolved by the assigned national offices without even reaching ministerial consultations, and some doubt that the often serious violations were not properly addressed. So far, only one labour-rigths related case was taken to

²⁴³ OECD, “Scoping paper for the public consultation on investor state dispute settlement.” (Paris, 2012)

²⁴⁴ International Labour Organization and International Institute for Labour Studies, “World of work report 2009: The Global Jobs Crisis and Beyond” (Geneva: 2009) ; International Labour Organization, “Social Dimensions of FTA ” (Geneva : ILO, 2013, revised edition in 2015)

²⁴⁵ Axel Marx, Franz Ebert and Nicolas Hachez “Dispute Settlement for Labour Provisions in EU Free Trade Agreements: Rethinking Current Approaches”, *Politics and Governance*, 5(4) (June 2017), 52

arbitration under an FTA- the dispute under the CAFTA-DR between the US and Guatemala- which was not successful because the party was not able to fulfil the strict requirements to assert causality between the trade deal and the alleged violations.²⁴⁶

In light of this, we insist on the importance of making the EU dispute settlement model for labour provisions accessible to all interested relevant stakeholders, despite obstacles concerning 1) the high costs of the system and 2) high volume of submissions, that can be worked upon.

8.1.1.2 Including the ILO

A commonly referred positive strength of labour provisions in FTA is that it mentions ILO standards instead of European law which could create a sense of imposition of European standards on trade partners countries. We agree with this. Then again, the bringing of ILO standards to international trade should also empower ILO to decide upon their interpretation and application.

For this reason, we believe that a norm obliging the arbitration panel or the parties to request ILO's legal guidance where labour provisions regarding ILO sources are at stake should be in place. At the same time, factual information concerning findings on the current situation of a specific country in relation to compliance with ratified conventions- which might already be available on reports of the ILO Committee of Experts on the Application of Conventions and Recommendations, that regularly analysis ILO member states' compliance with conventions previously ratified- should be consulted.

8.3. Financial Penalties

Financial penalties to be decided by the arbitration procedure should be considered as a solution for noncompliance with treaty obligations, as one that does not directly impact businesses that are not involved in the violations (on the contrary of generalized sanctions). The endorsement of financial penalties was already proposed by the European Parliament in 2010 and Canada also brought it to the negotiation table of the CETA. The CPTPP, already mentioned in the context of the Vietnamese trade relations, also includes financial penalties as an endorsed mechanism.

²⁴⁶ Marco Bronckers and Giovanni Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements", *Journal of International Economic Law* 24, n° 1 (March 2021), 31

Some practical questions that might arise, namely if the financial penalties would have to come out of the collective budget of the EU, has already been answered in respect to investment protection agreements. The EU has enacted a regulation establishing that member states shall bear the financial responsibility unless the transgression was a result of EU law.²⁴⁷ Another important question would be the criteria to be applied when deciding the value of the penalties. A possible solution would be to establish a permanent formula that considers the GDP and the value of traded goods between the parties.

Another question remarks the idea that financial penalties have a different weight on developing and poorer countries, which contributes to development asymmetries. Considering this, developing countries must benefit from a special treatment based on the application of the principle of proportionality. Such a principle of guaranteeing a special and differential treatment to developing countries already exists in WTO rules.²⁴⁸ Furthermore, the money collected should revert to a global fund to promote social standards through measures implemented by ILO programs in developing countries. Such measures would contribute to promote and protect core labour rights and improve living standards.²⁴⁹

8.4 Targeted Sanctions

A variety of more targeted measures should also be implemented. This means that the EU would target concrete shipments or entities implicated in the violation of sustainability standards, instead of blocking entire trade concessions granted in the FTA in the first place²⁵⁰.

There has been discussion over several initiatives in Europe in the last years. Recently, the European Commission launched consultations on sustainable corporate governance that was followed by the JURI Committee's Report from the European Parliament calling on legislation to hold companies liable for human rights violations.²⁵¹

²⁴⁷ Regulation of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, (2014), L 257/121

²⁴⁸ Olivier De Schutter, *Trade in the Service of Sustainable Development : Linking Trade to Labour Rights and Environmental Standards*. (Oxford: Hart Publishing, 2015), 185

²⁴⁹ Ibid, 183

²⁵⁰ Marco Bronckers and Giovanni Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements", *Journal of International Economic Law* 24, n° 1 (March 2021): 22

²⁵¹ "Legal Affairs Committee Adopts Corporate Due Diligence Report", FERN, accessed June 26 2021 <https://www.fern.org/publications-insight/legal-affairs-committee-adopts-corporate-due-diligence-report-2287/>

There are already a few examples on human rights due diligence legislation for companies in Europe, such as the French Duty of Vigilance Law in 2017 that imposes duties of due diligence on large French-based companies and their external subsidiaries²⁵², or the new German Supply Chain Law, adopted in June 2021, that creates obligations on companies to report annually on the human rights impact assessment of their businesses with the consequence of administrative fines if they do not comply with their obligations²⁵³.

On March 2021 the European Commission opened another public consultation on the so-called Sustainable Product Initiative, which focuses on driving informed and conscious choices from consumers. The issue of allowing consumers to easily access the production process of what they consume is particularly important in a world where traceability of products has become more complex with growing global value chains and from the lens of consumer protection. One complementing proposal brought to the table is an *European Product Passport* to be applied to every product entering Europe-unfortunately, it focuses only on product's "environmental impact and potential", but it seems to us like an interesting complementing proposal for holding companies accountable for labour rights violations in the same line.

Furthermore, concerning targets on foreign individuals and companies, the EU Council adopted in the end of 2020 a new regulation²⁵⁴ foreseeing restrictive measures on legal and natural persons involved in serious human rights abuses. This new directed sanctions regime entails, for example, travel bans and freezing assets, independently of where the human rights violations occurred. This is not a new regulation worldwide, with some examples coming from the USA, UK, Canada, Estonia, Latvia and Lithuania.²⁵⁵ In the EU the mechanism was first given use in March 2, 2021, when four Russian officials linked to the treatment of the main Russian opposition leader, Alexei Navalny, were added to the *Consolidated List for serious human rights violations*. By the end of the same

²⁵² Christophe Clerc, "The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains" *ETUI Research Paper - Policy Brief 1/2021* (January 2021)

²⁵³ "Germany: New Supply Chain Law a Step in the Right Direction", Human Rights Watch, accessed June 26 2021, <https://www.hrw.org/news/2021/06/11/germany-new-supply-chain-law-step-right-direction>

²⁵⁴ Council Regulation 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (2020) L1410/1

²⁵⁵ "The EU adopts its first sanctions under its new global human rights sanctions regime", Norton Rose Fulbright, last accessed 25 June 2021, <https://www.nortonrosefulbright.com/en/knowledge/publications/81a274ea/the-eu-adopts-its-first-global-human-rights-sanctions-regime>

month, more eleven individuals and four entities were added to the list²⁵⁶. Under this procedure, or another similar one, sanctions could be targeted at those accountable for systematic and repeated grave labour core standards violations. Still, the approval of human-rights related constraints requires unanimity between the 27 Member States, which might be an hurdle.

Also related with the idea of targeted sanctions is the Canadian, UK and USA legislation that prohibits the entrance of goods in the country that result from forced labour. Also, the European Parliament has been calling for the European Commission to come with a proposal ban on imported products that result from forced labour.²⁵⁷ This should inspire the EU to legislate on targeted restrictions on imported goods for which the production process implicates the violation of core labour standards violations, and would also enhance and strengthen EU's foreign policy on other issues. As an example, applying sanctions on China over the systematic oppression of the Uyghur community²⁵⁸ doesn't echo very loud if the EU imports masks that result from forced labour in the so called "re-education camps"²⁵⁹.

8.5. Should the EU be trading with countries where labour rights are systematically not respected in the first place?

The question of whether the EU should be negotiating with countries who systematically disrespect labour rights has already been briefly touched upon in this work. We believe that where trading partners have authoritarian regimes that are fundamentally opposed to some of the core values of the EU, certain safeguards should be assured before ratification. If certain guarantees are not seriously ensured- such as safeguarding civil society genuine participation in the treaty mechanisms and roadmaps with implementing

²⁵⁶ "EU imposes further sanctions over serious violations of human rights around the world", Consilium.europa.eu, last accessed 25 June 2021 , <https://www.consilium.europa.eu/en/press/press-releases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-around-the-world/>

²⁵⁷ Ban on Import of Goods Produced Using Modern Forms of Slavery and Forced Labour, Including that of Children', European Parliament legislative train, last accessed 25 June 2021, <https://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-ban-on-import-of-goods-produced-using-modern-forms-of-slavery>

²⁵⁸ "EU imposes further sanctions over serious violations of human rights around the world", Consilium.europa.eu, last accessed 25 June 2021 , <https://www.consilium.europa.eu/en/press/press-releases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-around-the-world/>

²⁵⁹ "Masks produced by slave labour in China on sale in Belgium", The Brussels Times, las accessed 25 June 2021, <https://www.brusselstimes.com/news/business/145679/masks-produced-by-slave-labour-in-china-on-sale-in-belgium/>

institutions to solve core issues of systematic labour rights violations- ratification should not take place.

This is a logical answer for any stakeholder trying to achieve a sustainability driven policy, and one that sounds radical only for those who considers trade has an all-cost end. But trade is not- and should never be- an end in itself, but rather a tool to achieve generic obligations of governance as the public interest for economic stability (rather than economic growth), social development, environmental sustainability, food security, among others²⁶⁰. Exploitation of persons on non-democratic trading partner countries, with impacts on the deterioration of working conditions in developed countries, is never a fair price for trade.

But another counterargument should be developed upon. For those who see trade policy in the lens of foreign policy, trade is a means to achieve peace and maintain stable relations among states. Cutting any commercial relations with authoritarian states could damage the achievement of geopolitical goals- the so-called “liberal peace” view that goes back to Montesquieu or Kant. Our answer is that there are certainly more ethical means in international relations to maintain stable relations with non-democratic countries than consenting and buying products which result from human rights violations- these are diplomatic channels, and usually participation in regional and non-regional or inter-governmental organizations should do the trick in a more constructive way.

8.6. Impact Assessment of Trade Deals

The intersection between trade liberalization and the protection of labour rights should not be limited to labour provisions and corresponding mechanisms in the agreements. In fact, as already outlined, we should aim to design trade deals that *are* sustainable, which can only be accessed through human rights impact assessments of trade deals- or, as they are named within the EU, Sustainability Impact Assessments (SIA). This idea has been captured by the UN Special Rapporteur on the Right to Food:

“there is a duty to identify any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements, and to refrain from entering into such agreements where such inconsistencies are found

²⁶⁰ UN Human Rights Council, “Report of the Independent Expert on the promotion of a democratic and equitable international order” (2016) UN Doc A/HRC/36/40, 5

to exist”. “By preparing human rights impact assessments prior to the conclusion of trade and investment agreements, States are addressing their obligations under the human rights treaties”.²⁶¹

Within this framework, the EU has committed in 2011²⁶² and 2012²⁶³ to include human rights impact assessments and to consider human rights when negotiating trade and investment deals. Although the EU has been conducting SIA’s since the late 1990’s- both before (ex ante) and after the agreement has been concluded (ex post)- only since 2011 the analysis explicitly advanced on the impact of the agreements on Human Rights and social standards from a rights based approach.

The impact assessment conducted before the signature of the EUKFTA was part of the previous generation of SIA’s, entailing an economic vision on the social impact of the agreement which failed to analyze and foresee the by the time continuous violations on the right to collective bargaining and freedom of association. As for the case of the EUVFTA, the process was dishonorably neglected and a human rights impact assessment was not developed based on the argument that “the negotiations with Vietnam (were) taking place under the legal framework established in 2007 for FTA”²⁶⁴, which did not entail an impact assessment on human rights.

Generally, the new generation of SIA’s, if taken seriously, is a promising development in protecting labour rights. The legal principle of sustainable development is appropriate for achieving wider coherence, as it delivers a multidimensional methodological norm that requires careful balancing of values to which the EU is legally binded. This is important for the promotion and protection of labour rights for the fact that human rights, the protection of environmental standards and the promotion of economic vitality are all interdependent principles when aiming for structural reform. Besides, impact assessments should encourage a evidence-based and creative decision-

²⁶¹ UN Human Rights Council, “Report of the Special Rapporteur on the right to food, Olivier De Schutter” (2011) UN Doc A/HRC/19/59/Add.5, 5

²⁶² In a letter from the EU commission from 26/06/2013, it is stated: “In 2011, further to the entry into force of the EU Charter of Fundamental Rights, the Commission has started to introduce in its IAs – as well as in the SIAs carried out for trade agreement sexplicit requirements for the analysis of human rights impacts”. FIDH and VCHR, “The European Ombudsperson Complaint about maladministration” submitted on August 2014.

²⁶³ Council of the European Union, “EU strategic framework and action plan on human rights and democracy”, (June 2012) 11855/12, outcome 1 & 11

²⁶⁴ Answer from the European Comission to the FIDH and VCHR to the European Ombudswomen . Full statemenet available at https://www.fidh.org/IMG/pdf/20140807complaint_ombudsperson_vn.pdf , last accessed 25 June 2021

making in re-directing trade to a sustainable order and identify optimal trade regulation options that might not be entailed in the trade option originally tabled, which pushes further the discussion among EU decision-making organs.

9. Conclusion

The structure and enforcement of labour provisions in the analysed agreements celebrated by the EU can be said to have brought more frustration than results in the eyes of any human rights enthusiastic. The question of effectiveness, as analysed, is far from being a closed matter, and is one that depends on a constellation of issues beyond a mere reform of the clauses.

From the perspective of effectiveness as problem solving, little or nothing was achieved in the chosen cases, with South Korea still being one of the worst countries in the world for workers according to the latest report of the ITUC and where arbitrary arrests and detentions take place. Vietnam continues to be a highly repressive system where, at the moment, there are no other legal trade unions beside the highly politicized Vietnam General Confederation of Labour. Some would argue that the panel of expert's decision in the Korea's dispute case contributed to the country ratifying three important ILO Core Conventions and that in the Vietnamese case an extensive negotiation process pressured the ratification of two core ILO Conventions and led to milestone changes in the Labour legislation. But how much of these events are not simply tickling boxes to reassure EU's negotiators? So far, it is hard to stay optimistic.

On the other hand, when it comes to behavioural and constitutive effectiveness of labour clauses, meaning, the impact of labour provisions on states and corporations to alter their behaviour and the emergence of relevant social practices, the result is even more disappointing. In the case of Korea, two cooperation projects were triggered under the FTA, which resulted in a comparative study mainly neglected. Positively, the DAG's provided an important space for recognition of organizations and trade unions in the eyes of the government. In Vietnam, no internal initiative or mechanism took place, which can be partially justified by the recentness of the FTA. In both cases, corporate responsibility and accountability runed between the raindrops.

The analysed agreements have also illustrated the hurdles of protecting and promoting effectively labour rights when trade concerns are the overriding aspect and countries see human rights obligations as obstacles to economic and ideological interests. But if the EU aims to embrace labour rights as universal recognized human rights in its external relations and have an ambitious Trade Policy towards development, the text of the agreements, and specifically labour provisions in TSD chapters, should reflect such

aims. Concretely, labour rights obligations should be addressed in a clear and incisive way, with less politicized empty compromises, and a strong binding dispute settlement system that is as solid as the ones that apply to the other chapters of the agreement.

We have suggested a model in the previous pages. Mostly, an effective mechanism should tackle the issues of stakeholder inclusion and participation, ensure compliance and accountability, and consider development asymmetries and other human rights obligations that rise from international human rights law and the legal principle of sustainable development. The ILO should have a key role in interpreting and applying standards. At the same time, for TSD chapters and labour provisions to have an impact on global supply chains and the working conditions and rights at work of employees, company responsibility should be addressed, and targeted sanctions should be entailed on products which result from violations. This topic has been growing momentum in Europe, and some promising examples are already in place.

Some questions posed in the introductory pages are still to be answered. Firstly, does the inclusion of labour provisions in FTAs contribute to the dilution of labour standards? The answer depends on how much labour rights get politicized and how legally coherent is the approach to them. One could say that the current attitude by the EU- including fuzzy clauses, weaker mechanisms of dispute resolution in comparison to trade clauses and timely and non-binding decisions- contributes to a general sense that labour provisions are minor and malleable to the context in which they appear. This is the result of a solely “promotional” approach favoured by the EU so far that openly creates a hierarchy between obligations contained in FTA. We sustain that such an approach should be complemented- and not discarded- with an arbitration mechanism that entails binding decisions and financial penalties.

At the same time, the choices that lead to labour rights being jeopardized by trade interests in FTA only reflect the order at the international level. This thesis started with an introduction to the tension between the on-going globalization wave and labour rights and the failed process of integrating social issues within the discussion and decision-making spaces of the World Trade Organization. In fact, the underlying problem affecting all attempts to relate labour issues to trade can well be recalled to the lack of political will that keeps labour rights to enter the WTO agenda, where since the 90s a number of countries have prevented it to become part of the governance approach. The treatment of labour rights in the WTO and its inclusion in dispute settlement mechanisms would not

only strengthen but also legitimize labour rights provisions in FTA. Ideally, in a future where world trade is designed to ensure sustainable development for all human beings, labour provisions in FTA might even become obsolete, or be replaced by binding rulings of an International Court or a specific (inexistent) ILO Tribunal on the matter.

Another question reiterated throughout this work is the idea that protecting and promoting labour rights- and sustainability in general- does not encompass only the labour provisions but should be envisioned in every clause of the agreement. This relates to the fact that the satisfaction of labour rights within a society depends on a number of factors that are closely related to the general concept of sustainability. For example, climate change will lead to structural changes in activities that depend on accessing natural resources at certain points of the globe, which will lead to mass displacement of people as a result of lack of income and which might overburden the welfare system of other societies. But labour rights and environmental standards have a different relationship to economic growth, since growth means a greater pressure on resources and higher affluence of pollution, and it can mean improvements in working conditions and improved labour standards. From this example one can understand the importance of an holistic approach to sustainability, and for which a crucial instrument are impact assessments of trade agreements. Impact assessments should have a key role before and after the signing of trade deals and should be human rights focused. They should also be ambitious and creative in presenting proposals that were not set up in the first place, while considering the implementation of human rights and social standards, the protection of environmental standards and the promotion of economic vitality and stability.

Furthermore, the EU should have a more thoughtful approach when negotiating with states that have authoritarian regimes or do not share the same fundamental values. Firstly, an analysis of the whole viability of the agreement through the lens of sustainability should confirm its pertinence. If it is still beneficial for everyone involved to celebrate the treaty, certain safeguards need to be assured before the ratification, and situations of exploitation cannot be absorbed and economically incentivised through the agreement.

Both for using the European leverage to push for better practices in partner countries and to strive for a model of trade that is a tool for sustainability, the European Parliament develops a key role as the democratic arm of the EU. The European Parliament needs to have a more active and persistent role in the negotiation of FTAs,

and one that holds the European Commission accountable. The case of the South Korea as showed how the Commission ignored the appeals for action from different bodies- including the Europea Parliament- concerning violations of freedom of association and the right to collective bargaining, which should not take place in a democratic Europe.

Finnally, the intersection of labour rights and trade should have a wider meaning than labour provisions in trade agreements. It should lead us to reflect on a new model for global trade and development where rights are the sole foundation of economic “growth” and the dignity of decent work is respected everywhere and in every production process. Afterall, such a reflection is not anymore only in the interest of human rights enthusiasts, but is also in the best interest of everyone who benefit from the global multilateral and interdependent trade system, considering that its legitimacy and adherence might depend on it.

Bibliography

- Alston, Philip. "Core Labour Standards' and the Transformation of the International Labour Rights Regime", *European Journal of International Law* 15, (June 2004): 457–521.
- Alston, Philip. "Resisting the Merger of Acquisition of Human Rights by Trade Law: A Reply to Petersmann", *European Journal of International Law* 13 No. 4 (2002): 815-844
- Alston, Philip. *Labour Rights as Human Rights*. Oxford, Oxford University Press 2005.
- Barbu, Mirela, Smith, Adrian, Harrison, James, Richardson, Benjamin and Campling, Liam. "The Trade-Labour Nexus: Global Value Chains and Labour Provisions in European Union Free Trade Agreements." *Global Labour Journal*.
- Bartels, Lorand. "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements." *Legal Issues of Economic Integration* 40, no. 4 (2013).
- Bartels, Lorand. "Social Issues: Labour, Environment and Human Rights." *Bilateral and Regional Trade Agreements: Commentary and Analysis*, edited by Simon Lester and Bryan Mercurio, (Cambridge University Press, 2009), 342–66.
- Benedek, Wolfgang, Koen De Feyter, and Fabrizio Marrella, eds. *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization*. European Inter University Centre for Human Rights and Democratisation. Cambridge: Cambridge University Press, 2007.
- Brando, Nicolás, Brecht Lein and Axel Marx. "The Protection of Labour Rights in Trade Agreements: The Case of the EU-Colombia Agreement". *Journal of World Trade* 4: 587-610
- Breining-Kaufmann, Christine. *Globalisation and Labour Rights*. Oxford: Hart Publishing, 2007.
- Bronckers, Marco and Giovanni Gruni. "Retooling the Sustainability Standards in EU Free Trade Agreements". *Journal of International Economic Law* 24, n° 1. March 2021.
- Campling, Liam, Harrison, James, Richardson, Ben, Smith, Adrian and Mirela Barbu. "South Korea's Automotive Labour Regime, Hyundai Motors' Global Production Network and Trade-Based Integration with the European Union". *British Journal of Industrial*. 59: 139-166.
- Canadian Centre for Policy Alternatives, Corporate Europe Observatory, Friends of the Earth Europe, Forum Umwelt und Entwicklung and the Transnational Institute, "Investment Court System put to the test". April 2016.
- Civic Consulting and Ifo Institute, *Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea*. Brussels, 2017.
- Clark, Naomi. *The Shock Doctrine*. UK: Penguin Books, 2008.
- Clerc, Christophe. "The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains". *ETUI Research Paper - Policy Brief 1/2021*. January 2021.
- Cross, Ciaran. "Legitimizing an Unsustainable Approach to Trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements", *International Centre for Trade Union Rights* September 2017.

- Cross, Ciaran. *Anchoring climate and environmental protection in EU trade agreements*. Berlin: PowerShift, 2020.
- Cross, Ciaran. "Focus: Failure by Design: Did the US Choose to Lose the Guatemala Labour Dispute?" *International Union Rights* 24, no. 3: 23-28
- ECORYS, IIDE, CATIF, IT IS, CES , Mekong and PT Inacon Luhur Pertiwi, *Trade Sustainability Impact Assessment for the FTA between the EU and ASEAN*, (Brussels: 2008), TRADE07/C1/C01 – Lot 2 ,88-89
- Hafner-Burton, Emilie. *Forced to Be Good: Why Trade Agreements Boost Human Rights*. Ithaca; London: Cornell University Press, 2009
- Harrison, James, Barbu, Mirela, Campling, Liam, Richardson, Ben and Adrian Smith. "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters." *JCMS: Journal of Common Market Studies*, 57: 260– 277
- Harrison, James, Barbu, Mirela, Campling, Liam, Franz Ebert, Christian, Martens, Deborah, Marx, Axel, Orbie, Jan, Richardson, Ben and Adrian Smith. "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda." *World Trade Review* 18, no. 4 (2019): 635–57.
- Harrison, James. "The Labour Rights Agenda in Free Trade Agreements", *The Journal of World Investment & Trade* 20, 5 (2019): 705-725
- Harvey, David. *A Brief History of Neoliberalism*. Oxford: Oxford University Press 2005.
- Held, David. *Global Covenant*. Cambridge: Polity Press, 2004.
- Holden, Erling, Linnerud, Kristin and Banister, David. "The Imperatives of Sustainable Development." *Sustainable Development* 25.
- IBM Belgium in association with DMI , Ticon , & TAC. *Trade Sustainability Impact Assessment of the EU-Korea FTA : Draft Final Report*. Brussels, 2008.
- International Federation for Human Rights (FIDH), "Urgent Appeal - South Korea: Arbitrary detention of Mr. Sang-gyun Han, president of the Korean Confederation of Trade Unions (KCTU)". 2015.
- International Labour Organization, European Commission and Flanders State of Art, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*. Geneva: ILO, 2017
- International Trade Union Confederation (ITUC), "Internationally Recognized Core Labour Standards In the Republic of Korea. Report for the WTO General Council Review of the Trade Policies of Korea". Geneva, 2008.
- International Trade Union Confederation, *2018 ITUC Global Rights Index*. Brussels: General Secretary, 2018.
- International Trade Union Confederation, *2019 The World's Worst Countries for Workers*. Brussels: General Secretary, 2020.
- J Flangan, Robert. *Globalization and Labour Conditions. Working Conditions and worker rights in a global economy*. Oxford; Oxford University Press, 2006.
- Jan Wouters, Manfred Nowak, Anna-Luise Chané, and Nicholas Hachez. *The European Union and Human Rights : Law and Policy* . Oxford: Oxford University Press, 2020.
- Joint Korean NGO's, "NGO Report on the Situation of Freedom of Opinion and Expression in the Republic of Korea since 2008" (April 2010).

- Joseph, Sarah. "Relationship between the WTO and International Human Rights Law." *Blame it on the WTO?: A Human Rights Critique*. Oxford: Oxford University Press, 2011.
- Laurence Boisson de Chazournes, Jaemin Lee and Jill Murray, "Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts"
- Lee, Wonbo, *Understanding Korea's Labour Relations*. Seoul: Korea International Labor Foundation, 2007.
- Mantouvalou, Virginia. "Are Labour Rights Human Rights?." *European Labour Law Journal* 3, no. 2 (June 2012): 151–72.
- Mantouvalou, Virginia. "The Protection of the Right to Work Through the European Convention on Human Rights." *Cambridge Yearbook of European Legal Studies* 16 (2014): 313–32.
- Martens, Deborah , Potjomkina, Diana , Orbie, Jan. *Domestic Advisory Groups in EU Trade Agreements Stuck at the Bottom or Moving up the Ladder?*. Friedrich-Ebert-Stiftung South Caucasus Office 2020.
- Marx, Axel, Ebert, Franz and Nicolas Hachez. "Dispute Settlement for Labour Provisions in EU Free Trade Agreements: Rethinking Current Approaches". *Politics and Governance*, 5(4). June 2017.
- Milanovic, Marko. *Extraterritorial Application of Human Rights Treaties: Law Principles and Policy*. Oxford: Oxford University Press, 2011.
- OECD, "Scoping paper for the public consultation on investor state dispute settlement." Paris 2012.
- Ōmae, Kenichi. *Borderless World*. London: HarperCollin, 1996.
- Petersmann, Ernst Ulrich. "Time for a United Nations 'global compact' for integrating human rights into the law of worldwide organizations: lessons from European integration". *European Journal of International Law* 13 No. 3 (2002): 621–650
- Prakash and J. Hart, *Globalization and Governance*
- Putte, Lore Van Den "Involving Civil Society in the Implementation of Social Provisions in Trade Agreements: Comparing the US and EU Approach in the Case of South Korea", *Global Labour Law Journal* 6(2). May 2015.
- Ratnam, C. S. Venkata. "India and International Labour Standards." *Indian Journal of Industrial Relations* 35, no. 4 (2000).
- Schutter, Olivier De. *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards*. London: Hart Publishing.
- Skogly, Sigrun "Regulatory Obligations in a Complex World." *Building a Treaty on Business and Human Rights*. Cambridge University Press, 2017. 318-45.
- Smith, Adrian, Harrison, James, Campling, Liam, Richardson, Ben and Mirela Barbu, *Free Trade Agreements and Global Labour Governance*. Milton: Taylor & Francis Group, 2020.
- T&E, *Trade and Sustainable Development: A chance for innovative thinking*. Transport and Environment, 2017.
- Thu, Mai Ha and Erwin Schweißhelm, "Labour rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement", *Institute for Political Economy Berlin*. Working Paper no 135/2020. March 2020.

Thu, Mai Ha and Erwin Schweißhelm, “Labour rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement”, *Institute for Political Economy Berlin*, working Paper no 135/2020. March 2020.

Young, Oran R. *International Governance: protecting the Environment in a Stateless Society*. London: Cornell University Press, 1994

Website content

Agency Europe, “Eighteen NGOs call on European Parliament to postpone approval of EU/Vietnam trade agreements”, last accessed June 24 2021.

<https://agenceurope.eu/en/bulletin/article/12363/26>

Bercero, Ignacio Garcia. “Virtual Eu Trade Policy Day”, panel on “Multilateralism as an engine of global recovery, Global megatrends, Role of multilateralism/global rules, WTO reform”. Accessed May 6, 2021.

<https://webcast.ec.europa.eu/virtual-eu-trade-policyday>

Bilaterals.org. “FTA labour provisions useless without trade union action, says Korean unionist”. Accessed June 4 2021.

<https://www.bilaterals.org/?fta-labour-rights-provisions>

Consilium.europa.eu. “EU imposes further sanctions over serious violations of human rights around the world” Accessed 25 June 2021.

<https://www.consilium.europa.eu/en/press/press-releases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-around-the-world/>

Consilium.europa.eu. “EU imposes further sanctions over serious violations of human rights around the world”. Accessed 25 June 2021.

<https://www.consilium.europa.eu/en/press/press-releases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-around-the-world/>

Dadush, Uri and William Shaw. “Globalization, Labor Markets, and Inequality”, Accessed July 6, 2021.

<https://carnegieendowment.org/2012/02/02/globalization-labor-markets-and-inequality-pub-47028>.

Ecoi.net. “Freedom in the World 2013- South Korea”. Accessed June 3 2021,

<https://www.ecoi.net/en/document/1344115.html>

EEAS Homepage. “EU Open Strategic Autonomy and the Transatlantic Trade Relationship”. Accessed May 6, 2021.

https://eeas.europa.eu/delegations/united-states_america/85321/eu-open-strategic-autonomy-and-transatlantic-trade-relationship_en.

Epsu.org. “EU DAG letter to Commissioner Malmstrom signed by the Chair and Vice-Chairs”. Accessed June 25, 2021.

https://www.epsu.org/sites/default/files/article/files/EU%20DAG%20letter%20to%20Commissioner%20Malmstrom_signed%20by%20the%20Chair%20and%20Vice-Chairs.pdf

Equal Times. “Is there a glimmer of hope for Vietnamese workers?”. Accessed June 24.

<https://www.equaltimes.org/is-there-a-glimmer-of-hope?lang=en#.YMy2uWgzZPY>

ETUC.org. “ETUC position on the EU-Vietnam Free Trade and Investment Protection Agreements”. Accessed June 24 2021.

<https://www.etuc.org/en/document/etuc-position-eu-vietnam-free-trade-and-investment-protection-agreements>

EU-Delegation to Vietnam. “Guide to the EU-Vietnam free trade agreement”. Accessed 24 June 2021.

- http://eeas.europa.eu/archives/delegations/vietnam/documents/eu_vietnam/evfta_guid.pdf
- European Commission. “Commission welcomes European Parliament’s approval of EU Vietnam trade and investment agreements”. Last accessed June 24 2021.
[https://trade.ec.europa.eu/doclib/press/index.cfm?id=2114&title=Commission welcomes-European-Parliaments-approval-of-EU-Vietnam-trade-and-investment agreements](https://trade.ec.europa.eu/doclib/press/index.cfm?id=2114&title=Commission_welcomes-European-Parliaments-approval-of-EU-Vietnam-trade-and-investment_agreements)
- European Ombudsman. “The Commission's failure to carry out a human rights impact assessment of the envisaged EU-Vietnam free trade agreement”. Accessed July 12 2021.
<https://www.ombudsman.europa.eu/en/opening-summary/en/54682>
- European Parliament Legislative Train. “Ban on Import of Goods Produced Using Modern Forms of Slavery and Forced Labour, Including that of Children”. Accessed 25 June 2021.
<https://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-ban-on-import-of-goods-produced-using-modern-forms-of-slavery>
- European Parliament. “Answer given by Ms Malmstrom on behalf of the Commission”. Accessed June 4 2021.
https://www.europarl.europa.eu/doceo/document/E-8-2016-007009-ASW_EN.html
- European Parliament. “Human Rights”. Accessed May 6, 2021.
<https://www.europarl.europa.eu/factsheets/en/sheet/165/human-rights>
- FERN. “Legal Affairs Committee Adopts Corporate Due Diligence Report”. Accessed 26 June 2021.
<https://www.fern.org/publications-insight/legal-affairs-committee-adopts-corporate-due-diligence-report-2287/>
- FIDH. “EU-Vietnam: FIDH and VCHR submit a Complaint to EU Ombudsperson”. Accessed June 24 2021.
<https://www.fidh.org/en/region/asia/vietnam/eu-vietnam-fidh-and-vchr-submit-a-complaint-to-eu-ombudsperson>
- Foreign Policy, “Vietnam Wants Western Politicians, Not Western Politics”, Accessed 24 June 2021.
<https://foreignpolicy.com/2019/02/27/vietnam-wants-western-politicians-not-western-politics/>
- Freedom House.org. “Vietnam” Accessed June 24 2021.
<https://freedomhouse.org/country/vietnam>
- Freedom House. “Freedom in the World 2020: South Korea”. Accessed July 12, 2021.
<https://freedomhouse.org/country/south-korea/freedom-world/2020>
- Human Rights Watch. “Germany: New Supply Chain Law a Step in the Right Direction”, Accessed 26 June 2021.
<https://www.hrw.org/news/2021/06/11/germany-new-supply-chain-law-step-right-direction>
- Human Rights Watch. “The Rehab Archipelago: Forced Labor and Other Abuses in Drug Detention Centers in Southern Vietnam”. Accessed June 24 2021.
[https://www.hrw.org/report/2011/09/07/rehab-archipelago/forced-labor-and-other abuses-drug-detention-centers-southern](https://www.hrw.org/report/2011/09/07/rehab-archipelago/forced-labor-and-other-abuses-drug-detention-centers-southern)
- Human Rights Watch . “Vietnam: events of 2020”. Accessed June 24 2021.
<https://www.hrw.org/world-report/2021/country-chapters/vietnam>
- ILO Asia Pacific Network. “Migrant workers treated like "slaves" in South Korea's agricultural industry”. Accessed Jun 3 2021.
<https://apmigration.ilo.org/news/migrant-workers-treated-like-slaves-in-south-koreas-agricultural-industry>

- ILO. "Case No 3138 (Republic of Korea) - Complaint date: 18-JUN-15". Accessed June 24 2021.
https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMP_AINT_FILE_ID:3247234
- ILO. "Ratifications for Republic of Korea". Accessed June 3, 2021.
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_CUNTRY_ID:103123
- ILO. "Ratifications for Viet Nam", Accessed 24 June 2021.
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::p11200_country_id:103004
- ILO. "Revised Vietnamese Labour Code to Help Everyone Gain Fair Shares of Economic Growth". Accessed June 24, 2021.
https://www.ilo.org/hanoi/Informationresources/Publicinformation/newsitems/WCMS_729339/lang--en/index.htm
- International Labour Rights Forum. "Vietnam's Forced Labor Centers". Accessed June 24 2021.
<https://laborrights.org/publications/vietnams-forced-labor-centers>
- ITUC CSI IGB. "ITUC Global Rights Index 2017: Violence and repression of workers on the rise". Accessed June 7 2021.
<https://www.ituc-csi.org/ituc-global-rights-index-2017-18767?lang=en>
- ITUC. "Korea: ITUC Condemns Arrest of KCTU President". last Accessed June 3 2021.
<https://www.ituc-csi.org/korea-ituc-condemns-arrest-of-kctu>
- ITUC. "Korea: Migrants Trade Union's leaders deported". Accessed June 3 2021.
<https://www.ituc-csi.org/korea-migrants-trade-union-leaders>
- ITUC-CSI.org. "Trade justice: historic opportunity as European Union calls for review of Korea's neglect". Accessed at 24 June 2021.
<https://www.ituc-csi.org/EU-Korea-FTA-labour?lang=en>
- ITUC-csi.org. "Vietnam". Accessed June 24, 2021.
<https://survey.ituc-csi.org/Vietnam.html?lang=en#tabs-2>
- Max Planck Encyclopedias of International Law. "International Labour Organization (ILO)". Accessed April 16, 2021.
<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law9780199231690e490#law-9780199231690-e490-div1-1>
- Norton Rose Fulbright. "The EU adopts its first sanctions under its new global human rights sanctions regime". Accessed 25 June 2021.
<https://www.nortonrosefulbright.com/en/knowledge/publications/81a274ea/the-eu-adopts-its-first-global-human-rights-sanctions-regime>
- OHCHR. "South Korea expected to show concrete leadership on business and human rights, says UN expert group". Accessed June 24 2021.
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20042&angID=E>
- Reuters. "Vietnam steps up online crackdown, jailed activists at record high – Amnesty", Accessed June 25 2021.
<https://www.reuters.com/article/vietnam-security-socialmedia-idUSKBN28A2GC>
- The Nobel Peace Prize. "International Labour Organization". Accessed April 16, 2021.
<https://www.nobelprize.org/prizes/peace/1969/labour/history/>
- The Brussels Times. "Masks produced by slave labour in China on sale in Belgium". Accessed 25 June 2021.
<https://www.brusselstimes.com/news/business/145679/masks-produced-by-slave-labour-in-china-on-sale-in-belgium/>

Vietnam+. “ILO applauds Vietnam’s adoption of revised Labour Code”. accessed June 24 2021.

<https://en.vietnamplus.vn/ilo-applauds-vietnams-adoption-of-revised-labour-code/164081.vnp>

Official documents

EU sources:

Commission , “Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions: Towards a global partnership for sustainable development” COM 82.

Commission Director-General for Trade, “A comparative study of the implementation of ILO Convention 111 in the Republic of Korea and the Member States of the European Union” (Brussels 2016).

Commission Services Position Paper, “Trade Sustainability Impact Assessment of the Free Trade Agreement between the Eu and the Republic of Korea” (Brussels 2010).

Commission, “Commission Services' Annex on Vietnam to the Position Paper on the Trade Sustainability Impact Assessment of the Free Trade Agreement Between the EU and ASEAN” (Brussels: 2016).

Commission, “Communication on Human Rights, Democracy and Development Cooperation Policy”, COM (91).

Commission, “Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries” COM (95) 216.

Commission, “Non Paper of the Commission Services Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements” (2017).

Commission, “Non paper on Using EU Trade Policy to promote fundamental human rights”, 2016.

Commission, “Non-paper of the Commission services Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)” (2017).

Commission, “Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements” (Brussels, 2021)

Commission, “Report on the Implementation of EU Trade Agreements”, COM (2020) 705 final

Commission, “Report from the Commission to the European Parliament and the Council: Annual Report on the Implementation of the EU-Korea Free Trade greement” , COM/2017/0614 final.

Council of the European Union, “EU strategic framework and action plan on human rights and democracy”, (June 2012) 11855/12

Council Regulation 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (2020) LI 410/1

Directorate-general for Trade of the European Commission, *Strategic Plan 2020-2024* (Brussels: 2020).

Domestic Advisory Group under the EU-Korea Free Trade Agreement , “Opinion on the Fundamental rights at work in the Republic of Korea, identification of areas for action” (Brussels, 2013).

Dumitru Fornea (Rapporteur), “Opinion of the European Economic and Social Committee On the EU-Korea Free Trade Agreement – Trade and Sustainable Development Chapter” (Brussels, 2017), REX/479-EESC-2017-2894.

EU-Cariforum FTA (2008) L 289/I/3.

EU-Central America FTA (2012) L 346/ I/3.

EU-Delegation to Vietnam, “Guide to the EU-Vietnam free trade agreement” (March 2019).

EU-Korea Free Trade Agreement (2011) L127/6.

European Parliament resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)). P8_TA(2016)0298

European Parliament Resolution P8_TA(2017)0496 of 14 December 2017 on freedom of expression in Vietnam.

European Commission, “Non-paper of the Commission Services Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements” (2018)

European Commission, “Non-paper of the Commission services Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)” (2017).

European Parliament resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement (2013/2989(RSP)

European Parliament Resolution P8_TA(2016)0276 of 9 June 2016 on Vietnam.

European Parliament Resolution P8_TA(2018)0459 of 15 November 2018 on Vietnam.

European Parliament resolution P9_TA(2020)0027 of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Vietnam.

European Parliament, “European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam” (06050/2019 – C9 0023/2019 – 2018/0356M(NLE)

European Union, “Request for the establishment of a Panel of Experts by the European Union”, (Brussels, 2019).

EU-Singapore FTA (2019) L 294/3.

EU-Vietnam Free Trade Agreement (2020) L186/63.

Opinion of the European Economic and Social Committee (EESC), “Opinion on the EU Korea Free Trade Agreement – Trade and Sustainable Development Chapter” (2018), OJ C 81/201.

Regulation of the European Parliament and of the Council, Establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, (2014), L 257/121

Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development of 28 Nov 1991 COM/94/42 FINAL.

UN sources:

UN Committee on Economic, Social and Cultural Rights, “General comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)”, (2016) UN Doc E/C.12/GC/23

UN Committee on Economic, Social and Cultural Rights, “Statement on Globalization and Economic, Social and Cultural Rights” (11 May 1998) UN Doc E/1999/22

UN Human Rights Council, “Report of the Special Rapporteur on the right to food, Olivier De Schutter” (2011) UN Doc A/HRC/19/59/Add.5

UN Human Rights Council, “Report of the Independent Expert on the promotion of a democratic and equitable international order” (2016) UN Doc A/HRC/36/40,

UN Human Rights Council, “Report of the Special Rapporteur on extreme poverty and human rights” (2015) UN Doc A/HRC/29/31

UN Human Rights Council, “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea” (2016), UN Doc A/HRC/36/40

UNCTAD, *World Investment Report 2013, Global Value Chains: Investment and Trade for Development*, United Nations Publication

United Nations Conference on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 331 UNTS 1155

ILO Sources

General Agreement on Tariffs and Trade 1947. GATT 1947. 55 U.N.T.S. 194

International Labour Conference. *The Declaration of Philadelphia* 26th. Philadelphia 1944.

International Labour Organization, “Assessment of Labour Provisions in Trade and Investment Arrangements”, *Studies on Growth With Equity* (Geneva: ILO, 2016)

International Labour Organization, *Social Dimensions of FTA* (Geneva : ILO, 2013, revised edition in 2015)

Protocol on the Provisional Application of the GATT of 30 October 1947, 55 UNTS 308.

Singapore Ministerial Declaration, WT/Min (96) , 18 December 1996

United Nations Conference on Trade and Employment. *Havana charter for an International Trade Organization*, 1948. Washington, U.S. Govt. Print. Off.

WTO Ministerial Declaration of Singapore

Other Sources

North American Agreement on Environmental Cooperation (NAAEC)