School of International Studies

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POVERTY EVERYWHERE ENDANGERS PROSPERITY EVERYWHERE: TRADE AGREEMENTS AND LABOUR RIGHTS PROTECTION

Supervisor:
Professor Matteo BORZAGA

PhD Candidate:
Michele MAZZETTI

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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.

(Constitution of the International Labour Organization, Preamble)

Abstract

Historically, International Labour Law was developed to mitigate the negative social externalities of the Industrial Revolution and protect international trade from unfair competition. With a similar objective, the international community failed to establish the International Trade Organisation provided for in the 1948 Havana Charter. In its place, the General Agreement on Tariffs and Trade (GATT) was adopted. However, the Havana Charter remains the first universal trade treaty to include a social clause.

During the Cold War, Western countries failed to introduce a social clause in the GATT. The most resounding failure was in the 1990s when the World Trade Organisation (WTO) was created. This failure drove Western countries to introduce social clauses in bilateral and non-universal multilateral trade agreements.

Since the 2000s there has been a 'boom' of new social clauses. These clauses have developed into two main models: the conditional model and the cooperative (or promotional) model. The former model is typical of the US, the latter of the EU.

The US and EU clauses have four characteristics and structural elements: social obligations, procedural commitments, implementation mechanisms and dispute settlement mechanisms. The main difference between the two types of social clauses lies in the presence (US model) or absence (EU model) of sanctions for breach of obligations.

The research question of this dissertation concerns the legal efficacy of social clauses. First, the research reconstructs the historical-legal background and conceptualises social clauses. Second, the study compares the EU and US models from a legal-historical perspective. Third, the dissertation comparatively assesses two fundamental (and so far unique) cases for breach of social obligations: the US v. Guatemala case and the EU v. Republic of Korea case.

Abbreviations

1998 ILO Declaration	The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022
2008 ILO Declaration	The ILO Declaration on Social Justice for a Fair Globalization adopted in 2008
AA	Association Agreement
ACP Countries	African, Carribean and Pacific Countires
AEMM	ASEAN-EC Ministerial Meeting
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
ASEAN	Association of South-East Asian Nations
ASEM	Asia-Europe Meetings
AUFTA	Australia-US Free Trade Agreement
BHFTA	Bahrain-US Free Trade Agreement
CAFTA-DR	Central American and Dominican Republic Free Trade Agreement
CARIFORUM	Caribbean Forum
CAS	Committee on the Application of Standards
CEACR	Committee of Experts on the Application of Conventions and Recommendations
Centenary Declaration	ILO Centenary Declaration for the Future of Work (2019)
CEPA	Comprehensive and Enhanced Partnership Agreement
CETA	Comprehensive Economic and Trade Agreement
CFA	ILO Committee on Freedom of Association
CLFTA	Chile-US Free Trade Agreement
CLS, ILO CLS	ILO Core Labour Standard
Convention No. 100	Equal Remuneration Convention, 1951 (No. 100)
Convention No. 105	Abolition of Forced Labour Convention, 1957 (No. 105)
Convention No. 111	Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
Convention No. 138	Minimum Age Convention, 1973 (No. 138)
Convention No. 155	Occupational Safety and Health Convention, 1981 (No. 155)
Convention No. 182	Worst Forms of Child Labour Convention, 1999 (No. 182)
Convention No. 187	Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)
Convention No. 29	Forced Labour Convention, 1930 (No. 29)
Convention No. 87	Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
Convention No. 98	Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

COTPA	US-Colombia Free Trade Agreement
CU	Custom Union
EAC	East African Community
EBA	Everything But Arms
EC	Economic Community
ECJ	European Court of Justice
ECOSOC	Economic and Social Council (United Nations)
EEC	European Economic Community
EPA	Economic Partnership Agreements
EPOCA	Economic Partnership, Political Coordination and Cooperation Agreement
ESA	Eastern and Southern Africa
EU	European Union
EU-Republic of Korea FTA	Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L127/68 of 14.5.2011
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System (or Scheme) of Preferences
Havana Charter	Havana Charter for an International Trade Organization
IEM(s)	Investigation and Enforcement Mechanisms
IFA	International Framework Agreement
IFLR(s)	International Fundamental Labour Rights
IFLS	International Fair Labour Standards (non-technical for workers' rights, social clause, CLS and IFLRs)
ILC	International Labour Conference
ILFTA	Israel-US Free Trade Agreement
ILO	International Labour Organization
IMF	International Monetary Fund
ITO	International Trade Organization
ITUC	International Trade Union Confederation
JOFTA	Jordan-US Free Trade Agreement
KORUS FTA	US-Korea Free Trade Agreement
MAFTA	Morocco-US Free Trade Agreement
MFN	Most-Favoured Nation Principle
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NAFTA system	NAFTA, NAALC and NAAEC
NAO	National Administrative Office
NGO	Non Governmental Organisation
OACPS	Organisation of African, Caribbean and Pacific States

OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
OMFTA	Oman-US Free Trade Agreement
OSH	Occupational Health and Safety
PATPA	Panama-US Trade Promotion Agreement
PCA	Partnership Cooperation Agreement
PETPA	Peru-US Trade Promotion Agreement
Philadelphia Declaration	Declaration concerning the aims and purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944
SADC	Southern Africa Development Cooperation
SGFTA	Singapore-US Free Trade Agreement
TDCA	Trade Development and Cooperation Agreement
TPA	Trade Promotion Agreement
TPP	Trans-Pacific Partnership
TSD Chapter(s)	Trade and Sustainable Development Chapter of the EU FTAs
TTIP	Transatlantic Trade and Investment Partnership
TULRAA	Trade Union and Labour Relations Adjustment Act, Act No. 5310, 13 March 1997 (Republic of Korea)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USMCA	United States, Mexico, Canada Agreement
USTR	United States Trade Representative
Vienna Convention	Vienna Convention on the Law of Treaties, 1969
WB	World Bank
WTO	World Trade Organization

Tables

Contents

Introduction

Summary: 1. Introduction; 2. Philosophical Understanding of Law; 3. Scientific Knowledge of Law; 4. Methodology of Legal Research; 4.1. Objective-based Research; 4.2. Doctrinal and Non-doctrinal Approach; 5. Research Methodology and Operationalisation; 6. Research Structure.

1. Introduction

Research is an act of curiosity about social, physical, and philosophical reality. Therefore, all research begins with questions. Having identified the problem to be investigated, the scholar needs to delineate the object of study, the perspective of analysis, the conceptual framework of reference, and the theoretical basis of the study. Thus, this introduction aims to describe the conceptual framework and methodological choices guiding the research in order to explain to the reader which axioms determine the understanding of the legal phenomenon.

The research question is whether the social clauses of Free Trade Agreements (FTAs) are an effective instrument to protect labour rights. Therefore, the phenomenon under study is the social clause, and the problematic aspect analysed is its legal efficacy[1] as an instrument to protect labour rights with an evaluative objective. For the purpose of

[1] The term 'efficacy' was chosen instead of 'effectiveness.' Although often used as synonyms, these concepts are different. 'Efficacy' refers to the relationship between conduct and norms, whereas 'effectiveness' refers to the legal system as a whole. In this sense, 'efficacy' represents the conformity of the addressees with the norm. Conversely, 'effectiveness' means that the rules of a legal system are observed on most occasions by most addressees or enforced by the authorities. See: Luka Burazin, "The Concept of Law and Efficacy," in *Encyclopedia of the Philosophy of Law and Social Philosophy*, ed. Mortimer Sellers and Stephan Kirste (Dordrecht: Springer, 2017); Norberto Bobbio, "Sul Principio Di Legittimità (1964)," in *Studi per Una Teoria Generale Del Diritto* (Torino: Giappichelli, 2012), 65–77; Pietro Piovani, "Effettività (Principio Di)," in *Enciclopedia Del Diritto* (Milano: Giuffrè, 1965); Giacomo Gavazzi, "Effettività (Principio Di)," in *Enciclopedia Giuridica* (Roma: Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 1988); Luigi D'Andrea, "Effettività," in *Dizionario Di Diritto Pubblico*, ed. Sabino Cassese (Milano: Giuffrè, 2006), 2118–23; Luigi Ferrajoli, *Principia Iuris. Teoria Del Diritto e Della Democrazia. Vol I. Teoria Del Diritto* (Roma, Bari: Laterza, 2007); Roberto Bin, "Effettività," in *Riscoprire La Sfera Pubblica. Confini, Regole, Valori*, ed. Giovanni Di Cosimo and Luca Lanzalaco (Milano: ATì Editore, 2012), 59–79.

this study, efficacy means the ability of an international standard to influence national authorities to adapt national norms to international ones and to prevent the violation of social obligations under social clauses through deterrence mechanisms.

Structurally, the study begins with the legal-historical conceptualisation of social clauses. After framing the phenomenon, the focus narrows down through a legal-historical analysis of the two main existing models of social clauses: the US conditional model and the European cooperative model. This stage explains the historical form taken by the US and EU social clauses and defines how the two models react to labour rights violations. At this stage, the difference between theory and practice also emerges, with the theoretical notion capturing much but not all of the social clauses. Finally, the research analyses the two main (and so far only) international disputes on social clause violations settled by International Panels, namely the US v. Guatemala case and the EU v. Republic of Korea case.

The methodology adopted is the objective-based legal research.[2] The research objectives are four: explanatory, descriptive, comparative and evaluative. The latter is the main objective, while the others are subordinate to it because their function is to enable value judgements on the legal efficacy of social clauses. The four objectives are unified by the doctrinal approach relating to explanation, description and evaluation and the non-doctrinal approach relating to comparison. The research results answer the question on the efficacy of the US and EU social clauses.

[2] Lina Kestemont, "A Typology of Research Objectives in Legal Scholarship," *The Russian Juridical Journal (Electronic Supplement)* 5 (2015): 5–21; Lina Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," *European Journal of Social Security* 17, no. 3 (2015): 361–84; Lina Kestemont, *Handbook on Legal Methodology. From Objective to Method* (Cambridge: Intersentia, 2018).

2. Conceptual Framework and Theoretical Basis of the Research

This introduction has a twofold purpose: to describe the conceptual framework (Section 2) and to explain the methodological choices (Sections 3 and 4) that guided the research.

Regarding the conceptual framework, it concerns the ideological approach of the research and derives from the study of Law as a complex social phenomenon. In fact, this research is rooted in the academic analysis of the Law, investigating a specific aspect of it, but without losing the general theoretical background. It is precisely this general theoretical framework that constitutes the subject of the next two sections (2.1. and 2.2.), which are concerned with describing the philosophical understanding and scientific knowledge of Law.

These two perspectives have investigated the legal phenomenon with diametrically opposed perspectives, but always using the tools of rational reflection. As a result, different answers have been given to the ontological question of what Law is and why it exists.[3]

This research combines a philosophical approach to the ontology of Law and a scientific approach to the knowledge and study of the legal phenomenon.

2.1. Philosophical Understanding of Law

The philosophical premise of this research is that the Law is both a social product and a voluntaristic act of an authority that derives its power from the community and the social reality of which it is an expression. Thus, the Law is a human fact and is produced

[3] Palazzani, "Le Ragioni Della Filosofia Del Diritto," 2-6; Lorenzo D'Avack, "Diritto," in Enciclopedia Giuridica, Vol. V (Il Corriere della Sera e Il Sole 24 ore, 2007), 191.

by human societies and authorities and shaped by non-normative, non-evaluative, contingent facts, i.e. descriptive facts.[4]

The interpretation underlying the research is that of legal positivism as a theory.[5] According to Bobbio, legal positivism is either a theory or an ideology.[6] The theory has as its basic assumption "the impossibility of finding out the law from nature [...]" and the separation of the ethical and political dimension from the legal dimension in a perspective of autonomy between the spheres.[7] The ideology prescribes citizens to obey positive law because: "it is [to be considered] just by the mere fact that it is prescribed, or regardless of whether it is just or unjust, but simply because it is prescribed."[8] The theoretical

[4] Mark Greenberg, "How Facts Make Law," *Legal Theory* 10, no. 3 (2004): 157.

[5] Legal positivism is a monistic theory that assumes that the only Law is the positive Law "actually and specifically enacted or adopted by proper authority for the government of an organized jural society." This positive Law has a heteronomous, historically- and context-dependent nature. Indeed, positive Law depends on the political will of the legislative authority, which varies over time, and is addressed only to a specific political community and not to the entire humankind. Moreover, positive Law bases its validity on coercion, i.e., the legitimate use of force, and on knowability, as it is written Law.
Legal positivism is not symmetrical to natural Law insofar as it denies the existence of natural Law and admits only positive Law. In this sense it is a theory rooted in modernity that starts from a scientific idea of Law. The latter is seen as a particular phenomenon to be studied through a method derived from science on the basis of the assumption that scientific knowledge is the only authentic knowledge of reality. The consequence of this theory is the neutrality of the study approach. In other words, legal scientists express only statements of fact and never value judgments and clearly separates the ethical and political dimension from the legal dimension. The analysis of Law is therefore based on a description of the legal phenomenon. Among others, see: Riccardo Guastini, "Diritto, Filosofia e Teoria Generale Del," in *Enciclopedia Delle Scienze Sociali* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 1993); Leslie Green and Thomas Adams, "Legal Positivism," in *The Stanford Encyclopedia of Philosophy (Winter 2019 Edition)* (Metaphysics Research Lab, Stanford University, 2019) https://plato.stanford.edu/entries/legal-positivism/; Palazzani, "Le Ragioni Della Filosofia Del Diritto," 21-30; Norberto Bobbio, *Giusnaturalismo e Positivismo Giuridico* (Roma, Bari: Laterza, 2018); Uberto Scarpelli, *Cos'è Il Positivismo Giuridico* (Napoli: ESI - Edizioni Scientifiche Italiane, 1997); Bruno Celano, "Giusnaturalismo, Positivismo Giuridico e Pluralismo Etico," *Materiali per Una Storia Della Cultura Giuridica*, no. 1 (2005): 161-84; "Positivismo Giuridico," in *Dizionario Di Filosofia* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2009) https://www.treccani.it/enciclopedia/positivismo-giuridico_%28Dizionario-di-filosofia%29/; Norberto Bobbio, *Il Positivismo Giuridico. Lezioni Di Filosofia Del Diritto* (Torino: Giappichelli, 1996).

[6] Bobbio, Il Positivismo Giuridico. Lezioni Di Filosofia Del Diritto; Losano, "Il Positivismo Nell'Evoluzione Del Pensiero Di Norberto Bobbio."

[7] Author's translation. Original text: "[…] la negazione della possibilità di trarre il diritto dalla natura […]." in Palazzani, "Le Ragioni Della Filosofia Del Diritto," 23.

[8] Author's translation. Original text: "[…] è giusto per il solo fatto di essere posto o indipendentemente dal fatto che sia giusto o ingiusto, ma semplicemente perché è posto. è questa la visione estrema che porta il diritto alla sottomissione al potere quale esso sia, in quanto autorità che statuisce il diritto." in Ibid.

approach of this research rejects the idea of a Law found in nature in the conviction that the legal sphere and ethics are connected but separate. the means of legal science.

The Law takes on the guise of a rational presupposition in the dialectic between the latter and society. If the Law is a social product emerging from society, once promulgated by an authority, it becomes a presupposition of society, shaping social action. The Law goes from being posited to being presupposed.[9] According to legal realism,[10] the Law becomes a foundation for society,[11] in a dialectical tension between freedom and order, change and respect for the Law.[12]

The Law that becomes presupposed must be rational, i.e. the result and expression of collective rationality (and therefore again of society), because rationality is the basis

[9] "Presuppósto," in *Vocabolario Treccani* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2022) https://www.treccani.it/vocabolario/presupposto/.

[10] Legal realism is a particular form of legal positivism that rejects the idea of a higher dimension of Law, namely natural Law. However, legal realism is not formalistic because its focus is on 'Living Law' studied from a sociological perspective. The 'Living Law' is a social product; its sources are mainly the customs found by legal practitioners and reflected in case law.
The 'Living Law' is characterised by dynamism, variability and close correlation with the social context and the historical period. This Law is real not because it has been adopted by an authority, but because it emerges from society; it is therefore knowable through rationality and the scientific study of its sources. The legal realists reject the link between ethics and Law and study the latter as an empirical and factual phenomenon through a non-cognitivist approach. Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge: Harvard University Press, 1936); Alberto Febbrajo, *Sociologia Del Diritto* (Bologna: Il Mulino, 2013); Vincenzo Ferrari, *Diritto e Società. Elementi Di Sociologia Del Diritto* (Roma: Laterza, 2014); Palazzani, "Le Ragioni Della Filosofia Del Diritto," 31.

[11] Tiedeman outlines the assumptions that would later lead Ehrlich to speak of 'Living Law': "I believe all the more firmly that neither the judge nor the legislator makes Living Law, but only declares that to be the Law, which has been forced upon them, whether consciously or unconsciously, by the popular sense of right, that popular sense of right being itself but the resultant of the social forces which are at play in every organized society," in Christopher G. Tiedeman, "Methods of Legal Education," *Yale Law Journal* 1, no. 4 (1892): 154.

[12] "The great mass of Legal Provisions are made not through statutes but in judicial and juristic Law, and not through forethought but through after thought; for in order that the judges and jurists may become occupied with a juristic dispute, the institution involved must have given rise to the dispute [….] For the social order is not fixed and unchangeable, capable at most of being refashioned from time to time by legislation. It is in a constant flux. Old institutions disappear, new ones come into existence, and those which remain change their content constantly. Marriage today is not exactly what it was formerly [….] The needs of modern great cities have brought with them the huge building enterprise of which a half century ago no mention had ever been made, and this is in process now of transforming the system of landholding in cities. Altogether different kinds of contracts come to be made [….] New conditions, moreover, mean also new conflicts of interests, new types of dispute, which call for new decisions and new Legal Provisions" in Eugen Ehrlich, "The Sociology of Law," *Harvard Law Review* 36, no. 2 (1922): 139–40.

of every interpretation.[13] Indeed, to understand individuals' legal behaviour, one must assume that they are, on the whole, rational.[14] Without this assumption, one could not attribute to them the desires and beliefs based on which one interprets their behaviour.[15] This rationality is the basis of the Law as a social product and presupposition of social action.

Law as a principle of civil society is an implication of law as a rational presupposition. Law becomes a principle of civil society when, after being created in society and posited by authority, it assumes the nature of a foundation according to the Aristotelian notion of *ἀρχή* (principle, beginning). Aristotelian philosophy defines principles as the "non-demonstrated foundations that it is necessary to postulate at the beginning of every demonstration […]."[16] Society turns the Law into the axiom of organised living and places it as the foundation for acting. In this sense, the Law is also a principle. Better, society selects a set of legal rules (*principles*) that it places as the foundation of its existence. These *principles* result from the creative process that inextricably links Law and society. This process results in the legitimisation of Law because it conforms to the *principles*, and the legitimisation of society because it conforms to Law. Law as principle legitimises the society from which it has, in turn, originated. This mechanism creates a circular discourse that allows the social and legal structure to develop and exist. This circularity can be constantly interrupted if society changes its *principles* and Law, but the underlying mechanism remains.

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[13] Jon Elster, "Razionalità," in *Enciclopedia Delle Scienze Sociali* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 1997) https://www.treccani.it/enciclopedia/razionalita_%28Enciclopedia-delle-scienze-sociali%29/.
[14] Ibid.
[15] Ibid.
[16] "Principio," in *Dizionario Di Filosofia* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2009) https://www.treccani.it/enciclopedia/principio_%28Dizionario-di-filosofia%29/.

2.2. Scientific Knowledge of Law

Knowledge, seen as the relationship between the knowing subject and the known object, is a crucial notion to all social sciences, including Legal Science.[17]

Legal scholars have investigated the problem of knowledge and its limits, identifying rationality as the tool to understand legal reality and developing methodologies to achieve an effective knowledge.[18] The theoretical tools for understanding a legal datum (a rule or a legal system) must be scientific; this implies a neutral attitude towards the phenomenon.[19]

The purpose of legal research is to observe, describe, analyse and evaluate the phenomenon independently of any ethical considerations. [20] This does not mean that value judgements cannot be made, but that these should be made *a posteriori* and kept separate from the study of legal facts.

In this research, the epistemological basis for knowledge is legal positivism. This epistemology implies that the legal phenomenon is understood as a norm – i.e., a legal

[17] Andrea Gentile, *Ai Confini Della Ragione. La Nozione Di «limite» Nella Filosofia Trascendentale Di Kant* (Roma: Edizioni Studium, 2003); Guido Calogero, "Gnoseologia," in *Enciclopedia Italiana Treccani* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 1993), https://www.treccani.it/enciclopedia/gnoseologia_%28Enciclopedia-Italiana%29/; "Epistemologia," in *Dizionario Di Filosofia* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2009), https://www.treccani.it/enciclopedia/epistemologia_%28Dizionario-di-filosofia%29/; Albert Hans, "Epistemologia Delle Scienze Sociali," in *Enciclopedia Delle Scienze Sociali* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani , 1993), https://www.treccani.it/enciclopedia/epistemologia-delle-scienze-sociali_%28Enciclopedia-delle-scienze-sociali%29/; Franco Volpi, "Filosofia Pratica," in *Enciclopedia Del Novecento* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 1998), https://www.treccani.it/enciclopedia/filosofia-pratica_%28Enciclopedia-del-Novecento%29/.

[18] Palazzani, "Le Ragioni Della Filosofia Del Diritto," 22.

[19] Ibid., 22–23.

[20] "Science," in Encyclopedia Britannica, 2020, https://www.britannica.com/science/science; "Scienza," in Enciclopedia Italiana Treccani (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2022) https://www.treccani.it/enciclopedia/scienza/; "[…] a legal phenomenon can only be explained when it has first been described, it can only be evaluated after the reason for its existence is clear, and finally, a researcher can only determine what characteristics the legal phenomenon should possess when it has first been described, explained and evaluated" in Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 364.

proposition with a preceptive content – pertaining to a legal system – i.e., a set of positive norms of a conventional nature – established by a political authority.[21]

Interpretation means analysing and understanding a legal system and its norms. Interpretation aims to bring out the deeper meaning of the linguistic structures used in the positive norm to make linguistic ambiguities clear, but also to give concrete meaning to texts that are designed to last and adapt to situations and are, therefore, general and abstract.[22]

Scientific interpretation is based on two assumptions: a) norms are governed by logic, and b) the reality governed by these norms is based on scientific laws. These assumptions guide scientific knowledge of a legal phenomenon according to legal positivism (i.e., realism and normativism).

Concerning the logic of norm, several studies have been conducted by legal realists such as Ross or Tarello.[23] In his study, Tarello echoes the reflections of Wittgenstein who stated that:

> The object of philosophy is the logical clarification of thoughts.
> Philosophy is not a theory but an activity.
> A philosophical work consists essentially of elucidations.
> The result of philosophy is not a number of "philosophical propositions," but to make propositions clear.
> Philosophy should make clear and delimit sharply the thoughts which otherwise are, as it were, opaque and blurred.[24]

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[21] Tommaso Greco, *Norberto Bobbio Un Itinerario Intellettuale Tra Filosofia e Politica* (Roma: Donzelli, 2000), 149–51; Hans Kelsen, *General Theory of Law and State* (London, New York: Routledge, 2005), 42, 120; Giorgio Pino, *Teoria Analitica Del Diritto I: La Norma Giuridica* (Pisa: Edizioni ETS, 2016), 19.
[22] Mark Greenberg, "Legal Interpretation," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Metaphysics Research Lab, Stanford University, 2021) https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/.
[23] Alf Ross, On Law and Justice (London: Stevens & Sons, 1958), 23-25; Giovanni Tarello, "Riforma, Dipartimenti, e Discipline Filosofiche," Politica Del Diritto, no. 1 (1970): 140-42.
[24] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London, New York: Routledge, 1981), paras. 4.0031, 4.11, 4.111-4.112.

The form of Law is investigated by legal normativism, which, starting from Kelsen, has addressed the question of the knowability of norms and the legal system through nomostatics and nomodynamics.[25]

Nomostatics describes the norm from a formal viewpoint and focuses on the causal relationship between a premise-fact and a sanctioning consequence.[26] A similar view is expressed by Bobbio, who defines the legal norm as characterised by an external and institutionalised sanction.[27]

Nomodynamics focuses on the system and the formal legal validity of norms. Where legal validity is to be distinguished both from the efficacy of the norm, to avoid confusion between Law and nature, and from the value of the norm, to separate Law and ethics. According to Kelsen, a norm is valid if it is enacted according to the criteria established by the hierarchically superior norm. Hence a non-infinite hierarchy is created closed by the *Grundnorm* (fundamental norm), understood first as a logical presupposition and then, in reaction to the realists' criticism, as the overall effectiveness of the legal system.[28] This approach is also shared by Bobbio who, however, roots the foundation of his reasoning in a non-positivist presupposition, namely in the "gorgon of power."[29]

Both normativism and realism configure Law as a particular discourse knowable through an understanding of legal propositions. Bobbio made a fundamental contribution to explaining how to understand norms.[30] The Italian scholar considers norms to be

[25] Kelsen, *General Theory of Law and State*, 3–178; Antonino Scalone, "Impossibile Purezza: Kelsen Fra Scienza Del Diritto, Politica e Scienze Umane," *Filosofia Politica*, no. 2 (2017): 315–28.
[26] Kelsen, *General Theory of Law and State*, 3–109.
[27] Norberto Bobbio, *Teoria Generale Del Diritto* (Torino: Giappichelli, 1993), 166.
[28] Kelsen, *General Theory of Law and State*, ll. 110–179.
[29] Losano, "Il Positivismo Nell'Evoluzione Del Pensiero Di Norberto Bobbio," ll. 24-25.
[30] Guastini, "Diritto, Filosofia e Teoria Generale Del."

"prescriptive linguistic statements," i.e., authority commands to modify human conduct. The interpretation of these statements is carried out by judges and scholars through several criteria – i.e., textual, systematic, and teleological interpretation –,[31] thus creating a metalinguistic discourse.[32] Once the legal statement is understood, it is explained and read in the light of its context – the legal system in which it is embedded and its historical and social framework – and its purpose. At this point, the pure legal study is over, and the further aims of the investigation come into play.[33]

These further aims may concern: the assessment of the efficacy of the norms and their social impact; the economic or social analysis of the policies to which the norms are directed; the comparison between similar institutions of different systems or between entire systems; the study aimed at reform; the analysis of the economic implications of national or international legal norms; the study of the interactions between systems.[34] Such research no longer belongs to pure or doctrinal legal research, but to empirical research, and depends on the discipline with which the law is combined; therefore, one speaks of socio-legal, economic-legal, legal-political and research.[35]

In each of these approaches the doctrinal component will necessarily be present because it is an unavoidable presupposition of legal research. Indeed, there can be no legal research without a pure understanding of the Law, and this understanding can only be achieved by means of Legal Science.[36] However, to the sole legal analysis will be added the important contribution deriving from another field of study and another

[31] Michele Fabio Tenuta, *Diritto Dell'interpretazione* (Canterano: Aracne, 2019), ll. 15–38.
[32] Guastini, "Diritto, Filosofia e Teoria Generale Del."
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.

research methodology, so that the further aims of empirical legal research can be pursued.[37]

3. Methodology of Legal Research

The study of Law is one of the oldest academic disciplines whose methodology has been developed over time as an implicit know-how inherent in the type of education offered in universities,[38] especially civil law universities.[39] The academic education offered to law students has at its core the learning of methods aimed at identifying, analysing, applying, and improving Law.[40] For a long time, this approach made legal research impermeable to the need to formalise a precise methodology, in contrast to other social sciences:

> In the past, the under-description of the doctrinal method has not been problematic because the research has been directed 'inwards' to the legal community. The targeted audience has been within the legal paradigm and culture and therefore cognisant of legal norms.[41]

However, this traditional understanding is no longer consistent with the needs of current scientific research.[42] Legal studies have evolved rapidly in recent decades, flourishing in parallel with the internationalisation and globalisation fostered by the spread of comparative analysis.[43] This development led to a careful reflection on the

[37] Ibid.
[38] Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review* 17, no. 1 (2012): 100; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 362; Axel De Theux, Imre Kovalovszky, and Nicolas Bernard, *Précis de Méthodologie Juridique: Les Sources Documentaires Du Droit* (Bruxelles: Presses de l'Université Saint-Louis, 1995), 87.
[39] Sébastien Pimont, "A Propos de l'activité Doctrinale Civiliste (Quelques Questions Dans l'air Du Temps)," *Revue Trimestrielle de Droit Civil*, no. 4 (2006): 707.
[40] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 1.
[41] Hutchinson and Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," 118.
[42] Carel Stolker, *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge: Cambridge University Press, 2014), 224.
[43] Philip Langbroek et al., "Methodology of Legal Research: Challenges and Opportunities," *Utrecht Law Review* 13, no. 3 (2017): 1.

methodology of legal research, which had to be understood outside the purely legal and national context.[44]

This process resulted in two types of research: object-based research[45] and doctrinal and non-doctrinal (empirical) research, depending on the emphasis placed on the objectives or the methods and sources used.[46] However, the division of the two types of research does not reflect the reality of legal research, which shares the two natures.

Objective-based research adopts an analytical approach by detailing the research methodology to be adopted according to the aim pursued. However, legal research often combines several objectives, which are closely interlinked and whose boundaries, although clear from a theoretical point of view, are much more blurred from a practical one.[47] To cement all these objectives, a vertical and a horizontal link needs to be applied. The vertical link cements each objective to a final and superior one, and the horizontal

[44] Rob van Gestel and Jan Vranken, "Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach," *German Law Journal* 12, no. 3 (2011): 906; Langbroek et al., "Methodology of Legal Research: Challenges and Opportunities," 1; Hutchinson and Duncan, "Defining and Describing What We Do: Doctrinal Legal Research"; Eva Brems, "Methods In Legal Human Rights Research," in *Methods of Human Rights Research*, ed. Fons Coomans, Fred Grünfeld, and Menno T. Kamminga (Antwerp: Intersentia, 2009), 77–90; Mike McConville and Wing Hong Chui, *Research Methods for Law*, ed. Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007); John Bell, "Legal Research and the Distinctiveness of Comparative Law," in *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?*, ed. Mark Van Hoecke (London: Hart Publishing, 2011), 155–76; Jaap Hage, "Comparative Law as Method and the Method of Comparative Law," *Maastricht European Private Law Institute Working Paper No. 20014/11* (Elsevier BV, May 28, 2014); Martin Löhnig, "Comparative Law and Legal History: A Few Words about Comparative Legal History," in *The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke*, ed. Maurice Adams and Dirk Heirbaut (Oxford: Hart Publishing, 2015); Mark Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?," in *Methodologies of Legal Research*, ed. Mark Van Hoecke (Oxford: Hart Publishing, 2011), 1–18.

[45] Kestemont, "A Typology of Research Objectives in Legal Scholarship"; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool"; Kestemont, *Handbook on Legal Methodology. From Objective to Method*.

[46] Ian Dobinson and Francis Johns, "Legal Research as Qualitative Research," in *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2017), 20, 41.

[47] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 364; Lina Kestemont, "A Typology of Research Objectives in Legal Scholarship," The Russian Juridical Journal (Electronic Supplement) 5 (2015): 7; Frank Kunneman, Rechtswetenschap (Nijmegen: Ars Aequi Libri, 1991), 4.

link cements the methods derived from the objectives according to the doctrinal or non-doctrinal approach. Here, the twofold methodological nature of legal research re-emerges.

Given the relevance of doctrinal and non-doctrinal research and that of objective-based research, it is worth dwelling on these models and trying to outline their characteristics before describing the objectives and methodology used explicitly for this research.

3.1. Objective-based Research

Objective-based research is a recent development from Kestemont's studies.[48] Awareness of the limitations of previous theorisations on legal research methodology prompted the researcher to carry out a systematic bottom-up analysis to conduct "[…] a meta-methodological study by interpreting, analysing, and synthesising the research objectives and methods applied in existing legal research."[49] Kestemont's approach echoes Zhao's one, who conducted a study on the convergence of metatheory, metamethod, metadata-analysis in sociological research.[50]

The results of Kestemont's research are particularly relevant in the field of labour and social law, because these disciplines have been the focus of the scholar's research.[51] However, the results are undoubtedly extensible to other branches of legal research, given

[48] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 364; Lina Kestemont, "A Typology of Research Objectives in Legal Scholarship," The Russian Juridical Journal (Electronic Supplement) 5 (2015): 7; Frank Kunneman, Rechtswetenschap (Nijmegen: Ars Aequi Libri, 1991), 4.
[49] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 362.
[50] Shanyang Zhao, "Metatheory, Metamethod, Meta-Data-Analysis: What, Why, and How?," Sociological Perspectives 34, no. 3 (1991): 377-90.
[51] "The scope of the project is restricted to legal research in [....] 'social security law.' More specifically, it examines all the PhDs on social security law defended at a Dutch or Belgian law faculty between 1945 and 2012" in Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 363.

the motivation that underpins the study of labour and social security law. Indeed, Kestemont studies labour and social security law for its versatility as a branch of law "[..] strongly intertwined with the major areas of legal scholarship, i.e., with public law and private law,"[52] yet closely linked to other non-legal disciplines (e.g., sociology and economics). This double rooting of labour and social security law meets the need to clarify legal methodology through a fruitful dialogue with the other social sciences. Moreover, it serves as a paradigmatic example of a methodology applied in other branches of law.

Based on the research objectives, there are seven possible types of legal research: *descriptive, classificatory, comparative, theory building, explanatory, evaluative and recommendatory*.[53] Each type of research presupposes a specific methodology. Objectives and methodologies are often combined in what Kestemont calls "research islands." Hierarchy is the unifying criterion in these islands: the objectives and methodologies are subordinated to a general objective.[54] To the vertical link, this research adds a horizontal one based on the doctrinal and non-doctrinal approach.

In *descriptive legal research*, the researcher aims to "systematically analyse a legal construct in all its components in order to present it in an accurate, significant and orderly manner."[55] The methodology used to conduct this research involves a process aimed at attributing "a meaning to a document, or to a set of documents, which is (are) regarded as expressing a legal norm."[56] Once identified the relevant legal documents they are

[52] Ibid.
[53] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 19–74.
[54] Ibid., 75.
[55] Ibid., 19.
[56] Patrick Nerhot, "The Law and Its Reality," in Law, Interpretation and Reality. Essays in Epistemology, Hermeneutics and Jurisprudence, ed. Patrick Nerhot (Dordrecht: Springer, 1990), 197.

interpreted[57] applying nine criteria: grammatical, technical, systematic, historical, teleological, case law, scholarly, based on non-binding legal sources, and sociological.[58] These canons are not hierarchical, but are chosen according to the purpose of the research.[59]

In *classificatory legal research*, the researcher aims to "conceptualise or classify (legal) phenomena in the existing legal system."[60] Firstly, the internal (belonging to the sphere of law)[61] and external sources (coming from non-legal disciplines but concerning law) [62] have to be selected. Secondly, legal researchers classify sources adopting existing criteria (i.e., legislation, case law or doctrine) or *ad hoc* criteria.[63] The classification implies describing the characteristics of legal constructs and categories and comparing the characteristics of each construct.[64]

In *comparative legal research*, "two or more phenomena or legal arrangements are compared with each other in order to detect similarities and/or differences."[65] Before delving into the actual comparison, it is necessary to state "the reasons for the comparison, the nature of the comparison (micro/macro), the *tertium comparationis*, the choice of

[57] "[….] legal scholars can be properly regarded as engaged in a process of interpretation, an effort to discover the meaning of a preexisting text. This interpretive process may attempt to discern the intent of the author, but that is only one approach to legal or literary meaning; there are numerous others, such as assessing the text's effect upon the reader, or its range of possible meanings, or its interaction with a broader set of social attitudes." in Edward L. Rubin, "Law and the Methodology of Law," *The Wisconsin Law Review*, no. 3 (1997): 528.
[58] Kestemont, Handbook on Legal Methodology. From Objective to Method, 23-31; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 21; Paul Delnoy, Eléments de Méthodologie Juridique (Brussels: Larcier, 2008), 155-80.
[59] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 21.
[60] Ibid., 33.
[61] Ibid., 33–34; Hermann U. Kantorowicz and Edwin Wilhite Patterson, "Legal Science-A Summary of Its Methodology," *Columbia Law Review* 28, no. 6 (June 1928): 688.
[62] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 34.
[63] Ibid., 34–35.
[64] Ibid., 35–36.
[65] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 368.

legal system, access to sources and the approach of the comparison (dogmatic, functional, *sui generis*)."[66] Having clarified the assumptions of comparative research,[67] it is possible to enter into the process of comparison. This process consists of four stages: description of the legal constructs or legal systems (adopting descriptive legal research), comparison, identification of similarities and uncovered differences, and evaluation of the results.[68]

In *theory-building legal research*, the researcher aims to "to abstract the essence from particular legal constructs in order to develop a model or legal theory."[69] According to Dreier's traditional distinction, the possible theories that can be developed at the legal level are: interpretative theories, systematic theories, institution theories (*Institutstheorien*), principle theories (*Prinzipientheorien*), and fundament theories (*Grundbegriffstheorien*).[70] For a theory to be considered as such it must meet five requirements: a) to cover existing Law and make it more comprehensible, b) to be all-encompassing and logical, c) to be accurate, d) to have a simple, clear and concise conceptual framework, and e) to pay attention to and refute dissenting opinions.[71] To build a coherent theory, it is particularly important to focus on the conceptual framework based either on internal (derived from the legal system) or external (derived from social reality) axioms.[72]

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[66] Emphasis in the original text, Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 36.
[67] Ibid., 37-48; For more information on reasons to compare see: Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 368.
[68] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 48–54.
[69] Ibid., 55.
[70] Ibid.; Ralf Dreier, *Recht - Moral- Ideologie: Studien Zur Rechtstheorie* (Frankfurt am Main: Suhrkamp, 2015), 73-77.
[71] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 370-71.
[72] Kestemont, Handbook on Legal Methodology. From Objective to Method, 57; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 370-71.

In *explanatory legal research*, the researcher aims to "find an explanation for the enactment, alteration, abolishment or current problems of a legal construct."[73] Explanatory research is bases ether on an internal approach or and an external approach.[74] To explain a legal phenomenon, while the internal approach resorts to the rules of legal interpretation[75] and to legal sources (legislation, case law, and doctrine), the external approach resorts to other academic disciplines (history, sociology, and economy).[76]

In *evaluative legal research*, the researcher aims to "critically assess or evaluate a legal phenomenon."[77] With evaluative research legal scholars can "assess the impact/influence of international rules on national legislation, the accessibility, transparency, quality or efficiency of a regulation, the degree to which legislation meets its objectives, the degree to which limitations to rights and freedoms can be justified [..]."[78] Evaluative researchers employ either internal – standards endogenous to Law – or external – standards exogenous to Law – evaluative criteria.[79] The type of criteria used varies according to the analysed norm, the purpose and topic of the research, and the ethical and philosophical premises underpinning the research.[80] Once identified norms, selected criteria and clarified indicators (i.e., the instruments for measuring the

[73] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 59.
[74] Ibid.; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 372-73.
[75] Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?," 15.
[76] Kestemont, Handbook on Legal Methodology. From Objective to Method, 59; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 372-73.
[77] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 373.
[78] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 60.
[79] Robert Cryer et al., *Research Methodologies in EU and International Law,* (Oxford: Hart Publishing, 2011), 10; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 374.
[80] Kestemont, Handbook on Legal Methodology. From Objective to Method, 61-62; Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 374-75.

correspondence between the legal phenomenon considered and the criterion), it is possible to make value judgements on the norms studied.

In *legal recommendatory research*, the researcher aims to "formulate recommendations on how the Law *should* be."[81] This type of research "embodies the 'solution orientation' of lawyers: trying to come to a better justified or more efficient operation of the Law by proposing corrections or adaptations."[82] Recommendatory legal research cannot be conducted independently since the starting point is to describe, explain and evaluate a legal phenomenon.[83] In other words, to be able to carry out recommendatory legal research, it is necessary first to describe, explain and evaluate the legal construct. Thus, it is necessary to select internal or external normative criteria that allow, after having evaluated the legislation, to express judgements on it.[84]

3.2. Doctrinal and Non-doctrinal Approach

The second type of research is doctrinal or non-doctrinal. According to Hutchinson and Duncan, "doctrinal research is research into the law and legal concepts."[85] In other words, doctrinal research describes a legal phenomenon, classifies it within a legal framework, interprets it through a systematic and teleological approach, explains its interrelationships with other rules and legal systems by means of comparative analysis, and evaluates the legal phenomenon, frequently making recommendations.[86] In this sense,

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[81] Emphasis in the original text, Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 63.
[82] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 375.
[83] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 64.
[84] Kestemont, "A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool," 376.
[85] Hutchinson and Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," 85.
[86] Dennis Pearce, Enid Campbell, and Don Harding, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (Canberra: Australian Government Publishing

doctrinal research aims to synthesises between different research objectives by adopting a theoretical approach that allows to analyse and to understand the Law.

Doctrinal research explores the legal phenomenon on the diachronic and on the synchronic level.[87] As regards the diachronic level, researchers use the categories of analysis of the historical and social sciences; as regards the synchronic level, researchers use specific legal categories. For this reason, we refer to legal research as qualitative research because it is a process of "selecting and weighing materials, taking into account hierarchy and authority as well as understanding social context and interpretation. It is not simply textual analysis. […] A researcher comes to understand the social context of decisions and draws inferences which need to be considered in a range of real-world factual circumstances."[88]

According to Dobinson and Johns, non-doctrinal legal research is a category that brings together all the non-theoretical research that falls into three categories: "problem, policy and law reform based research."[89] These three categories can coexist without being mutually exclusive, and they also complement doctrinal research. They are, therefore, a link to Kestemont's research objectives. As Dobinson and Johns pointed out:

> A researcher, for example, could begin by determining the existing law in a particular area (doctrinal). This may then be followed by a consideration of the problems currently affecting the law and the policy underpinning the existing law, highlighting, for example, the flaws in such policy. This in turn may lead the researcher to propose changes to the law (law reform).[90]

Service, 1987) cited in Terry Hutchinson, Researching and Writing in Law (Pyrmont: Lawbook Co., 2010), 7 and in Hutchinson and Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," 101.
[87] Dobinson and Johns, "Legal Research as Qualitative Research," 21.
[88] Ibid., 21, 24.
[89] Ibid., 22.
[90] Ibid.

Hence, non-doctrinal research is a: "Research which intensively evaluates the adequacy of existing rules, and which recommends changes to any rules found wanting."[91] This definition brings together all three of Dobinson and Johns' categories (problem, policy, and law reform), since a problem- and policy-based approach is needed to assess the appropriateness of a regulation, which then allows recommendations to be made on whether reform is desirable or necessary.

The unifying function of non-doctrinal research is also evidenced by its ductile nature. While doctrinal research is not quantitative, non-doctrinal research can be quantitative, qualitative, or a combination of the two.[92] This flexibility derives form the type of considerations and aims pursued by the analysis.[93]

Doctrinal and non-doctrinal research has a horizontal nature combining different methods, both internal and external to legal research, to carry out a cohesive analysis capable of giving coherent and justifiable outcomes.

4. Research Methodology and Operationalisation

After discussing the legal methodology from a theoretical viewpoint, it is necessary to describe the methodology adopted in this research. The starting point is the one

[91] Dennis Pearce, Enid Campbell, and Don Harding, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (Canberra: Australian Government Publishing Service, 1987) cited in Terry Hutchinson, Researching and Writing in Law (Pyrmont: Lawbook Co., 2010), 7 and in Hutchinson and Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," 101.
[92] "[…] The assessment of the problem, the evaluation of the policy and the need for law reform would require an empirical approach which could be quantitative, qualitative or a combination of the two. By its very nature, such research is inferential." See: Dobinson and Johns, "Legal Research as Qualitative Research," 22.
[93] "Problem, policy and law reform research often includes a consideration of the social factors involved and/or the social impact of current law and practice. In this regard, the type of research done might include surveys and interviews with various individuals and groups affected. Such research is often referred to as socio-legal research." Ibid., 23.

Griffiths indicated: "Questions go before methods."[94] The research question of this dissertation is whether the social clauses of FTAs are an effective instrument to protect labour rights. Therefore, the phenomenon under study is the social clause, and the problematic aspect analysed is its legal efficacy as an instrument to protect labour rights with an evaluative objective.

The research studies the social clauses of FTAs because this legal instrument links trade and social rights, committing the Parties to improve working conditions in their countries and adopting monitoring and dispute resolution mechanisms. The clauses are a complex legal phenomenon with a significant history. The doctrine has studied various aspects of these clauses. However, a systematic analysis capable of holding together a historical reconstruction, a comparative legal analysis and an empirical study of existing legal disputes is lacking. This dissertation aims to fills this gap in the literature.

In filling this gap, the research mainly considered the labour aspects of social clauses. However, the specific peculiarities of the analysed models, which also refer to environmental protection from a sustainable development perspective, were taken into account.

The general objective of this work is evaluative since it aims to "assess the impact/influence of international rules on national legislation [..]."[95] The first step in carrying out evaluative research is to identify evaluation criterion/a. The evaluation criterion employed in this research is the efficacy of social clauses.[96]

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[94] Maurice Adams and John Griffiths, "Against 'Comparative Method': Explaining Similarities and Differences," in *Practice and Theory in Comparative Law*, ed. Maurice Adams and Jacco Bomhoff (Cambridge: Cambridge University Press, 2012), 279.

[95] Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 60.

[96] Regarding terminology, please refer to note 1: the term 'efficacy' has been chosen instead of 'effectiveness' because 'efficacy' refers to the relationship between conduct and norms, whereas 'effectiveness' refers to the legal system as a whole. In this sense, 'efficacy' is the conformity of the addressees with the norm. Conversely, 'effectiveness' is when the rules of a legal system are observed on most occasions by most of the addressees or applied by the authorities.

Efficacy is the actual observance of the rule by its addressee.[97] Therefore, efficacy is a gradual criterion whereby a norm can be more or less effective according to its ability to influence social behaviour and depending on its impact on the addressee.[98] In other words, the efficacy of a norm concerns its ability to produce legal effects on the addressee.[99] This capacity to produce effects is closely linked to the power of deterrence of the rule itself, meaning the capacity to compel the addressee to comply with the prescriptions through the threat of an afflictive reaction.[100] For the purpose of this research, efficacy refers to the ability of an international standard to influence national authorities to adapt national norms to international standards and the ability to prevent the violation of social obligations under social clauses through deterrence mechanisms.

Ferrajoli stresses that there are two dimensions of efficacy: primary – effective compliance by citizens – and secondary – effective compliance by the authorities.[101] For this research, the obedience of citizens is not pertinent since the relevant norm (i.e., social clauses) is addressed to the authorities.[102]

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[97] Hans Kelsen, Teoria Generale Del Diritto e Dello Stato (1945) (Milano: Etas, 1994), 24, 39-40; Hans Kelsen, La Dottrina Pura Del Diritto (1960) (Torino: Einaudi, 1990), 20; Giacomo Gavazzi, Elementi Di Teoria Del Diritto (Torino: Giappichelli, 1984), 32; Norberto Bobbio, "Teoria Della Norma Giuridica (1958)," in Teoria Generale Del Diritto (Torino: Giappichelli, 1993), 25; Bobbio, "Sul Principio Di Legittimità (1964)," 74-75; Enrico Diciotti, "Il Concetto e i Criteri Della Validità Normativa," in Scritti per Uberto Scarpelli, ed. Mario Jori and Letizia Gianformaggio (Milan: Giuffrè, 1997), 333; Giorgio Pino, Diritti e Interpretazione. Il Ragionamento Giuridico Nello Stato Costituzionale (Bologna: Il Mulino, 2003), 22-25.

[98] Pino, *Teoria Analitica Del Diritto I: La Norma Giuridica*, 115.

[99] Angelo Falzea, "Efficacia Giuridica," in *Enciclopedia Del Diritto* (Milano: Giuffrè, 1965), 423 ff.; Ferrajoli, *Principia Iuris. Teoria Del Diritto e Della Democrazia. Vol I. Teoria Del Diritto*, 280–84; Riccardo Guastini, *La Sintassi Del Diritto* (Torino: Giappichelli, 2011), 257–58.

[100] "Deterrènte," in *Enciclopedia Italiana Treccani Online* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2022), https://www.treccani.it/enciclopedia/deterrente/.

[101] Kelsen, *Teoria Generale Del Diritto e Dello Stato (1945)*, 62; Ferrajoli, *Principia Iuris. Teoria Del Diritto e Della Democrazia. Vol I. Teoria Del Diritto*, 449–52.

[102] Pino, *Teoria Analitica Del Diritto I: La Norma Giuridica*, 109.

The preconditions for a rule to be effective are a) the knowledge or knowability of the norm; b) the concrete possibility of engaging in the conduct envisaged by the norm; c) the consequence (i.e., sanction) of not enforcing the norm.[103]

Once established the evaluation criterion, the research develops in three stages with a specific methodology linked to a specific objective. These objectives are: explanatory, descriptive, and comparative. These objectives are vertically unified by the general objective of the research (evaluative objective) and horizontally coordinated by the doctrinal and non-doctrinal approach. Indeed, the research is conducted on two levels. The first level is doctrinal and includes explanatory, descriptive and evaluative objectives. The second level is non-doctrinal and comprises the comparative objective focusing on the analysis of the EU and US social clause models and the US v. Guatemala and EU v. Republic of Korea cases. These two levels intersect at different points, creating a complex and cohesive structure.

Turning to operationalisation, the first phase of the research pursues the doctrinal explanatory objective with an external and internal approach. The external approach is based on a historical understanding of social clauses by tracing their emergence and development. The internal approach is based on a legal conceptualisation of the social clauses and is conducted by analytically assessing the legal construct, emphasising their substantive content.

The second phase of the research pursues a non-doctrinal comparative objective. At this stage, two regulatory models are analysed: the EU and US social clauses. This analysis is an external comparison since it compare legal constructs from different legal

[103] Ibid., 110.

systems aiming at identifying different solutions to the same problem.[104] This comparison is a micro-comparison since it aims to compare legal constructs and not entire legal systems.[105]

The comparison adopts a *sui generis* approach[106] – neither dogmatic nor functionalist – and follows a dual synchronic and diachronic analytical scheme. The study first compares the historical and then the legal evolution of the models. On the basis of this examination, the characteristics and structural elements of the two models are revealed, which are then compared to highlight similarities and differences.

The *tertia comparationis* of these models are a) political, b) economic, and c) legal. Politically, both the US and EU have unsuccessfully advocated for the inclusion of social provisions in Free Trade Agreements (FTAs) since the Havana Charter.[107] The failure to create the International Trade Organization (ITO), the opposition to social commitments during the post-World War II period, and the failure to include a universal social clause

[104] Jaakko Husa, "Research Design of Comparative Law," in *The Method and Methodology of Comparative Law. Essays in Honour of Mark Van Hoecke*, ed. Maurice Adams and Dirk Heirbaut (Oxford: Hart Publishing, 2014), 59; Mark Van Hoecke, *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004), 172; Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 401–6; Annemarie Elizabeth Oderkerk, *De Preliminaire Fase van Het Rechtsvergelijkend Onderzoek* (Nijmegen: Ars Aequi Libri, 1999), 73–78.

[105] Husa, "Research Design of Comparative Law," 57.

[106] There are mainly three comparative approaches: dogmatic, functional and *sui generis*. The dogmatic approach projects a defined legal concept or principle onto a non-national legal system in order to identify structurally and conceptually equivalent legal constructs. The functional approach *a priori* assumes that all legal systems deal with essentially the same problems and solves them using different means, often with similar results. Therefore, the aim is to evaluate the different results. Alongside the dogmatic and functional approaches, Kestemont introduces a heterogeneous category called the *sui generis* approach, which includes all variants to traditional approaches. The *sui generis* approaches tend to combine a number of comparisons, often adopting a dual comparison involving first a diachronic and then a synchronic study. See: Oderkerk, *De Preliminaire Fase van Het Rechtsvergelijkend Onderzoek*, 75; Wouter Devroe, *Rechtsvergelijking In Een Context Van Europeanisering En Globalisering* (Leuven: Acco, 2010), 38; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Oxford: Clarendon Press, 1998), 34; Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 34, 47–48.

[107] ILO, *Social Dimensions of Free Trade Agreements* (Geneva: International Labour Organization; International Institute for Labour Studies, 2013), 18.

in the WTO hindered the development of a link between labour and trade.[108] Hence, the US and the EU have overcome the impasse by introducing social clauses in their unilateral, bilateral or multilateral (not universal) trade arrangements.[109]

Economically, the US and EU have significant markets. According to data from the International Monetary Fund (IMF), the World Bank (WB), and the EU Commission, together, the US and the EU account for roughly 40% of the world Gross Domestic Product (GDP) and more than 40% of world trade.[110]

Legally, the US and the EU have adopted social clauses that are sufficiently similar to be compared and sufficiently different to bring out the differences. These characteristics offer an opportunity to assess the consistency between objectives and legal instruments.

The third and final phase of the research is once again of a non-doctrinal comparative nature and analyses two disputes: the US v. Guatemala case and the EU v. Republic of Korea case. As in the second phase, the analysis is a micro-comparison of an external nature, as two specific disputes are investigated. The approach is functional

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[108] Adalberto Perulli, "The Perspective of Social Clauses in International Trade," WP CSDLE "Massimo D'Antona" INT 147/2018 (Catania, 2018), 4; ILO, *Social Dimensions of Free Trade Agreements*, 18-19; Erika De Wet, "Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization," *Human Rights Quarterly* 17, no. 3 (1995): 445.

[109] ILO, *Social Dimensions of Free Trade Agreements*, 19–21.

[110] European Commission, "EU Trade Relations with United States," EU trade relationships by country/region, February 4, 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states_en; World Bank, "GDP (Current US$) - European Union, United States - Data," World Bank Open Data, 2022, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU-US; IMF, "Report for Selected Countries and Subjects - European Union," World Economic Outlook Database, 2022, https://www.imf.org/en/Publications/WEO/weo-database/2021/April/weo-report?a=1&c=998,&s=NGDP_RPCH,NGDPD,PPPGDP,PPPPC,&sy=2020&ey=2026&ssm=0&scsm=0&scc=0&ssd=1&ssc=0&sic=0&sort=country&ds=.&br=1; IMF, "Report for Selected Countries and Subjects - United States," World Economic Outlook Database, 2022, https://www.imf.org/en/Publications/WEO/weo-database/2021/April/weo-report?c=111,&s=NGDP_RPCH,NGDPD,PPPGDP,NGDPDPC,PPPPC,&sy=2020&ey=2026&ssm=0&scsm=0&scc=0&ssd=1&ssc=0&sic=0&sort=country&ds=.&br=1.

because the study assumes that both cases address the same legal issue, namely the protection of labour rights, but with different developments and outcomes. Central to this comparison is the study of how disputes are structured from a legal viewpoint because this shows social clauses' efficacy.

The comparison is carried out through a parallel examination of the two cases that focuses on the legal grounds for the decisions. The examination reveals similarities and differences in the Investigation and Enforcement Mechanisms (IEMs) by highlighting the problems related to the efficacy and deterrence of the social clauses.

The *tertia comparationis* of these two cases are four: a) the US v. Guatemala and EU v. Republic of Korea are the most relevant (and, so far, the only) disputes concerning violations of the social clause obligations settled by an International Panel; b) the US v. Guatemala case served as a forerunner and a model (from which to depart) for the EU v. South Korea case; c) the objectives, obligations, supervision, and dispute-resolution mechanisms of the social clauses are sufficiently similar to be compared; d) the outcomes of these decisions are relevant for assessing the efficacy of social clauses.

5. Research Structure

The dissertation revolves around three Chapters that cover the research objectives and follow the methodologies outlined above.

Chapter I deals with the historical development and conceptualisation of the social clause as a legal instrument. Besides the introduction and concluding remarks, Chapter I is divided into two main sections. Section 2 deals with the historical analysis of social clauses and the link between trade and labour. Section 3 concerns the doctrinal study and conceptualisation of the social clause as a legal instrument.

Chapter II concerns the comparative analysis of the US and EU social clause models. Besides the introduction and concluding remarks, Chapter II is divided into two main sections. Section 2 develops a historical and legal analysis of the US social clause model (i.e., the 'Labor Chapter'). Section 3 studies the EU social clause model (i.e., the 'Trade and Sustainable Development Chapter') from the same historical and legal perspective. Chapter III concerns the comparative analysis of the two case studies: US v. Guatemala and EU v. Republic of Korea. Besides the introduction, Chapter III is divided into two main sections. Section 2 analyses the dispute between the US and Guatemala. Section 3 that between the EU and the Republic of Korea.

In conclusion, the research assesses the efficacy of social clauses in protecting labour rights from a legal point of view.

Chapter I.
Linking Trade and Labour: The Social Clause

Summary: 1. Introduction; 2. Linking Trade and Labour: A Long History; 2.1. Form Necker to World War I; 2.2. Part XIII of the Treaty of Versailles and the Funding Principles of the ILO; 2.3 The Inter-war Period; 2.4. From the International Labour Organization to the World Trade Organization; 2.5. The World Trade Organization and the Free Trade Agreements; 3. Conceptualising the Social Clause; 3.1. The Social Clause: Definitions, Characteristics and Structural Elements; 3.2. Commercial Arrangements; 3.3. International Fundamental Labour Rights; 3.4. Investigation and Enforcement Mechanisms; 4. Preliminary Remarks.

1. Introduction

Historically, International Labour Law was developed to mitigate the negative social externalities of the industrial revolution and to protect international trade from unfair competition.[111] The first phase of the development of International Labour Law was at the beginning of the 19th century with the reflections on the need to improve the working conditions of workers by Owen (England), Blanqui, Villerme (France) and Ducpetiaux (Belgium).[112]

From the second half of the 19th century until the outbreak of World War I, the European powers, encouraged by the trade union movement, tried unsuccessfully to conclude international Conventions establishing minimum working standards.[113] The turning point came only after the end of the World War I, when the Treaty of Versailles

[111] Nicolas Valticos, *International Labour Law* (Deventer: Springer, 1979), 17, 20–26; Steve Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview," *International Labour Review* 126, no. 5 (1987): 566.
[112] Valticos, *Int. Labour Law*, 17; Jean-Michel Servais, *International Labour Law* (Alphen aan den Rijn: Kluwer Law International, 2011), 21.
[113] Perulli, "The Perspective of Social Clauses in International Trade," 4–5; ILO, *Dix Ans d'organisation Internationale Du Travail* (Geneva: International Labour Office, 1931), 15; Valticos, *Int. Labour Law*, 17–18; Jean-Michel Servais, *International Labour Law*, 6th ed. (Alphen aan den Rijn: Kluwer Law International, 2020), 21–24.

established the International Labour Organization (ILO).[114] Among the main objectives of the new organisation was the elimination of unfair competition based on inhuman working conditions.[115] This choice reflected the close connection between International Labour Law and international trade.

During the inter-war period, the ILO established numerous international Conventions that improved the working conditions in its Member States.[116] However, the greatest effort to combine economic and social progress began in the final years of World War II with the Declaration concerning the aims and purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944 (Philadelphia Declaration) and the 1946 Amendments to the ILO Constitution, which breathed new life into the ILO.[117] This process found an important convergence in International Trade Law in the attempt to adopt the 1948 Havana Charter for an International Trade Organization (Havana Charter) and its social Chapter.[118] Both the Philadelphia Declaration and the Havana Charter reaffirmed that economic growth and fair competition can be achieved only by protecting labour rights.[119] Although the Havana Charter never entered into force, for the first time a section on the promotion of labour rights (i.e., a social clause) was included in a multilateral universal trade treaty.[120] Thus,

[114] Nicolas Valticos, "Cinquante Années d'activité Normative de l'Organisation Internationale Du Travail," *Revue Internationale Du Travail* 100, no. 3 (1969): 224–25; Perulli, "The Perspective of Social Clauses in International Trade," 4.
[115] Valticos, *Int. Labour Law*, para. 20.
[116] Servais, *Int. Labour Law*, 2011, 26–27.
[117] Valticos, *Int. Labour Law*, 19–20; Servais, *Int. Labour Law*, 2011, 27–28.
[118] Isao Kamata, "Regional Trade Agreements with Labor Clauses: Effects on Labor Standards and Trade," *RIETI Discussion Paper Series*, Discussion Paper Series (Tokyo, February 2014), 1–4; Havana Charter for an International Trade Organization, 1948; Jean-Christophe Graz, "The Havana Charter: When State and Market Shake Hands," in *Handbook of Alternative Theories of Economic Development*, ed. Rainer Kattel, Jayati Ghosh, and Erik Reinert (Cheltenham: Edward Elgar Publisher, 2016), 281–90.
[119] Valticos, *Int. Labour Law*, paras. 20, 25; Servais, *Int. Labour Law*, 2011, para. 27.
[120] Oliver De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards*, (London: Hart Publishing, 2015), 8–9; Perulli, "The Perspective of Social Clauses in International Trade," 5.

the Havana Charter marked a turning point in its effort to institutionalise the link between international trade and Labour Law and to combine economic development and social progress.[121]

In the 1970s, social clauses gained new momentum in the international debate: [122]

> [when the] United States Commission on International Trade and Investment Policy recommended that the Government actively support a multilateral effort to gain acceptance of an IFLS [International Fair Labour Standards][123] code that would include "realistic means for enforcing the code."[124]

A similar situation occurred in 1987 when the Congress committed the government to introduce into the General Agreement on Tariffs and Trade (GATT) that "the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade."[125] All these attempts failed.

The 1990s marked a resurgence of efforts to introduce a social clause in a universal trade agreement. The first failed attempt occurred in 1994 with the creation of the World Trade Organisation (WTO),[126] the second in 1996 during the WTO Ministerial Summit in Singapore.[127] Indeed, the Singapore Ministerial Declaration (Singapore Declaration) was

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[121] Jean-Michel Servais, "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress," *International Labour Review* 128, no. 4 (1989): 423.

[122] Steve Charnovitz, "Fair Labor Standards and International Trade," *Journal of World Trade Law* 20, no. 1 (1986): 61–78; Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview," 575; "United States International Economic Policy in an Interdependent World. Report to the President by the Commission on International Trade and Investment Policy" (Washington, D.C., 1971), 65.

[123] In the context of the Charnovitz analysis, the acronym IFLS (International Fair Labour Standards) is used in a non-technical way as a synonym for workers' rights. In this study, IFLS is used with the same non-technical meaning for adherence to the source. See: Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview," 582.

[124] Ibid., 575.

[125] Ibid.

[126] Virginia A. Leary, "The WTO and the Social Clause: Post-Singapore," *European Journal of International Law* 1 (1997): 118–22.

[127] Singapore Ministerial Declaration, 1996; Leary, "The WTO and the Social Clause: Post-Singapore," 118–22; Arvind Panagariya, "Trade-Labour Link: A Post-Seattle Analysis," in *Globalisation under Threat: The Stability of Trade Policy and Multilateral Agreements*, ed. Zdenek Drabek (Cheltenham: Edward Elgar, 2001), 102–288; Paul Bairoch, "Brief History of the Social Clause in Trade Policy," in *Trade and Jobs in Europe: Much Ado About Nothing?* (Oxford: Oxford University Press, 1999), 161–71.

non-committal, just recalling "the observance of internationally recognized core labour standards" (CLS) adopted by the ILO.[128]

Given the impossibility of introducing a universal social clause, there has been a 'boom' of social clauses in all other non-universal bilateral and multilateral trade agreements since the early 2000s.[129] However, this 'boom' posed problems for International Trade Law, International Labour Law and International Economics because the social clause is a dilemma that straddles law and economics.[130] Those who envisage greater international protection for workers see social clauses as an important tool to realise their efforts, while those who envisage a more favourable business environment emphasise the possible economic externalities of such regulation.[131]

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[128] In the 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (1998 Declaration), the ILO established four fundamental principles to pursue social justice: a) freedom from forced labour; b) freedom from child labour; c) freedom from discrimination in employment; d) freedom to form and join trade unions and to bargain collectively. To each of these principles, the 1998 Declaration related two Conventions, the Core Labour Standards (CLS). These conventions are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Convention No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Convention No. 98); the Forced Labour Convention, 1930 (No. 29) (Convention No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105) (Convention No. 105); Minimum Age Convention, 1973 (No. 138) (Convention No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182) (Convention No. 182); Fair Wages Convention, 1951 (No. 100) (Convention No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (Convention No. 111). There is a formal distinction between principles and standards.
On 10 June 2022, the International Labour Conference (ILC) adopted the Resolution on the Inclusion of a Healthy and Safe Working Environment in the Fundamental Principles and Rights of the ILO. This resolution amended paragraph 2 of the 1998 Declaration to include occupational health and safety (OSH) among the fundamental principles and rights at work. The two conventions designated as core are the Occupational Safety and Health Convention, 1981 (No. 155) (Convention No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) (Convention No. 187).
According to the ILO doctrine, CLS are binding on all ILO member States, regardless of whether or not they have ratified the Conventions since the CLS are necessary to enable workers to defend and improve their working conditions and make them decent. See: ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, 1998; ILO Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work, 2022.

[129] Perulli, "The Perspective of Social Clauses in International Trade," 4–5; ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, *Studies on Growth with Equity* (Geneva: International Labour Office, 2017), 11.

[130] Servais, *Int. Labour Law*, 2020; Servais, "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress."

[131] Servais, *Int. Labour Law*, 2011, 34–44.

Social clauses are often blamed for being protectionist instruments aimed at shielding developed countries from commodities produced in developing countries.[132] In these terms, social clauses are seen not as an instrument aimed at spreading fair competition and protecting workers, but rather at slowing down the economic growth of developing countries.[133] However, to create fair competition in global markets, minimum labour standards are necessary; indeed, "[i]f a country allows its companies to employ their workers in a deplorable working condition and for miserable wages [..] it will be able to obtain an unfair advantage over its competitors."[134]

Nowadays, social clauses are a strong reality in bilateral, multilateral and unilateral (e.g., Generalised Systems or Schemes of Preferences, i.e., GSPs)[135] trade arrangements,[136] and their historical and legal study is necessary to understand their efficacy. Indeed, social clauses are multifaceted legal tools whose understanding poses a significant research challenge. This Chapter aims at the dual task of describing the historical evolution of social clauses and the link between trade and labour (Section I), as well as conceptualising the social clause and its characteristics and structural elements (Section II).

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[132] Jagdish Bhagwati, "Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues," *The World Economy* 18, no. 6 (1995): 745-59.
[133] Servais, *Int. Labour Law*, 2020, 34.
[134] Ibid.
[135] The Generalized System of Preferences (also known as Generalized Scheme of Preferences or GSP), can be defined as a preferential tariff and duty scheme, which provides tariff reduction for least developed countries on several commodities. It was instituted in 1971 under the aegis of UNCTAD by developed countries to boost the economic development of least developed countries. Among others see: Lester Simon, Mercurio Bryan, and Davies Arwel, *World Trade Law* (Oxford, London, New York, Sydney: Hart Publishing, 2015), 886–909.
[136] ILO, *Social Dimensions of Free Trade Agreements*, 17–21; ILO, "Free Trade Agreements and Labour Rights - Labour Provisions in Trade Agreements Hub," December 2, 2020, https://www.ilo.org/LPhub/.

2. Linking Trade and Labour: A Long History

This section traces the historical development of social clauses and the link between labour and trade. The internal articulation of the section focuses first on International Labour Law (subsections 2.1., 2.2. and 2.3.), and secondly on social clauses (subsections 2.4. and 2.5). Bringing International Labour Law and social clauses together is indispensable because they are two interconnected phenomena where the former influences the latter. The analysis is theoretical and based on academic sources.

2.1. From Necker to World War I

Jacques Necker, *Contrôleur général des finances* of Louis XVI, was the first to theorise that social inequalities negatively affect international trade:[137]

> the country which, out of barbarian ambition, would abolish the day of rest prescribed by religion, would probably attain a certain degree of superiority if it were the only country to do so; but as soon as other nations follow the lead, this advantage would be lost, and shares in sales would return to what they had been prior to the change. The same reasoning demonstrates that countries where days of rest are multiplied beyond the norm will have a disadvantage with respect to countries that have selected as days of rest only the holy days imposed by the church.[138]

Necker's reflection presents the main themes of the legal and economic debate on the influence of social conditions on the trade of nations that began in the 18th century and continues to the present day.[139] Moreover, the Swiss banker was one of the first to

[137] Kofi Addo, *Core Labour Standards and International Trade: Lessons from the Regional Context* (Berlin: Springer Berlin Heidelberg, 2015), 81; Servais, "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress," 424; Erika De Wet, "Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization," *Human Rights Quarterly* 17, no. 3 (1995): 444; ILO, Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements, 18; Nigel Haworth and Stephen Hughes, "Trade and International Labour Standard: Issues and Debates over Social Clause," *Journal of Industrial Relations* 39, no. 2 (1997): 182; Nicolas Valticos, "Social Conditions, Equitable Competition and Trade," in *World Interdependence and Economic Cooperation among Developing Countires, North-South Dialogue* (Geneva: Centre d'études pratiques de la négociation internationale, 1981), 49-60.
[138] Bairoch, "Brief History of the Social Clause in Trade Policy," 161.
[139] Ibid.

propose that States create international agreements to protect workers. In the first half of the 19th century, Necker's view was continued by various philanthropists, entrepreneurs and politicians, including Robert Owen in England, Jérôme Blanqui and Villerme in France, and Ducpetiauxin Belgium. These philanthropists advocated the improvement of working and living conditions.[140] Among these philanthropists, Charles Frederick Hindley argued that it was necessary to achieve an International Labour Law conceived as an autonomous product of an international organisation.[141]

In 1838, it was the economist Jérôme Blanqui who expressed the need to harmonise labour legislation at the European level to improve workers' conditions and economic security:

> There is only one way of accomplishing it [the reform] while avoiding its disastrous consequences: this would be to get it adopted simultaneously by all industrial nations which compete in the foreign market.[142]

In the same period, the French manufacturer Daniel Le Grand, echoing Blanqui and Hindley, urged the industrial powers (UK, France, Germany, and Switzerland) to adopt a global regulation of Labour Law.[143]

In the second half of the 19th century, ideas for improving working conditions were mainly promoted through congresses and private associations of academics, entrepreneurs, trade unionists and progressive politicians in Europe. The results were the national reform proposed mainly in France and Germany.[144]

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[140] Addo, *Core Labour Standards and International Trade: Lessons from the Regional Context*, 81; Nicolas Valticos, "L'avenir Des Normes Internationales Du Travail," *Revue Internationale Du Travail* 118, no. 6 (1979): 17–18; Servais, *Int. Labour Law*, 2011, 21.
[141] Göte Hansson, *Social Clauses and International Trade: An Economic Analysis of Labour Standards in Trade Policy*, (London, New York: Croom Helm, St. Martin's Press, 1983), 12.
[142] Blanqui Jérôme A., *Cours D'Economie Industrielle. 1838-1839* (1839) quoted in Addo, *Core Labour Standards and International Trade: Lessons from the Regional Context*, 82.
[143] ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, 18; Valticos, *Int. Labour Law*, 17–18; Bairoch, "Brief History of the Social Clause in Trade Policy."
[144] Valticos, *Int. Labour Law*, 17.

The first intergovernmental initiative came from Switzerland, where the government called for a Conference on the issue of workers' rights in Berne in 1890.[145] At the last moment, Emperor Wilhelm II called a Conference with the same objectives in Berlin, thus nullifying the Swiss effort.[146] The Berlin Conference resulted in a dead end with only non-binding guidelines being adopted.[147]

Meanwhile, the US trade unions successfully campaigned for the McKinley Tariff Act (1890) prohibiting the import of products made by prisoners in US trade agreements. This Act was soon imitated in the United Kingdom (1897), Canada (1907), New Zealand (1908), and South Africa (1913).[148]

A turning point came in 1897 with the Zurich and Brussels Congresses. The Zurich Congress was an expression of the European labour movement and trade unionism, the Brussels Congress of the progressive thinking of professors, administrators and politicians. In Brussels, the International Association for the Legal Protection of Workers was founded with its headquarters in Basel.[149] Despite being a private association, the Basel Association carried out fundamental work that led to the International Conferences of 1905 and 1906 in Berne. The Berne Conferences adopted the first two international labour Conventions: the International Convention on the Prohibition of Night Work for Women in Industry and the International Convention on the Prohibition of the Use of

[145] Ibid., 17–18; Servais, *Int. Labour Law*, 2011, 21–22.
[146] Valticos, *Int. Labour Law*, 17.
[147] Addo, *Core Labour Standards and International Trade: Lessons from the Regional Context*, 82–83.
[148] John Cavanagh et al., *Trade's Hidden Costs: Worker Rights in a Changing World Economy* (Washington D.C.: The International Labor Rights Education and Research Fund, 1988), 42; Bairoch, "Brief History of the Social Clause in Trade Policy," 162.
[149] James Shotwell, *The Origins of the International Labor Organization* (New York: Columbia University Press, 1934); Valticos, *Int. Labour Law*, 18.

White Phosphorus in the Manufacture of Matches.[150] The outbreak of World War I abruptly halted work on the adoption of other draft Conventions.[151]

2.2. Part XIII of the Treaty of Versailles and the Funding Principles of the ILO

At the end of World War I, the Allied Powers recognised both the negative effects of social inequality and poor working conditions on international trade and economic growth and the need to address labour mistreatment internationally as a threat to peace and security.[152] Therefore, at the Versailles Conference, the victorious powers decided to create an international organisation to protect workers' rights.[153] The political reason, according to Shotwell, stemmed from the recognition that in 1919 there were only two possible responses to the call for social justice: the revolutionary method adopted in Russia, which denied the legitimacy of the existing social order, and the reformist method, which reconfigured the social order on the basis of experience without denying its validity.[154] To evolve the capitalist model in a social direction, Part XIII of the Treaty of Versailles established the ILO,[155] whose constitutional preamble proclaimed that:

> 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.[156]

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[150] Shotwell, *The Origins of the International Labor Organization*; John W. Follows, *Antecedents of the International Labour Organization* (Oxford: Clarendon Press, 1951); Valticos, *Int. Labour Law*, 18.
[151] Shotwell, *The Origins of the International Labor Organization*; Follows, *Antecedents of the International Labour Organization*; Valticos, *Int. Labour Law*, 18.
[152] Valticos, *Int. Labour Law*, 18; Charnovitz, "Fair Labor Standards and International Trade," 61–78.
[153] Servais, *Int. Labour Law*, 2011, 24.
[154] Alessandra Zanobetti, *Diritto Internazionale Del Lavoro. Norme Universali, Regionali e Dell'Unione Europea* (Milan: Giuffrè, 2011), 29-30; Gerry Rodgers et al., *The ILO and the Quest for Social Justice, 1919-2009* (Geneva: International Labour Office, 2009), 6-7.
[155] Valticos, "Cinquante Années d'activité Normative de l'Organisation Internationale Du Travail," 224–25; Perulli, "The Perspective of Social Clauses in International Trade," 4; Servais, *Int. Labour Law*, 2011, 24.
[156] ILO Constitution, 1919.

Alongside the preamble, the ILO Constitution sets out five fundamental principles. The first principle States that a "Lasting peace cannot be achieved unless it is based on social justice, grounded in freedom, dignity, economic security and equal opportunity"[157] and represents both the peak of the hierarchy of values and the ILO's *raison d'être*. The second principle concerns the rejection of commodification of labour and the affirmation of the dignity of labour as a prerequisite for the realisation of social justice and peace.[158] The third principle is freedom of association and equality and serve to create a democratic society that guarantees decent work for every person. [159] This democratic society is meant to benefit everyone. Therefore, the fourth principle concerns the fight against poverty.[160] The ILO followed up on these principles by developing policies and regulations for promoting full employment, ensuring a decent and sufficient wage, regulating the working day, protecting women, banning child labour, prohibiting forced labour, protecting migrant workers, ensuring health and safety at work, introducing insurances against injuries, sickness and unemployment, and establishing pension systems.[161]

To ensure effective functioning, the ILO was given an institutional structure based on three bodies: the General Labour Conference, the Governing Body and the International Labour Office as secretariat.[162] These bodies were based on tripartism, i.e. the equal involvement of workers' and employers' representatives and States in standard setting.[163] Furthermore, to promote economic and social progress, the ILO was mandated to adopt Conventions and Recommendations, which national governments were required

[157] Rodgers et al., *The ILO and the Quest for Social Justice, 1919-2009*, 8.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] ILO Constitution; Rodgers et al., *The ILO and the Quest for Social Justice, 1919-2009*, 8.
[162] Valticos, *Int. Labour Law*, 34–38; Servais, *Int. Labour Law*, 2020, 45–51.
[163] Valticos, *Int. Labour Law*, 29–34.

to ratify and implement, and to engage in their promotion and monitoring by cooperating with States and other organisations.[164]

2.3. The Inter-war Period

In the 1920s, the ILO sought to establish itself as the authority responsible for the production and monitoring of Labour Law,[165] struggling with the limitations imposed by the novelty of the matter and the limited enforcement power granted by States.[166] The decisions of the Permanent Court of International Justice from 1921-1933 contributed to the establishment of the ILO by extending its competence to all economic sectors.[167]

During the inter-war years, the ILO mainly produced legislation to provide a solid foundation for International Labour Law.[168] Before 1939, the ILO adopted at least 67 labour Conventions to improve working conditions during its annual labour Conference. The first Convention was adopted in 1919 setting the working week at 48 hours as Robert Owen had already advocated in the early 1830s.[169] According to Bairoch, "[t]he adoption of these Conventions soon gave rise to the idea of exercising pressure through trade as a means of promoting their enforcement[…]." This approach was adopted by the US in 1922 with customs legislation that established an adjustable tariff to compensate for differences in wages and production costs in the US.[170]

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[164] Rodgers et al., *The ILO and the Quest for Social Justice, 1919-2009*; Valticos, *Int. Labour Law*, 43-57; Servais, *Int. Labour Law*, 2020, 45-51.
[165] Nicolas Valticos, *Droit International Du Travail* (Paris: Dalloz, 1983), 69–70.
[166] Peter-Tobias Stoll, "International Economic and Social Dimensions: Divided or Connected?," in *Labour Standards in International Economic Law* (Cham: Springer, 2018), 12.
[167] International Court of Justice/Permanent Court of International Justice, "Collection of Advisory Opinions (1923-1930)," Series B, accessed January 26, 2021, https://www.icj-cij.org/en/pcij-series-b.
[168] Servais, *Int. Labour Law*, 2011, 26–27.
[169] Bairoch, "Brief History of the Social Clause in Trade Policy," 168–69.
[170] Charnovitz, "Fair Labor Standards and International Trade," 61–78.

In 1930, the McKinley Tariff Act was amended by extending the ban on importing commodities produced by forced or compulsory labour.[171] The election of President Roosevelt and his economic program, especially during World War II, refocussed the post-war political debate on the issue of working conditions and social inequalities. This agenda was clearly stated in the 1941 State of the Union speech:

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. […] The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants-everywhere in the world.[172]

Roosevelt's political principles served as the basis for post-war reconstruction.

2.4. From the International Trade Organization to the World Trade Organization

Towards the end of World War II, the Allied Nations began to lay the foundations for the new World Order that would ensure peace, security, and prosperity for the people. The 1944 Philadelphia Declaration was one of the most important steps in the realisation of this project as it reaffirmed the ILO's principles of solidarity and social justice and breathed new life into International Labour Law.[173] The Philadelphia Declaration led to the ILO's constitutional amendments of 1945-1946, which adapted the organisation to the new needs of the international community.[174]

In 1947, the United Nations Conference on Trade and Employment was held in Havana to reorganise the international trade and labour system.[175] This conference

[171] Tariff Act of 1930, 1930.
[172] Franklin D. Roosevelt, "Annual Message to Congress on the State of the Union," January 6, 1941, https://www.presidency.ucsb.edu/documents/annual-message-congress-the-state-the-union.
[173] Valticos, *Int. Labour Law*, 19; Servais, *Int. Labour Law*, 2011, 27–30.
[174] Servais, *Int. Labour Law*, 2020, 27–31.
[175] Perulli, "The Perspective of Social Clauses in International Trade," 8.

produced the Havana Charter[176] establishing the International Trade Organisation (ITO).[177] The Charter was strongly influenced by the contemporary Keynesian economic vision, which combined economic development with social progress to promote full employment and collective welfare.[178] This approach clearly emerges from the Charter's provisions in Chapter III on economic development and reconstruction, Chapter VI on trade policy and Chapter II on employment and economic activity.[179] The latter represents the first social clause linking trade and labour and it makes explicit reference to the ILO International Labour Standards (ILS) established in a general trade treaty.[180] The main provision of Chapter II is Article 7 (Fair Labour Standards), which states:

> 1. The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, Conventions and agreements. They recognize 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. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.
> 2. Members which are also members of the International Labour Organisation shall cooperate with that organization in giving effect to this undertaking.
> 3. In all matters relating to labour standards that may be referred to the Organization in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation.[181]

During the negotiations, the states agreed on reciprocal tariff reductions to be applied on a provisional basis until the ITO becomes operational.[182] However, the change

[176] Havana Charter for an International Trade Organization.
[177] Graz, "The Havana Charter: When State and Market Shake Hands."
[178] United Nations Conference on Trade and Development, *Trade and Development Report 2017. Beyond Austerity: Towards A Global New Deal* (New York, Geneva: United Nations, 2017), 151; Perulli, "The Perspective of Social Clauses in International Trade," 16.
[179] Stoll, "International Economic and Social Dimensions: Divided or Connected?," 18.
[180] Ibid.
[181] Havana Charter for an International Trade Organization.
[182] Stoll, "International Economic and Social Dimensions: Divided or Connected?," 19.

in American policy and the outbreak of the Cold War led the US to not ratify the Havana Charter, thus precluding the establishment of the ITO and the entering into force of the social clause.[183] Therefore, the provisional tariff reductions were detached from the Havana Charter and became the General Agreement on Tariffs and Trade (GATT).[184] The social Chapter was not completely abandoned because Article XX of the GATT provided for a ban on trade in products manufactured by prisoners that echoed that of the McKinley Tariff Act.[185] The most damaging result of the failure of the Havana Charter was the substantial and persistent divide between trade and labour.[186]

During successive rounds of GATT negotiations, the US and European countries sought to strengthen the social provisions of the agreement.[187] The first failed attempt happened in 1953 when the United States proposed to introduce a clause that would prohibit unfair labour standards, defined as "the maintenance of working conditions below those which the productivity of industry and the economy in general would justify"[188] because they "create difficulties in international trade which nullify or impair the benefits arising from this agreement."[189] This clause had two merits: a very broad definition of unfair labour standards and the application of Article XXIII of the GATT

[183] Perulli, "The Perspective of Social Clauses in International Trade," 16.
[184] The background behind the decision to not ratify the Havana charter is rooted in the post-war debate between Republicans and Democrats in the United States. The Republicans' economic vision at the end of World War II had shifted from protectionism to trade liberalisation with a view to strengthening US preponderance in the international market. Conversely, the Democrats maintained a protectionist economic vision. This situation had an unfortunate consequence, leading to the failure of liberalising legislation in 1949 when the majority of Congress was taken by the Democrats. Instead, the Republican victory in the subsequent presidential and congressional elections led the US back on the path to liberalisation. Robert E. Baldwin, "U.S. Trade Policy Since 1934: An Uneven Path Toward Greater Trade Liberalization," *National Bureau of Economic Research Working Paper*, no. 15397 (2009): 3–4.
[185] Bairoch, "Brief History of the Social Clause in Trade Policy."
[186] Stoll, "International Economic and Social Dimensions: Divided or Connected?," 19.
[187] Charnovitz, "Fair Labor Standards and International Trade;" Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview."
[188] US House of Representatives Committee on Ways and Means, "Compendium of Papers on United States Foreign Trade Policy" (Wahington, D.C., 1958), 789–90.
[189] US Commission on Foreign Economic Policy, "Staff Papers Prepared for the Commission on Foreign Economic Policy" (Wahington, D.C., 1954), 437–38.

which authorised a nation that saw its benefits "nullified or impaired" by the practices of another nation to act against the latter.[190]

On the other side of the Atlantic, British trade unions made proposals in the 1950s to introduce binding social obligations in the GATT. The idea was to use Article XXIII to impose sanctions against States that did not act to prohibit unfair labour standards. In 1959, in preparation for the Geneva round (1960-1962), the International Confederation of Free Trade Unions (ICFTU) advocated the reintroduction of a social Chapter modelled on the Havana charter. All these proposals were unsuccessful.[191]

Another failed attempt occurred in 1971 when the US Commission on International Trade and Investment Policy supported an effort to promote the codification and enforcement of the IFLS. This recommendation was reflected in the Trade Act of 1974, in which Congress bound the government to act for the inclusion of IFLS in the GATT. The US proposal was abandoned during the Tokyo Round (1973-1979) because it did not find the necessary consensus.[192]

One of the main causes of the failures of these proposals was opposition from developing countries.[193] Indeed, the basic idea of the development of decolonised countries in the 1960s and 1970s was associated with political independence and rapid industrialisation with little regard for labour rights.[194] According to Stoll,

> the concept of development in those days focused on industrialization, while other issues such as agriculture or the basic needs of individuals were only added later. The issue of labour conditions was hardly ever mentioned.[195]

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[190] Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview," 574.
[191] Ibid., 575.
[192] Ibid.
[193] Baldwin, "U.S. Trade Policy Since 1934: An Uneven Path Toward Greater Trade Liberalization;" Bairoch, "Brief History of the Social Clause in Trade Policy."
[194] Stoll, "International Economic and Social Dimensions: Divided or Connected?," 20.
[195] Ibid., 20–21.

In the 1980s, the major step forward in the history of the labour and trade linkage was the adoption of a conditional clause in the US GSP.[196] Indeed, between 1984-1987 US GSP reform committed the beneficiary countries to pass legislation on:

> (A) the right of association;
> (B) the right to organize and bargain collectively;
> (C) a prohibition on the use of any form of forced or compulsory labor;
> (D) a minimum age for the employment of children; and
> (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[197]

Although this clause was included in a unilateral trade regulation, it became the model for all other subsequent social clauses. In fact, starting from this clause, the US developed others that were included in FTAs. The EU has done the same, developing its own autonomous model (the EU and US models will be discussed in the next Chapter).[198]

All the failures of this period have two main causes: the historical framework of the Cold War, which reduced the question of working conditions and social justice to a criticism of the world economic system, and the economic conception of development, understood, especially by developing countries, as a question of sovereignty and political independence.[199]

Despite all the failures, between the 1950s and 1980s, there was the most remarkable development of International Labour Law through the ILO's regulatory,

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[196] Baldwin, "U.S. Trade Policy Since 1934: An Uneven Path Toward Greater Trade Liberalization;" United Nations Conference on Trade and Employment, *Generalized System of Preferences. Handbook on the Scheme of the United States of America* (New York, Geneva: United Nations, 2016), 4-5; Vivian C. Jones, "Generalized System of Preferences: Background and Renewal Debate," *CRS Report for Congress* (Wahington, D.C., 2006), 2-9.
[197] Trade and Tariff Act of 1984, Pub. L. No. 98–573 (1984), sec. 503.
[198] Ulf Thoene, "The Strategic Use of the Labour Rights Discourse – Revisiting the 'Social Clause' Debate in Trade Agreements," *Justicia Juris* 10, no. 2 (2015): 59–70; ILO, *Social Dimensions of Free Trade Agreements*, 29–91.
[199] Stoll, "International Economic and Social Dimensions: Divided or Connected?," 25.

promotional, and monitoring activities. Therefore, this development should be emphasised when addressing labour and trade relationships.[200]

As Valticos and Servais explain, between the 1950s and 1980s, the ILO produced most of the international Conventions and Recommendations, creating a veritable International Labour Law code. This normative effort has been complemented by that of monitoring and promoting international labour law. Despite numerous problems and setbacks, the ILO's efforts have led to the ratification and diffusion of international labour standards.[201]

2.5. The World Trade Organization and the Free Trade Agreements

A new phase in the history of universal social clauses opened with the conclusion of the Cold War. This disruptive event reinforced the capitalist model that emerged victorious, prompting the US and other Western countries to promote further liberalization and to combine labour and trade. The stage for this new phase was the Uruguay Round negotiations held between 1986 and 1994, which led to the creation of the World Trade Organization (WTO).

The US intent to introduce a universal social clause in the GATT emerged as early as the preparatory work for the round. During the preparatory phase, the US proposed to "adopt, as a principle of GATT, that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade."[202] The US proposal was also supported by a 1986 European Parliament resolution calling for the

[200] Ibid.
[201] Valticos, *Int. Labour Law*, 19–20; Servais, *Int. Labour Law*, 2011, 27–32.
[202] Omnibus Trade and Competitiveness Act of 1987,1988.

adoption of a social clause in the GATT.[203] However, after 8 years of negotiation in the Marrakesh Agreement establishing the WTO, there was no universal social clause.[204]

This umpteenth failure was even more evident following the first 1996 Singapore Ministerial Conference. In the Singapore Declaration, ministers of WTO Members affirmed: "We renew our commitment to the observance of internationally recognized core labour standards."[205] However, the ministers were non-committal, stating that: "the International Labour Organization (ILO) is the competent body to set and deal with these [labour] standards."[206] The once again unsuccessful outcome of the negotiations on labour rights resulted from the opposition of many countries, especially developing ones, motivated by the desire to maintain low labour cost for companies and competitive advantage. [207]

The 1999 ministerial summit in Seattle was an opportunity to revitalise the debate on the social clause in the WTO.[208] In January 1999, the US proposed to convene a working table for establishing a work programme within the WTO; this soon turned into a call for the introduction of labour standards in the WTO.[209] The resounding failure led to the abandonment of any further attempt to create a universal social clause.[210]

Having concluded that there was no political will to introduce a universal social clause, developed countries adopted a new strategy. Beginning with the 1992 North American Free Trade Agreement (NAFTA), the US began to include social clauses in its

[203] Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview," 565, 575.
[204] Marrakesh Agreement Establishing the World Trade Organization, 1994.
[205] Singapore Ministerial Declaration.
[206] Ibid.
[207] Leary, "The WTO and the Social Clause: Post-Singapore;" Panagariya, "Trade-Labour Link: A Post-Seattle Analysis," 3.
[208] Panagariya, "Trade-Labour Link: A Post-Seattle Analysis," 3.
[209] Ibid.
[210] Bairoch, "Brief History of the Social Clause in Trade Policy."

trade agreements that conditioned the Parties to comply with IFLS. From 1999, the US strategy was followed by the EU in its trade agreements.

The use of social clauses was then further favoured due to the 1998 ILO Declaration on Fundamental Principles and Rights at Work (1998 ILO Declaration), which codified four fundamental freedoms: freedom of association and collective bargaining, freedom from discrimination, freedom from child labour, and freedom from forced and compulsory labour. These freedoms were referred to as CLS, and eight ILO core Conventions were associated with them. The 1998 ILO Declaration was amended in 2022 to include occupational health and safety (OSH) among the CLS. The enucleation of CLS made them the minimum benchmark for defining IFLS in both the US and the EU. [211]

The abandonment of the introduction of a social clause in the GATT, the identification of CLS and globalisation have led to an increase of FTAs with social clauses:

> The number of trade agreements with labour provisions has increased from three in 1995 to 77 in 2016. Additionally, since 2010 the share of trade agreements with labour provisions being concluded each year has increased. Consequently, the share of trade agreements with labour provisions has risen from 7.3 per cent of the total number of trade agreements in 1995 to 28.8 per cent in 2016. In addition, labour provisions have also become more comprehensive in their scope, with most referring to core labour standards and other ILO instruments, as well as mechanisms for implementation and cooperation, including with stakeholder involvement. [212]

The proliferation of social clauses necessitates reflection on its conceptualisation. This theme occupies the next section, which aims to grasp the complex nature and identify the characteristics and structural elements of social clauses.

[211] "ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up."
[212] ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, 11.

3. Conceptualising the Social Clause

The social clause is a multifaceted legal instrument that needs to be conceptualised; to this end, this section analyses its main definitions. Indeed, several scholars have attempted to develop a definition of the social clause. The added value of such a doctrinal analysis is to be able to count on research that has already filtered legal reality by interpreting it and purging it of irrelevant elements.

The four definitions that have been analysed are that proposed by Van Liemt, the *Dictionnaire de Droit International Public*, Bairoch and Bronstein. These definitions were chosen for their relevance, which was assessed on the basis of the historical period of elaboration, the capacity to synthesise previous research and the ability to adequately determine and describe the characteristics and structural elements of the social clause.

On the basis of these definitions, the main characteristics and structural elements of the social clause are identified and analysed from a legal point.

3.1. The Social Clause: Definitions, Characteristics and Structural Elements

The first academic definition of the social clause to be analysed is that proposed by Van Liemt in 1989. He affirmed that:

> A social clause aims at *improving labour conditions* in exporting countries by allowing *sanctions* to be taken against exporters who fail to *observe minimum standards*.[213]

This very first definition was inspired by both empirical and theoretical analysis carried out by several scholars, such as Valticos, Charnovitz, Moreau, Servais, and

[213] Emphasis added. Gijsbert Van Liemt, "Minimum Labour Standards and International Trade: Would a Social Clause Work?," *International Labour Review* 128, no. 4 (1989): 434; Thoene, "The Strategic Use of the Labour Rights Discourse – Revisiting the 'Social Clause' Debate in Trade Agreements," 60.

Hansson.[214] Furthermore, Van Liemt's definition synthesised the legal development preceding the fall of the Berlin Wall – from the Havana Charter, through all the GATT rounds up to the clause included in the 1984 US GSP reform – and set a precedent in the future legal debate.

The first feature Van Liemt focused on was the aim of the social clause, namely the "improv[ement] of working conditions." This social aim is expressed in different ways in all the relevant definitions and is always understood in connection with trade.

Alongside the aim, Van Liemt identified two other characteristics and structural elements of the definition: a) *sanctions* and b) *compliance with minimum standards*. These characteristics and structural elements capture the labour-law nature of social clauses, while the type of trade arrangement in which the social clause is to be included is left in the background being an implicit precondition.

In 2001 the *Dictionnaire de Droit International Public* proposed a new definition of the social clause:

> [A social clause is a] Provision included in *regional trade agreements or the agreement establishing the WTO* providing for the use of *restrictive measures* such as trade restrictions or the withdrawal of trade preferences, where *fundamental rights at work are not respected*.[215]

[214] Valticos, "Social Conditions, Equitable Competition and Trade;" Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview;" Marie-Ange Moreau, "La Clause Sociale Dans Les Traités Internationaux. Bilans et Perspectives," *Revue Française Des Affaires Sociales* Jenury-Mar, no. 1 (1996): 89-110; Jean-Michel Servais, "The Social Clause Dilemma," in *International Labour Law*, ed. Jean-Michel Servais (Biggleswade: Kluwer Law International, 2009), 34-44; Servais, "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress;" Hansson, *Social Clauses and International Trade: An Economic Analysis of Labour Standards in Trade Policy*.

[215] Emphasis added. Jean Salmon, *Dictionnaire de Droit International Public* (Brussels : Bruylant, 2001), paras. 41-68 as translated in Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005), 89.

This definition specified the characteristics and structural elements of the social clause pointed out by Van Liemt. Such greater precision encouraged Hepple to employ it in his studies.[216]

An important innovation of the *Dictionnaire*'s definition was to highlight the link between the protection of labour rights and trade. Furthermore, the definition no longer revolved around two key characteristics and structural elements but three: a) *trade agreements*, b) *fundamental rights at work*, and c) *restrictive measures*.

A problematic point of the definition was the scope of social clauses. The *Dictionnaire* only selected trade agreements as legal texts that could contain a social clause, overlooking the unilateral arrangements. Despite this problem, the *Dictionnaire*'s definition was a step forward because it identified the three main characteristics and structural elements retained in all the other definitions.

The third definition originated from Bairoch. Although this definition preceded that of the *Dictionnaire* by a couple of years, from a logical point of view, it should be considered a development of that definition. Indeed, Bairoch states that:

> A social clause is a clause that may be included in a *customs tariff (or other commercial instruments)* and which sets forth *sanctions* to be applied against the importation of products from countries that do not *enforce a minimum standard of working conditions*.[217]

The first important element of Bairoch's definition was the emphasis on the relationship between workers' rights and trade. Compared to the *Dictionnaire* definition, Bairoch's solved the problem of scope. In fact, Bairoch's definition considered all trade instruments. Bairoch's characteristics and structural elements are: a) *customs tariff or*

[216] Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005), 89.
[217] Emphasis added. Bairoch, "Brief History of the Social Clause in Trade Policy," 161.

other commercial instruments, b) *enforcing a minimum standard of working conditions*, and c) *sanctions*.

The fourth definition was provided by Bronstein in 2009 and recalled by Addo in 2015.[218] This definition summarised three decades of academic debate, echoing all the developments from Van Liemt to Bairoch. Furthermore, Bronstein's definition has the advantage of being completely unambiguous, clearly stating all the characteristics and structural elements of social clauses. Indeed, the scholar affirmed that:

> [..] the social clause […] can have a *multilateral or a unilateral source*. In the first case, the social clause may be part of a treaty or an international trade agreement: it would endow the treaty or the agreement with the mechanisms to investigate and, if appropriate, to impose *fines or trade restrictions* on countries which have denied or *violated internationally recognized workers' rights* with *the aim or the effect of improving international competitiveness*.[219]

The added value of this definition was threefold. First, Bronstein dispelled any doubts about the legal source and scope of social clauses, stating that they are provided for in a unilateral or multilateral trade agreement. Secondly, the author clarified that social clauses allow for investigations and possible trade sanctions. Thirdly, the definition specifies what the purposes of social clauses are: the protection of "internationally recognised labour rights" and "international competitiveness." Thus, Bronstein's definition contains all the characteristics and structural elements of the social clause and unequivocally underlines the purposes of this legal instrument.

The doctrinal comparison of these four definitions has clarified the legal concept of a social clause by identifying its aims and its three characteristics and structural elements.

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[218] Emphasis added. Arturo Bronstein, *International and Comparative Labour Law. Current Challenges* (Geneva: Palgrave Macmillan and International Labour Organization, 2009), 95; Addo, *Core Labour Standards and International Trade: Lessons from the Regional Context*, 4.
[219] Emphasis added. Bronstein, *International and Comparative Labour Law. Current Challenges*, 95; Addo, *Core Labour Standards and International Trade: Lessons from the Regional Context*, 4.

Indeed, the four authors agree that the purpose of the social clause is to protect fundamental labour rights in order to ensure international trade and fair competition and that the three characteristics and structural elements of the legal notion of a social clause are: a) the inclusion in *commercial arrangement* (unilateral, multilateral or bilateral), b) the protection of *international fundamental labour rights*, c) the provision for *the investigation and enforcement mechanisms*.[220]

This doctrinal comparison has made it possible to achieve the first objective of this section, namely the clarification of the theoretical notion of the social clause. Having done this, it is now necessary to move on to the second objective of the section, namely, to understand and describe the main characteristics and structural elements of the social clauses that have been set out in this first subsection.

3.2. Commercial Arrangements

The first characteristic and structural element of the definition of the social clause are the *commercial arrangements*. This element is relevant because it determines the scope of application of social clauses. In order to delineate the legal acts that can provide for social clauses, it is necessary to study the existing literature from a historical and legal perspective.

The first and only universal social clause (that never entered into force) was Chapter II – Employment and Economic Activity of the Havana Charter.[221] The inclusion of universal social clauses in the GATT remained a common trade policy goal of the US, European and other developed countries throughout the 20th century.

[220] This research does not employ the terms applied in the definitions analysed to indicate the characteristics and structural elements of the notion of the social clause because it aims to synthesise previous studies in an autonomous perspective.
[221] Stoll, "International Economic and Social Dimensions: Divided or Connected?," 18.

Despite the efforts, the first social clause was adopted in a unilateral trade arrangement.[222] In fact, with the 1984 reform of the Trade Act, the US introduced a provision in the GSP conditioning beneficiary countries on the implementation of basic international labour rights:

> (A) the right of association;
> (B) the right to organize and bargain collectively;
> (C) a prohibition on the use of any form of forced or compulsory labor;
> (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor, as defined in paragraph; and
> (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[223]

Any state failing to protect fundamental labour rights could be unilaterally excluded from the US GSP.[224] The US legislation replicated this social clause in several other preferential trade acts aimed at supporting the economic growth of developing countries, such as the Caribbean Basin Trade Partnership Act or the Andean Trade Preference Act, or the African Growth and Opportunity Act.

In the 1990s, the EU introduced social provisions in its trade policy, starting with the GSP. The current EU GSP Regulation provides for a progressive reduction of tariff and non-tariff barriers for the developing countries committed to implementing internationally recognised labour rights and to protecting the environment.[225]

Starting with the 1994 NAFTA, the number of trade agreements including social clauses has been steadily increasing. This practice occurs in agreements between developed countries (North-North Agreement), between developed and developing

[222] Lance A. Compa and Jeffrey S. Vogt, "Labor Rights in the Generalized System of Preferences: A 20-Year Review," *Comparative Labour Law and Policy Journal* 22, no. 2/3 (2001): 199-238; Servais, *Int. Labour Law*, 2020, 40.
[223] Trade Act of 1974, 1974, para. 2467.
[224] Trade Act of 1974; United Nations Conference on Trade and Employment, *Generalized System of Preferences. Handbook on the Scheme of the United States of America*, 1–28.
[225] See combined provisions of Article 9 and Annex VIII of the Regulation (EU) No. 978/2012 of 25 October 2012.

countries (North-South Agreement), and between developing countries and emerging countries (South-South agreements).[226] According to the ILO, in 2017 almost 70% of North-South trade agreement provided for social conditionalities and there was "an increasing number of trade agreements with labour provisions concluded among developing and emerging countries (South-South agreements)."[227]

This analysis confirms Bronstein's understanding that social clauses can be contained in any trade arrangement. These arrangements can be unilateral regulations, such as the GSP, bilateral and multilateral FTAs, regional customs union, or universal trade treaty. The essential element is that the legal instrument containing the social clause aims to promote free trade between nations and seeks to protect workers' rights with a view to fair competition.

3.3. International Fundamental Labour Rights

The second characteristic and structural element of the social clause definition are the *International Fundamental Labour Rights* (IFLRs). Defining this second element is crucial because it determines the obligatory content of the social clause and complex because it is subject to political and legal influences.

Before determining the content of IFLRs, it is necessary to understand the legal framework within which labour rights are to be researched. This framework is International Labour Law established by the ILO. The sources that support this assertion are the Havana Charter and the Singapore Declaration.[228] Although these are non-binding instruments, they have unique interpretative value because they commit Parties to

[226] ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, 11.
[227] Ibid., 12.
[228] Havana Charter for an International Trade Organization; Singapore Ministerial Declaration.

implement the Labour Law established by the ILO. The reason for resorting to the Havana Charter and the Singapore Declaration lies in the fact that social clauses are institutions of International Trade Law. Therefore, it was necessary to search International Trade Law for a source justifying the reference to International Labour Law.[229]

After having determined the legal framework, it is necessary to identify the IFLRs legal content. The main sources are: the Preamble to the ILO Constitution, the Philadelphia Declaration, the 1998 ILO Declaration, as amended in 2022, the Decent Work Agenda, the 2008 ILO Declaration on Social Justice for a Fair Globalization (2008 ILO Declaration), and the 2019 Centenary Declaration for the Future of Work (Centenary Declaration), the caselaw of the monitoring bodies, and the doctrinal elaboration.[230]

A decisive indication of the IFLRs legal content comes from the ILO *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*.[231] This empirical analysis conducted on the social clauses of Canada, the US, the EU and Chile points to the 1998 ILO Declaration as the reference for IFLRs.[232] The importance of the 1998 ILO Declaration results from the fact that it stipulates the ILO fundamental principles: freedom of association and collective bargaining; prohibition of child labour; elimination of forced or compulsory labour; elimination of discrimination in respect of employment and occupation. To each of these principles, the 1998 ILO Declaration

[229] Lore Van den Putte and Jan Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," *The International Journal of Comparative Labour Law and Industrial Relations* 31, no. 3 (2015): 263–284; ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, 11–16.
[230] ILO Constitution; 1944 Declaration Concerning the Aims and Purposes of the International Labour Organisation (Philadelphia Declaration); ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (1998 ILO Declaration); ILO Declaration on Social Justice for a Fair Globalization (2008 ILO Declaration), ILO Centenary Declaration for The Future Of Work (Centenary Declaration).
[231] ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*.
[232] Ibid., 13–14.

reconnects two Conventions.[233] These Conventions are Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Convention No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Convention No. 98); the Forced Labour Convention, 1930 (No. 29) (Convention No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105) (Convention No. 105); Minimum Age Convention, 1973 (No. 138) (Convention No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182) (Convention No. 182); Fair Wages Convention, 1951 (No. 100) (Convention No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (Convention No. 111). There is a formal distinction between principles and standards.

On 10 June 2022, the International Labour Conference (ILC) adopted the Resolution on the Inclusion of a Healthy and Safe Working Environment in the ILO Fundamental Principles and Rights at Work. This resolution amended paragraph 2 of the 1998 ILO Declaration to include Occupational Health and Safety (OSH) among the fundamental principles and rights at work. The two Conventions designated as fundamental are the Occupational Safety and Health Convention, 1981 (No. 155) (Convention No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) (Convention No. 187).[234]

The ILO analysis shows that the core of IFLRs mostly coincides with CLS, with the exception of those related to the Occupational Health and Safety (OSH) because they were only introduced in 2022.[235] Political choices make the notion of IFLRs flexible.

[233] Matteo Borzaga and Michele Mazzetti, "Core Labour Standards e Decent Work: Un Bilancio Delle Più Recenti Strategie Dell'OIL," *Lavoro e Diritto*, no. 3 (2019): 447–65; ILO, *Rules of the Game. An Introduction to the Standards-Related Work of the International Labour Organization* (Geneva: International Labour Office, 2019); ILO Centenary Declaration for The Future Of Work, 2019.

[234] ILO Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work.

[235] Regarding the OSH, the existing social clauses do not mention it. A later inclusion is possible, but it requires explicit renegotiation of the treaties. Indeed, (practically) all existing agreements do not include dynamic reference and, therefore, automatic adaptation to changes in the reference text. After referring to the 1998 Declaration, normally the agreements list the fundamental principles of labour.

Especially in the context of EU trade agreements, IFLRs are not limited to CLS, but often include declarations and conventions on human rights and sustainable development standards including the 2008 ILO Declaration and UN Declaration and Covenants on Human Rights.[236]

In conclusion, the core element of IFLRs can be identified in the 1998 ILO Declaration. Yet it is not *a priori* excluded that social clauses may include other international standards. Therefore, IFLRs do not necessarily always coincide with the CLR allowing for additions that broaden the range of labour rights to be protected.

3.4. Investigation and Enforcement Mechanisms

The third characteristic and structural element of the social clause definition are the *Investigation and Enforcement Mechanisms* (IEMs). This is a very complex and

Concerning the coincidence between IFLRs and CLS, see among others: Sandra Polaski, "The Strategy and Politics of Linking Trade and Labor Standards: An Overview of Issues and Approaches," in *Handbook on Globalisation and Labour Standards*, ed. Kimberly Ann Elliott (Cheltenham: Edward Elgar Publisher, 2021), 203-25; Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions;" Lore Van den Putte, "Involving Civil Society in Social Clauses and the Decent Work Agenda," *Global Labour Journal* 6, no. 2 (2015): 221-235; James Harrison et al., "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda," *World Trade Review* 18, no. 4 (October 1, 2019): 635-57; Mirela Barbu et al., "The Trade-Labour Nexus: Global Value Chains and Labour Provisions in European Union Free Trade Agreements," *Global Labour Journal* 9, no. 3 (2018): 258-80.

[236] Free Trade Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, *OJ L 127, 14.5.2011, p. 1–1426*, 2011; Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) No. 732/2008, *OJ L 303, 31.10.2012, p. 1–82*, 2012 provide that the Parties are committed to implement: ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and the eight CLS; the Convention on the Prevention and Punishment of the Crime of Genocide (1948); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); the Agenda 21 on Environment and Development (1992); the Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002); the Ministerial Declaration of the United Nations Economic and Social Council on Full Employment and Decent Work (2006); the ILO Decent Work Agenda; the Outcome Document of the United Nations Conference on Sustainable Development entitled "The future we want" (2012); the Outcome Document of the United Nations Summit on Sustainable Development entitled "Transforming Our World: the 2030 Agenda for Sustainable Development" (2015).

problematic profile, which is not merely limited to the provision of penalty measures but also to mechanisms for monitoring the implementation of social obligations, and the dispute resolution procedure.[237] Indeed, the debate on IEMs is wide-ranging and polarised: there are those who advocate the inclusion of sanctions in the social clause for breaches of social obligations (conditional approach) and those, who advocate cooperation and persuasion (cooperative or promotional approach).[238]

The conditional approach is typical of US trade policy, which conditions economic benefits on the implementation of social obligations.[239] This approach consists of the obligation to enforce labour rights included in the social clause and the provision of mechanisms for verification, conciliation and economic sanctions in case of violation.[240] Under the conditional approach, when there is an allegation of violation, each party may initiate a series of consultations, good offices and intergovernmental conferences aimed

[237] Servais, *Int. Labour Law*, 2020, paras. 57–59.

[238] ILO, *Social Dimensions of Free Trade Agreements*; Addo, *Core Labour Standards and International Trade: Lessons from the Regional Context*; Keith Eugene Maskus, "Should Core Labor Standards Be Imposed Through International Trade Policy?," *Policy Research Working Paper*, no. 1817 (1997): 1–83; Liam Campling et al., "Can Labour Provisions Work beyond the Border? Evaluating the Effects of EU Free Trade Agreements," *International Labour Review* 155, no. 3 (2016): 357–382; ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*; Alessia Vatta, "The Social Clauses in EU Trade Agreements: Contents and Prospects," *Poliarchie/Polyarchies*, no. 2 (2018): 286–306; Van den Putte, "Involving Civil Society in Social Clauses and the Decent Work Agenda"; Van Liemt, "Minimum Labour Standards and International Trade: Would a Social Clause Work?"

[239] ILO, "United States Free Trade Agreements (FTAs)," 2021, https://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115531/lang--en/index.htm#P61_3885; Sabina Dewan and Lucas Ronconi, "U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America," *Inter-American Development Bank Working Papers*, no. 543 (2014): 1–20; James Harrison, "The Labour Rights Agenda in Free Trade Agreements," *The Journal of World Investment and Trade* 20, no. 5 (2019): 705–25; David A. Gantz, "Introduction to U.S. Free Trade Agreements," *British Journal of American Legal Studies* 5, no. 2 (2016): 299–313.

[240] Myriam Oehri, "Comparing US and EU Labour Governance 'near and Far' – Hierarchy vs Network?," *Journal of European Public Policy* 22, no. 5 (2015): 737–38; Van den Putte, "Involving Civil Society in Social Clauses and the Decent Work Agenda," 221; ILO, *Social Dimensions of Free Trade Agreements*, 29–61.

at settling the dispute. If no solution is reached, international arbitration is resorted to, the decision of which may include the loss of trade benefits or economic sanctions.[241]

The promotional approach is typical of EU trade policy, and it is based on multilateralism, gradualism, and the promotion of best practices.[242] Since the 1990s, the EU has included social clauses in its unilateral or multilateral trade arrangements,[243] which commit the Parties to implement a number of international standards to protect sustainable development, labour rights and the environment.[244] The EU approach is more nuanced than the US one, focusing on socio-economic development and cooperation rather than trade sanctions.[245] Indeed, in the case of breaches of the social clause, the EU prefers negotiations and only turns as the last resort to Panels of Experts, which, however, have no sanctioning power.[246]

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[241] Harrison, "The Labour Rights Agenda in Free Trade Agreements," 715-710; Perulli, "The Perspective of Social Clauses in International Trade," 25-28; Dewan and Ronconi, "U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America;" David A. Gantz et al., "Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements," *The University of Miami Inter-American Law Review* 42, no. 2 (2011): 300-306; Virginia A. Leary, "Workers' Rights and International Trade - The Social Clause (GATT, ILO, NAFTA, U.S. Laws)," in *Fair Trade and Harmonization: Prerequisites for Free Trade? Vol. 2 Legal Analysis*, ed. Jagdish Bhagwati and Robert Hudec (Cambridge: MIT Press, 1996), 177-230.

[242] ILO, "European FTAs," 2021, https://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang--en/index.htm; Perulli, "The Perspective of Social Clauses in International Trade," 35–52; Oehri, "Comparing US and EU Labour Governance 'near and Far' – Hierarchy vs Network?," 738–44; ILO, *Social Dimensions of Free Trade Agreements*, 67–97.

[243] For a general overview of the EU's FTAs see ILO, "European FTAs;" for an example of supervisory mechanism see Lachlan Mckenzie and Katharina L. Meissner, "Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA," *Journal of Common Market Studies* 55, no. 4 (July 1, 2017): 832-49.

[244] Perulli, "The Perspective of Social Clauses in International Trade," 35–52; James Harrison et al., "LabourStandards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda," *World Trade Review* 18, no. 4 (2019): 636–42.

[245] Harrison, "The Labour Rights Agenda in Free Trade Agreements," 710–15.

[246] Jan Orbie, Lore Van den Putte, and Deborah Martens, "Civil Society Meetings in EU Free Trade Agreements: The Purposes Unravelled," in *Labour Standards in International Economic Law*, ed. Henner Gött (Berlin, Heidelberg: Springer, 2018), 135-52; Van den Putte, "Involving Civil Society in Social Clauses and the Decent Work Agenda;" James Harrison et al., "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters," *Journal of Common Market Studies* 57, no. 2 (2019): 260-77.

Despite their differences, these two approaches coexist and share some common traits. Both approaches include monitoring and dialogue mechanisms to prevent labour disputes, use economic and moral leverage and involve civil society, social partners and experts. Furthermore, the US has made very little use of sanctions, preferring confrontation and dialogue. Therefore, it can be concluded that when the social clause definition refers to IEMs, it does not mean solely the infliction of economic loss but rather the provision of monitoring and dispute settlement mechanisms.

4. Preliminary Remarks

This Chapter had the twofold aim of describing the historical evolution of social clauses and the link between trade and labour and of conceptualising the social clause and its characteristics and structural elements. These two aims were reflected in the two sections.

The Section 2 shows that historically, International Labour Law and social clauses have been created with the same objective of reducing the negative social externalities of capitalism. Both were ancillary and complementary in nature to the market and international trade. The history of social clauses is both a history of failed attempts and successes. Failed attempts to incorporate social obligations into the GATT and successes for the boom of FTAs with social clauses that has taken place since the mid-1990s.

The Section 3 illustrated the theoretical notion of the social clause from a doctrinal point of view. For the purposes of this dissertation, the social clause is understood as an institution of International Trade Law provided for in a trade arrangement that commits the Parties to protect IFLRs by providing for the investigation and enforcement mechanisms.

The next Chapter studies with a comparative legal-historical approach the two main existing social clause models – namely the US and the EU one – to highlight similarities and differences and the strengths and weaknesses of the two systems.

Chapter II.
Labour Provisions in EU and US Social Clauses

Summary: 1. Introduction; 2. The US 'Labor Chapter': A Mount Rushmore of Social Clauses; 2.1. The 1990s Template: NAFTA, NAALC, NAAEC; 2.2 The Bush G. W. Administration's Free Trade Agreements; 2.3. The May 10th Compromise: A New Social Clause Template; 2.4. From the Bush G. W. Administration to the Obama Administration; 2.5. Innovation and Continuity: The USMCA 'Labor Chapter'; 3. The EU 'Trade and Sustainable Development Chapter': Balancing Promotion and Protection; 3.1. Geography of the EU Agreements; 3.2. Mix and Match: Legal Basis and Nature of the EU Free Trade Agreements; 3.3. The First EU Model: From the 1990s to the Lisbon Treaty; 3.4. A New Model: The 'Trade and Sustainable Development Chapter'; 4. Preliminary Remarks.

1. Introduction

The US was the first developed country to adopt social commitments in its trade policy during the 1984-1987 Generalized System of Preferences (US GSP) reforms.[247] Subsequently, this same approach was adopted in FTAs starting with the 1994 North American Free Trade Agreement (NAFTA).[248] The NAFTA included labour obligations in its side agreement North American Agreement on Labour Cooperation (NAALC).[249] Since 2000, the US commercial agreements have internalised social commitments through 'Labor Chapters.'[250] These Chapters have evolved progressively. The turning point was the Compromise between the Republican Administration and the Democratic

[247] Baldwin, "U.S. Trade Policy Since 1934: An Uneven Path Toward Greater Trade Liberalization;" United Nations Conference on Trade and Employment, *Generalized System of Preferences. Handbook on the Scheme of the United States of America*, 4-5; Jones, "Generalized System of Preferences: Background and Renewal Debate," 2-9.
[248] "Canada-Mexico-United States: North American Agreement on Labor Cooperation," *International Legal Materials* 32, no. 6 (1993): 1499-1518.
[249] "Canada-Mexico-United States: North American Free Trade Agreement," *International Legal Materials* 32, no. 2 (1993): 289-456.
[250] See, for instance, the trade agreements between USA and Australia, Chile, Colombia, Israel, DR-CAFTA.

Congress of 10 May 2007 (May 10th Compromise), which strengthened social obligations by referring to the CLS of the 1998 ILO Declaration.[251]

The Obama Administration unsuccessfully promoted the May 10th Compromise achievements in the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP). The Trump Administration abandoned both the TPP and TTIP. However, this Administration concluded the 2020 Agreement between the United States of America, the United Mexican States and Canada (USMCA), in which a robust social clause exists.[252] In a nutshell, the USMCA commits the Parties to national and ILO labour standards by adopting a conditional approach.[253]

Since the 1995 reform of the Generalised Scheme of Preferences (EU GSP),[254] the EU has consistently introduced social commitments in its trade policy to bridge the gap at the WTO level.[255] The 1999 Agreement on Trade, Development and Cooperation between the European Community and the Republic of South Africa (EU-South Africa TDCA) was the first EU trade agreement to include social commitments.[256]

Compared to 1999, today's EU social clauses are more developed. The step change came with the Lisbon Treaty, which strengthened the role of the European Parliament in

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[251] See note 128.
[252] Agreement between the United States of America, the United Mexican States, and Canada, 2020.
[253] Marco Bronckers and Giovanni Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements," *Journal of International Economic Law* 24, no. 1 (2021): 25.
[254] The Generalised System/Scheme of Preferences (GSP) is a unilateral trade arrangement that provides preferential access to the domestic (or EU) market for commodities produced in developing Countries through the reduction or elimination of duties and non-tariff barriers. The EU introduced the GSP in 1971 following the United Nations Conference on Trade and Development (UNCTAD) proposal, while the US only adopted a GPS in 1974. However, the US was the first to adopt a social clause in 1984, which made GSP benefits conditional on respect for certain fundamental workers' rights (what the ILO would call CLS in 1998). From an economic viewpoint, the US GSP has never been particularly significant. By contrast, for the EU, the GSP has been the leading trade policy for Asian and many African Countries.
[255] James Harrison, "The Labour Rights Agenda in Free Trade Agreements," *The Journal of World Investment and Trade* 20, no. 5 (2019): 706-11.
[256] The preamble generally refers to the protection of labour rights, while Article 86 deals specifically with "Social issues;" see: Agreement on Trade, Development and Cooperation between the European Community and Its Member States, of the One Part, and the Republic of South Africa, of the Other Part, *OJ L 311, 4.12.1999, p. 3-415*, 1999.

the common trade policy.[257] Indeed, the 2008 EU-Caribbean Forum Economic Partnership Agreement (EU-CARIFORUM EPA) and the 2010 Free Trade Agreement between the EU and the Republic of Korea (EU-Republic of Korea FTA)[258] introduced the 'Trade and Sustainable Development Chapter' (TSD Chapter). The TSD Chapters improved the previous clauses on social obligations, procedural commitments, implementation mechanisms, and dispute settlement mechanisms. In a nutshell, the TSD Chapters promote the implementation of the CLS, decent work, Corporate Social Responsibility, and sustainable development through a cooperative and promotional approach.[259]

Methodologically, this Chapter is an external micro-comparison of the EU an US social clauses models. The comparison adopts a *sui generis* approach[260] – neither dogmatic nor functionalist – and follows a dual synchronic and diachronic analytical scheme. The study first compares the historical and then the legal evolution of the models. On the basis of this examination, the characteristics and structural elements of the two models are revealed, which are then compared to highlight similarities and differences.

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[257] Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," 280.

[258] The preamble refers generally to the protection of the environment and labour rights, while 'Chapter Thirteen' deals specifically with labour and environmental issues; see Free Trade Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part.

[259] Bronckers and Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements," 25.

[260] There are mainly three comparative approaches: dogmatic, functional and *sui generis*. The dogmatic approach projects a defined legal concept or principle onto a non-national legal system in order to identify structurally and conceptually equivalent legal constructs. The functional approach *a priori* assumes that all legal systems deal with essentially the same problems and solves them using different means, often with similar results. Therefore, the aim is to evaluate the different results. Alongside the dogmatic and functional approaches, Kestemont introduces a heterogeneous category called the *sui generis* approach, which includes all variants to traditional approaches. The *sui generis* approaches tend to combine a number of comparisons, often adopting a dual comparison involving first a diachronic and then a synchronic study. See: Oderkerk, *De Preliminaire Fase van Het Rechtsvergelijkend Onderzoek*, 75; Devroe, *Rechtsvergelijking In Een Context Van Europeanisering En Globalisering*, 38; Zweigert and Kötz, *An Introduction to Comparative Law*, 34; Kestemont, *Handbook on Legal Methodology. From Objective to Method*, 34, 47–48.

The *tertia comparationis* of these models are a) political, b) economic, and c) legal. Politically, both the US and EU have unsuccessfully advocated for the inclusion of social provisions in FTAs since the Havana Charter.[261] The persistent failure, led the US and the EU to overcome the impasse by introducing social clauses in their unilateral, bilateral or multilateral (not universal) trade arrangements.[262] Economically, the US and EU have significant markets; according to data from the International Monetary Fund (IMF), the World Bank (WB), and the EU Commission, together the US and the EU account for roughly 40% of world Gross Domestic Product (GDP) and more than 40% of world trade.[263] Legally, the US and the EU have adopted social clauses that are sufficiently similar to be compared and sufficiently different to bring out the differences. These characteristics offer an opportunity to assess the consistency between objectives and legal instruments.

Operationally, this Chapter analyses from a legal-historical perspective the US clauses (Section 2), then those of the EU (Section 3) and concludes by identifying similarities and differences (Section 4).

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[261] ILO, *Social Dimensions of Free Trade Agreements*, 18.
[262] Ibid., 19–21.
[263] European Commission, "EU Trade Relations with United States," EU trade relationships by Country/region, February 4, 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-Country-and-region/Countries-and-regions/united-States_en; World Bank, "GDP (Current US$) - European Union, United States - Data," World Bank Open Data, 2022, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU-US; IMF, "Report for Selected Countries and Subjects - European Union," World Economic Outlook Database, 2022, https://www.imf.org/en/Publications/WEO/weo-database/2021/April/weo-report?a=1&c=998,&s=NGDP_RPCH,NGDPD,PPPGDP,PPPPC,&sy=2020&ey=2026&ssm=0&scsm=0&scc=0&ssd=1&ssc=0&sic=0&sort=Country&ds=.&br=1; IMF, "Report for Selected Countries and Subjects - United States," World Economic Outlook Database, 2022, https://www.imf.org/en/Publications/WEO/weo-database/2021/April/weo-report?c=111,&s=NGDP_RPCH,NGDPD,PPPGDP,NGDPDPC,PPPPC,&sy=2020&ey=2026&ssm=0&scsm=0&scc=0&ssd=1&ssc=0&sic=0&sort=Country&ds=.&br=1.

2. The US 'Labor Chapter': A Mount Rushmore of Social Clauses

Geographically, the US has signed fifteen FTAs with twenty States (Table 1); fourteen are in force (the USMCA has replaced NAFTA). Furthermore, twelve FTAs are bilateral, and three are multilateral: NAFTA, USMCA and the Central and Dominican Republic America Free Trade Agreement (CAFTA-DR).

Since the outset of the Monroe Doctrine,[264] the main area of interest for the US has been the Americas.[265] In fact, twelve of the twenty Countries with which the United States stipulated a commercial treaty are on the American continent.[266] The first US FTA was the 1994 NAFTA, whose two side agreements – NAALC and NAAEC – represented the first US social and environmental commitment.[267] The 2004 Chile-US Free Trade

[264] Regarding the history of US relations with other Countries in the Americas see: John D. Martz and Lars. Schoultz, eds., *Latin America, The United States, And The Interamerican System* (New York, London: Routledge, 2019), 95-173; Irwin Gellman, *Good Neighbor Diplomacy: United States Policies in Latin America, 1933-1945* (Baltimore: Johns Hopkins University Press, 2019); Tom Long, *Latin America Confronts the United States: Asymmetry and Influence* (Cambridge: Cambridge University Press, 2015); Ernest R. May, *The Making of the Monroe Doctrine* (London: Harvard University Press, 2013); Jay Sexton, *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (New York: Hill and Wang, 2011); Mark T. Gilderhus, *The Second Century: U.S.-Latin American Relations Since 1889* (Lanham: Rowman & Littlefield, 1999); Peter H. Smith, *Talons of the Eagle: Dynamics of U. S.-Latin American Relations* (Oxford: Oxford University Press, 1996); Richard W. Van Alstyne, *American Diplomacy in Action* (Stanford: Stanford University Press, 1947); Samuel Flagg Bemis, *The Latin American Policy of the United States: An Historical Interpretation* (New York: Harcourt, Brace and Company, 1943).

[265] Regarding the economic relations between the US and other Countries in the Americas see: Rafal Wordliczek, "From North American Free Trade Agreement To United States - Mexico - Canada Agreement (USMCA)," *Politeja* 5, no. 74 (2021): 293-313; Hubert Rioux, "Canada First vs. America First: Economic Nationalism and the Evolution of Canada-U.S. Trade Relations," *European Review of International Studies* 6, no. 3 (2019): 30-56; Cintia Quiliconi, "Competitive Diffusion of Trade Agreements in Latin America," *International Studies Review* 16, no. 2 (2014): 240-51; J. F. Hornbeck, "U.S.-Latin America Trade: Recent Trends and Policy Issues" (Washington, D.C., 2010); J. F. Hornbeck, "U.S.-Latin America Trade: Recent Trends and Policy Issues" (Washington, D.C., 2009); Charlene; James T. Hill; Shannon K. O'Neil; Julia E. Sweig Barshefsky, "U.S.-Latin America Relations: A New Direction for a New Reality," *Independent Task Force Report n. 60* (New York, 2008); Jeffrey Schott, "Free Trade Agreements and US Trade Policy: A Comparative Analysis of US Initiatives in Latin America, the Asia-Pacific Region, and the Middle East and North Africa," *The International Trade Journal* 20, no. 2 (July 1, 2006): 95-138.

[266] Canada, Chile, Colombia, Costa Rica, The Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Peru.

[267] There is extensive academic literature on NAFTA, NAALC and NAAEC, often with a comparative perspective. Among others see: Francisco E. Campos Ortiz, "Labor Regimes and Free Trade in North America: From the North American Free Trade Agreement to the United States-Mexico-Canada Agreement," *Latin American Policy* 10, no. 2 (2019): 268-85; Kimberly A Nolan and Kimberly A Nolan Garcia, "Transnational Advocates and Labor Rights Enforcement in the North American Free Trade Agreement," *Latin American Politics and Society* 53, no. 2 (2017): 29-60; Spencer Hamelin, "A New Scale of Activism: Canadian Unions and the North American Free Trade Agreement, 1992-1999," *Labour/ Le*

Agreement (CLFTA) was the second FTA signed with a country in the Americas.[268] In the same period, the US negotiated two multilateral agreements with the Central American and Andean Countries.[269] While the 2004 CAFTA-DR[270] was reached with the Central American Countries joined by the Dominican Republic, the Andean Free Trade Agreement (AFTA) was never concluded due to the opposition of Bolivia and Ecuador.[271] Consequently, two separate bilateral agreements were signed in 2006 with Peru (in force since 2009) and Colombia (in force since 2012).[272] Signed in 2007 and entered into force in 2012, the most recent bilateral agreement with a Latin American country is the United

Travail 80 (2017): 157-84; David A. Gantz et al., "Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements," *University of Miami Inter-American Law Review* 42, no. 2 (2011): 297-366; Dewan and Ronconi, "U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America;" Sheveta Sehgal, "The Evolution of NAFTA," *India Quarterly: A Journal of International Affairs* 66, no. 3 (2010): 303-16; Norman Caulfield, *NAFTA and Labor in North America* (Urbana: University of Illinois Press, 2010); Frank H. Bieszczat, "Labor Provisions in Trade Agreements: From the NAALC to Now," *Chicago-Kent Law Review* 83, no. 3 (2008): 1387-1408; Ruth Buchanan and Rusby Mariela Chaparro, "International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labour Cooperation," *UCLA Journal of International Law and Foreign Affair* 13, no. 1 (2008): 129-59; Rainer Dombois, "Sozialklauseln in US-Freihandelsabkommen — Ein Wirksames Mittel Internationaler Arbeitsregulierung?," *Industrielle Beziehungen/The German Journal of Industrial Relations* 13, no. 3 (2006): 238-52; Tamara Kay, "Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America," *American Journal of Sociology* 111, no. 3 (2005): 715-56; Ian Robinson, "NAFTA, Social Unionism, and Labour Movement Power in Canada and the United States," *Relations Industrielles* 49, no. 4 (2005): 657-95; Paul Teague, "Standard-Setting for Labour in Regional Trading Blocs: The EU and NAFTA Compared," *Journal of Public Policy* 22, no. 3 (2002): 325-48; Parbudyal Singh and Roy J Adams, "Neither a Gem nor a Scam: The Progress of the North American Agreement on Labor Cooperation," *Labor Studies Journal* 26, no. 2 (2001): 1-16; Barry LaSala, "NAFTA and Worker Rights: An Analysis of the Labor Side Accord after Five Years of Operation and Suggested Improvements," *The Labor Lawyer* 16, no. 3 (2001): 319-48; Lance Conpa, "NAFTA's Labour Side Agreement Five Years On: Progress and Prospects for the NAALC," *Canadian Labour & Employment Law Journal* 7 (1999): 1-30; Jacqueline McFadyen, "NAFTA Supplemental Agreements: Four Year Review," *Working Paper 98-4*, 1998.

[268] SICE - Foreign Trade Information System, "United States - Chile," Trade Agreements, 2003, http://www.sice.oas.org/Trade/chiusa_e/chiusaind_e.asp.

[269] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 829.

[270] SICE - Foreign Trade Information System, "Central America - Dominican Republic - United States (DR-CAFTA)," Trade Agreements, 2004, http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp.

[271] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 829.

[272] SICE - Foreign Trade Information System, "Peru - United States Trade Promotion Agreement," Trade Agreements, 2006, http://www.sice.oas.org/Trade/PER_USA/PER_USA_e/Index_e.asp; SICE - Foreign Trade Information System, "Colombia - United States Trade Promotion Agreement," Trade Agreements, 2006, http://www.sice.oas.org/Trade/COL_USA_TPA_e/Index_e.asp.

States-Panama Trade Promotion Agreement (PATPA).[273] However, the most innovative agreement in terms of social clauses is the 2020 USMCA.[274]

Since the early 2000s, the US has been interested in establishing trade relations with the Asia-Pacific region.[275] In 2003, the US signed agreements with Singapore, in 2004 with Australia, and in 2007 (renegotiated in 2010 and 2018)[276] with the Republic of Korea.[277] The Obama Administration's "Pivot to Asia"[278] strategy aimed to conclude a regional multilateral trade agreement with the Asia-Pacific Economic Cooperation

[273] SICE - Foreign Trade Information System, "United States - Panama," Trade Promotion Agreement, 2007, http://www.sice.oas.org/Trade/PAN_USA_TPA_Text0607_e/Index_e.asp; Liberto, "Congress Passes Trade Deals."

[274] SICE - Foreign Trade Information System, "United States - Mexico - Canada Agreement (USMCA)," Trade Agreements, 2019, http://www.sice.oas.org/Trade/USMCA/USMCA_ToC_PDF_e.asp.

[275] Schott, "Free Trade Agreements and US Trade Policy: A Comparative Analysis of US Initiatives in Latin America, the Asia-Pacific Region, and the Middle East and North Africa," 95-138; Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 830.

[276] Liberto, "Congress Passes Trade Deals;" Patrick Gillespie, "New US Trade Deal with South Korea: What You Need to Know," *CNN*, March 28, 2018.

[277] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 830; "Landmark U.S.-Korea Free Trade Agreement Enters Into Force," *The National Law Review*, March 19, 2012.

[278] Numerous articles have been published on the Obama administration's "Pivot to Asia" strategy. While many Europeans expressed concern about the diminishing importance of transatlantic ties, the Asians generally welcomed the new strategy. "Pivot to Asia" was openly opposed by China. The Obama administration's policy has been overturned by the Trump administration, which has adopted an aggressive approach to China. The Biden administration, albeit in different tones, has maintained a restrictive trade policy towards China. Regarding the 'Pivot to Asia' strategy, it is worth seeing: Choi Kang and Lee Jaehyon, "Overall Assessments of the Pivot to Asia," *What Asia Wants from the US: Voices from the Region* (Seoul, 2018); Feng Zhang, "Challenge Accepted: China's Response to the US Rebalance to the Asia-Pacific," *Security Challenges* 12, no. 3 (2016): 1-16; Hans Binnendijk, "Asian Partners and Inadequate Security Structures," in *Friends, Foes, and Future Directions. U.S. Partnerships in a Turbulent World: Strategic Rethink*, ed. RAND Corporation (Santa Monica, 2016), 97-122; Zulfqar Khan and Fouzia Amin, "'Pivot' and 'Rebalancing': Implications for Asia-Pacific Region," *Policy Perspectives* 12, no. 2 (2015): 3-28; Janine Davidson, "The U.S. 'Pivot to Asia,'" *American Journal of Chinese Studies* 21 (2014): 77-82; Euan Graham, "Southeast Asia in the US Rebalance: Perceptions from a Divided Region," *Contemporary Southeast Asia* 35, no. 3 (2013): 305-32; Satu P. Limaye, "Southeast Asia in America's Rebalance to the Asia-Pacific," *Southeast Asian Affairs 2013*, 2013, 40-50; David Shambaugh, "Assessing the US 'Pivot' to Asia," *Strategic Studies Quarterly* 7, no. 2 (2013): 10-19; Rong Chen, "A Critical Analysis of the U.S. 'Pivot' toward the Asia-Pacific: How Realistic Is Neo-Realism?," *Connections* 12, no. 3 (2013): 39-62; Justin Logan, "China, America, and the Pivot to Asia," *Policy Analysis*, 2013; Robert S. Ross, "The Problem With the Pivot: Obama's New Asia Policy Is Unnecessary and Counterproductive," *Foreign Affairs* 91, no. 6 (2012): 70-82; David A. Beitelman, "America's Pacific Pivot," *International Journal* 67, no. 4 (2012): 1073-94; Douglas Paal, "The United States and Asia in 2011: Obama Determined to Bring America 'Back' to Asia," *Asian Survey* 52, no. 1 (2012): 6-14; Alessandro Riccardo Ungaro, "Developments in and Obstacles to the US Pivot to Asia: What Alternatives for Europe?," *IAI Working Papers*, vol. 1224 (Roma, 2012).

(APEC)[279] States: the Trans-Pacific Partnership (TPP).[280] The TPP was signed on 4 February 2016 by twelve Countries including the US but was ratified only by Japan and New Zealand.[281] After Trump's election, the US withdrew its signature from the TPP. The Trump Administration ended the "Pivot to Asia" and regional trade agreements strategy by adopting a more aggressive trade agenda, especially towards China.[282] Although with different tones, the Biden Administration has maintained an aggressive trade strategy directed against China without revitalising the TPP.[283]

Turning to the European region, the US and EU Member States historically shared strong political and trade ties.[284] To cement the transatlantic relationship, the Obama

[279] Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

[280] For understanding the international regulatory context, the challenges faced by trade policy in the 2010s, and the legal structure of mega-regional agreements, see: Reeve T. Bull et al., "New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements," *Law and Contemporary Problems* 78, no. 4 (2015): 1-29.

[281] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 830.

[282]To understand the Trump Administration's trade policy, the "trade war" against China, and the implications of the US withdrawal from regional trade agreements, see: Xianbai Ji and Pradumna B. Rana, "A Deal That Does Not Die: The United States and the Rise, Fall and Future of the (CP)TPP," *Pacific Focus* 34, no. 2 (2019): 230-55; Evan S. Medeiros, "The Changing Fundamentals of US-China Relations," *Washington Quarterly* 42, no. 3 (2019): 93-119; Marcus Noland, "US Trade Policy in the Trump Administration," *Asian Economic Policy Review* 13, no. 2 (2018): 262-78; Gabriel Esteban Merino, "Los Tratados Comerciales y Las Luchas Globales En La Era Trump," *Realidad Económica* 313, no. 313 (2018): 37-39; Tao Liu and Wing Thye Woo, "Understanding the U.S.-China Trade War," *China Economic Journal* 11, no. 3 (2018): 319-40; World Bank, "World Development Indicators Database, Gross Domestic Product 2019" (Washington D.C., July 1, 2020), https://databank.worldbank.org/data/download/GDP.pdf; Michael Green and Matthew Goodman, "After TPP: The Geopolitics of Asia and the Pacific," *The Washington Quarterly* 38, no. 4 (2015): 19-34; Michael D. Bordo, "The Second Era of Globalization Is Not Yet Over: An Historical Perspective," NBER Working Paper (Cambridge, September 2017).

[283] Some useful remarks on the Biden Administration's trade policy can be found in: Judith Goldstein, "A New Era for Trade? Symposium on the Biden Administration and the International Legal Order," *American Journal of International Law Unbound* 115 (2021): 52-56; Ronald U. Mendoza, "Asian Voices on the Future of US-Asia Relations: Trade and Economic Policy under the Biden Administration," *Ateneo School Of Government Working Paper 21-005* (Manila, 2021); Xiangfeng Yang, "US-China Crossroads Ahead: Perils and Opportunities for Biden," *The Washington Quarterly* 44, no. 1 (2021): 129-53; Volker Perthes, "Dimensions of Rivalry: China, the United States, and Europe," *China International Strategy Review* 3, no. 1 (2021): 56-65.

[284]To explore the relationship between the EU and the US, among others, see: Jackson Janes, "Transatlantic Relations Under US President Joe Biden," *Zeitschrift Für Außen- Und Sicherheitspolitik* 14, no. 1 (2021): 57-73; Anthony Luzzatto Gardner, *Stars with Stripes: The Essential Partnership between the European Union and the United States* (London: Palgrave Macmillan, 2020); Andrei Martynov and Sergey Asaturov, "Analysis of Relationship Between the European Union and the United States in the Period the Presidency of Donald Trump (2017-2020)," *EUREKA: Social and Humanities*, no. 6 (2020): 35-39; Alexandra Bell et

Administration followed a trading strategy similar to that of the Asia-Pacific by focusing on a mega-regional trade agreement.[285] In 2013, the US and EU began negotiations on a Transatlantic Trade and Investment Partnership (TTIP).[286] The TTIP, like the TPP, was an innovative treaty in terms of its regional dimension and scope.[287] However, in 2016 the TTIP was abandoned due to the Trump Administration's opposition.[288] The election of President Biden has revived transatlantic relations both politically and economically. However, the Biden Administration did not intend to relaunch the TTIP negotiations. Given the enduring US position, in April 2019, the Council of the EU declared the

al., "The Obama Moment. European and American Perspectives" (Paris, 2009); Geir Lundestad, *The United States and Western Europe Since 1945: From "Empire" by Invitation to Transatlantic Drift*, (Oxford: Oxford University Press, 2004).

[285] To understand the relationship between the Obama Administration and the EU, and Obama's trade policy, among others, see: Jeffrey J. Anderson, "Rancor and Resilience in the Atlantic Political Order: The Obama Years," *Journal of European Integration* 40, no. 5 (2018): 621-36; Tyson Barker, "A Second Obama Administration And Europe," *Bertelsmann Brief* (New York, Washington D.C., 2012); Colin Budd, "Obama Nation?: US Foreign Policy One Year on: US-EU Relations after Lisbon: Reviving Transatlantic Cooperation," in *IDEAS Reports - Special Reports*, ed. Nicholas Kitchen (London: London School of Economics and Political Science, 2012), 34-36; David Jervis, "The United States and Europe in the Obama Years," in *The Barack Obama Presidency: A Two Year Assessment*, 2011, 107-26; John Bruton, "EU-US Transatlantic Relations: The Obama Moment," ed. Álvaro De Vasconcelos and Marcin Zaborowski, *The Obama Moment. European and American Perspectives* (Paris, 2009); Daniel Hamilton and Nikolas Foster, "The Obama Administration and Europe," ed. Álvaro De Vasconcelos and Marcin Zaborowski, *The Obama Moment. European and American Perspectives* (Paris, 2009); Erik Jones, "Transatlantic Economic Relations," ed. Álvaro De Vasconcelos and Marcin Zaborowski, *The Obama Moment. European and American Perspectives* (Paris, 2009).

[286] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 830.

[287]Concerning mega-regional agreements, see: Thilo Rensmann, ed., *Mega-Regional Trade Agreements* (Cham: Springer, 2017); Chad P. Bown, "Mega-Regional Trade Agreements and the Future of the WTO," *Global Policy* 8, no. 1 (2017): 107-12; Bull et al., "New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements."

[288] To understand the Trump Administration's position on TTIP, among others, see: Congressional Research Service, "U.S.-EU Trade and Investment Ties: Magnitude and Scope" (Washington, D.C., 2020); Asma Sana Bilal and Nabiya Imran, "Emerging Contours of Transatlantic Relationship under Trump Administration," *Policy Perspectives* 16, no. 1 (2019): 3-21; Marianne Schneider-Petsinger, "US-EU Trade Relations in the Trump Era Which Way Forward?," *Chatham House - US and Americas Programme* (London, 2019); Kiliç Buğra Kanat, "Transatlantic Relations in the Age of Donald Trump," *Insight Turkey* 20, no. 3 (2018): 77-88; Noland, "US Trade Policy in the Trump Administration;" Office of the United States Trade Representative, "2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program" (Washington, D.C., 2018); Office of the United States Trade Representative, "2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program" (Washington, D.C., 2017), 136.

guidelines for concluding the TTIP obsolete, thus closing the door to further negotiations.[289]

Between 1985 and 2006, the US concluded FTAs with Israel, Jordan, Morocco, Bahrain and Oman. Except for Israel, the treaties with all other Middle Eastern Countries refer to labour and environmental issues with specific social clauses. The pro-Western governments ruling several Middle East countries have historically had important trade relations with the US, but not in all cases has an FTA been concluded.[290] An emblematic example is the US-United Arab Emirates Free Trade Agreement (UAEFTA). In 2004, the US and UAE signed a Trade and Investment Framework Agreement (TIFA) aimed at creating an institutional structure for trade dialogue between the Countries, for investor and intellectual property protection, and for the implementation of transparent and efficient customs procedures.[291] In 2005, the US and UAE began negotiations on an FTA, which was never signed.[292]

Regarding sub-Saharan countries, in 2002, the US launched negotiations for an FTA with the Southern African Customs Union (SACU) States.[293] These negotiations languished from the outset and ended in 2006 without an agreement[294] due to important differences in treaty aims and labour and environmental rules.[295] However, this failure led

[289] Council of the European Union, "Decision n. 6052/19," April 9, 2019.
[290] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 829.
[291] Agreement between the Government of the United States of America and the Government of the United Arab Emirates Concerning the Development of Trade and Investment Relations, 2004.
[292] International Trade Administration U.S. Department of Commerce, "United Arab Emirates - Trade Agreements," Country Commercial Guide, 2022, https://www.trade.gov/Country-commercial-guides/united-arab-emirates-trade-agreements.
[293] South Africa, Botswana, Lesotho, Eswatini, and Namibia.
[294] Danielle Langton, "United States-Southern African Customs Union (SACU) Free Trade Agreement Negotiations: Background and Potential Issues," *CRS Report No. RS21387* (Washington, D.C., 2008), 1.
[295] As Vogt points out: "The SACU Countries had pushed to exclude intellectual property rights, government procurement, investment, and services from the negotiations, calling on market access commitments to be made first. The US sought a comprehensive deal that included these issues. Further, the SACU wanted to employ a positive list to its industrial sector, rather than a negative list approach where everything was on the table unless specifically excluded." See note 8 in Vogt, "The Evolution of Labor

to the 2008 Trade, Investment and Development Cooperation Agreement (TIDCA), which created an institutional framework for consultation on trade, customs, the removal of non-tariff barriers, sanitary and phytosanitary barriers, and investment.[296] The TIDCA consolidated the progress made in the negotiations up to 2006.

After concluding this geographical overview of US FTAs, this research assesses the different models of the US social clause. Based on Vogt's approach, these clauses are analysed according to the US Administration that introduced them.[297] However, Biden Administration is excluded from this Chapter since it has neither negotiated nor concluded any trade agreement. Furthermore, his policy has broadly followed that of his predecessor, President Trump.[298]

Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 829.

[296] US Trade Representative, "Southern Africa FTA," 2022, https://ustr.gov/node/4383.

[297] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership."

[298] Katherine Tai, "Remarks As Prepared for Delivery of Ambassador Katherine Tai Outlining the Biden-Harris Administration's 'New Approach to the U.S.-China Trade Relationship,'" United States Trade Representative, October 2021, https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/remarks-prepared-delivery-ambassador-katherine-tai-outlining-biden-harris-administrations-new; Chad P. Bown, "Why Biden Will Try to Enforce Trump's Phase One Trade Deal with China," Peterson Institute for International Economics - Trade and Investment Policy Watch, December 15, 2021, https://www.piie.com/blogs/trade-and-investment-policy-watch/why-biden-will-try-enforce-trumps-phase-one-trade-deal-china.

Signed	In force	Agreement	Labour Provisions
1985	1985	Israel-US Free Trade Agreement (ILFTA)	None
1992	1994-2020	North American Free Trade Agreement (NAFTA)	Yes (NAALC)
2000	2001	Jordan-US Free Trade Agreement (JOFTA)	Yes
2003	2004	Singapore-US Free Trade Agreement (SGFTA)	Yes
2003	2004	Chile-US Free Trade Agreement (CLFTA)	Yes
2004	2005	Australia-US Free Trade Agreement (AUFTA)	Yes
2004	2006	Morocco -US Free Trade Agreement (MAFTA)	Yes
2004	2005, 2006, 2007, 2009	CAFTA-DR (Costa Rica, The Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua)	Yes
2004	2006	Bahrain -US Free Trade Agreement (BHFTA)	Yes
2006	2009	Oman-US Free Trade Agreement (OMFTA)	Yes
2006	2009	Peru-US Trade Promotion Agreement (PETPA)	Yes
2006	2012	US-Colombia Free Trade Agreement (COTPA)	Yes
2007, 2010, 2018	2012	US-Korea Free Trade Agreement (KORUS FTA)	Yes
2007	2012	Panama-US Trade Promotion Agreement (PATPA)	Yes
2019	2020	US-Mexico-Canada Free Trade Agreement (USMCA)	Yes

Table 1: List of US Free Trade Agreements.[299]

2.1. The 1990s Template: The NAFTA, NAALC, NAAEC

The US social clauses resulted from the legal elaboration of the different US Administrations and from political and institutional agreements. The first model was that

[299] Full text of the US FTAs available at: SICE - Foreign Trade Information System, "United States - Mexico - Canada Agreement (USMCA);" SICE - Foreign Trade Information System, "United States - Panama;" SICE - Foreign Trade Information System, "United States - Republic of Korea," Trade Policy Developments, 2007, http://www.sice.oas.org/TPD/USA_KOR/Draft_text_0607_e/Index_e.asp; SICE - Foreign Trade Information System, "Colombia - United States Trade Promotion Agreement;" SICE - Foreign Trade Information System, "Peru - United States Trade Promotion Agreement;" SICE - Foreign Trade Information System, "United States - Oman," Trade Agreements, 2006, http://www.sice.oas.org/Trade/USA_OMN_FTA_e/USA_OMN_ind_e.asp; SICE - Foreign Trade Information System, "United States - Bahrain," Trade Agreements, 2004, http://www.sice.oas.org/Trade/US_BHR/USA_BHRind_e.asp; SICE - Foreign Trade Information System, "Central America - Dominican Republic - United States (DR-CAFTA);" SICE - Foreign Trade Information System, "United States - Morocco," Trade Agreements, 2004, http://www.sice.oas.org/Trade/US_MAR/US_MAR_e.asp; SICE - Foreign Trade Information System, "United States - Australia," Trade Agreements, 2004, http://www.sice.oas.org/Trade/US-AusFTAFinal/USAusind_e.asp; SICE - Foreign Trade Information System, "United States - Chile;" SICE - Foreign Trade Information System, "United States - Singapore," Trade Agreements, 2003, http://www.sice.oas.org/Trade/USA-Singapore/USASingind_e.asp; SICE - Foreign Trade Information System, "United States - Jordan," Trade Agreements, 2000, http://www.sice.oas.org/Trade/us-jrd/USA_JOR_e.asp; "Canada-Mexico-United States: North American Free Trade Agreement;" "Canada-Mexico-United States: North American Agreement on Labor Cooperation;" "Canada-Mexico-United States: North American Agreement on Environmental Cooperation," *International Legal Materials* 32, no. 6 (1993): 1480-98; SICE - Foreign Trade Information System, "United States - Israel," Trade Agreements, 1985, http://www.sice.oas.org/Trade/US-Israel/index_e.asp.

of the 'NAFTA system.'[300] The 'NAFTA system' was the result of a complex work. The idea of a North American free trade area was initially proposed by Reagan in the 1979 presidential campaign and was first implemented in the 1988 US Canada FTA.[301] As a result, Mexico proposed a similar agreement to the US.[302] Fearing economic repercussions, Canada successfully requested to be included in the negotiations resulting in the NAFTA.[303]

The US Trade Unions (AFL-CIO), together with environmental protection and civil society associations, strongly criticised NAFTA, prompting the newly elected Clinton Administration to include two side agreements filling labour and environmental loopholes.[304] This political pressure led the US to also conclude the NAALC and NAAEC:

> [t]he result [was] a hybrid agreement, one that preserves sovereignty but creates mutual obligations and combines broad cooperation and consultation programmes alongside contentious review, evaluation, and dispute resolution mechanisms.[305]

The NAALC aimed to "improving working conditions and living standards, promoting increased production and quality, encouraging data sharing and cooperative labor-related activities, and promoting compliance with and effective enforcement of domestic labor laws."[306] Therefore, the agreement obliged the contracting Parties to effectively implement and improve the national labour standards they had freely

[300] 'NAFTA System' summarises both the trade agreement (NAFTA) and the two side agreements on labour (NAALC) and environment (NAAEC) in force from 1994 to 2020 between the US, Canada and Mexico.
[301] Laura Macdonald, "Canada and NAFTA," in *The Canadian Encyclopedia* (Historica Canada, October 16, 2020).
[302] Ibid.
[303] Ibid.; Gary Clyde Hufbauer and Jeffrey J. Schott, *NAFTA: An Assessment* (Washington, DC: Institute for International Economics, 1993), 2–3.
[304] Fredrick Englehart, "Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation," *Case Western Reserve Journal of International Law* 29, no. 2 (1997): 348–49.
[305] Lance Compa, "NAFTA's Labor Side Accord: A Three-Year Accounting," *Law and Business Review of the Americas* 3, no. 3 (1997): 22.
[306] Englehart, "Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation," 350.

established.[307] The agreement did not provide for *ad hoc* standards, but committed to those set by each country.[308] Furthermore, the NAALC committed the Parties to ensure the availability and public diffusion of Labour Laws and regulations[309] and to guarantee workers access to justice and protection of their legally recognised interests.[310]

To enforce these obligations, the NAALC provided for establishing supervisory bodies at both national and international levels.[311] At the national level, each country was required to create National Administrative Offices (NAOs) and national or governmental advisory committees.[312] These bodies did not have powers of their own, but exercised the powers delegated to them by national legislation and had the function of monitoring and exchanging labour information.[313] At the international level, the NAALC created a Commission for Labor Cooperation consisting of a Council and a Secretariat.[314] The Council,[315] composed of three Cabinet-level labour officials, aims to foster cooperation

[307] Article 2, NAALC, full text of the agreement available at US Department of Labor, "North American Agreement On Labor Cooperation," Bureau of International Labor Affairs, 1993, https://www.dol.gov/agencies/ilab/reports/pdf/naalc.
[308] US Department of Labor, "North American Agreement on Labor Cooperation: A Guide," Bureau of International Labor Affairs, October 2005, https://www.dol.gov/agencies/ilab/trade/agreements/naalcgd#; Englehart, "Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation," 351.
[309] Articles 6 and 7, NAALC.
[310] Articles 4 and 5, NAALC.
[311] US Department of Labor, "North American Agreement on Labor Cooperation: A Guide."
[312] Articles 15 and 16, NAALC.
[313] US Department of Labor, "North American Agreement on Labor Cooperation: A Guide."
[314] Article 8, NAALC.
[315] Articles 9-11, NAALC.

on Labour Law.[316] The Secretariat, headed by a Director appointed by consensus, monitored the application of national standards and reported regularly to the Council.[317]

The NAALC provided for a monitoring and dispute resolution system centred on State litigation and public submissions to the NAO. When a State considered that another was failing in the application of Labour Law, it held ministerial consultations.[318] If the breach persisted, either Party could request an Evaluation Committee of Experts (ECE) to issue motivated opinion.[319] In the case of demonstrating a persistent pattern of failure to effectively enforce its occupational safety and health, child labour or minimum wage technical standards, the Parties could refer the matter to an arbitration Panel.[320] The arbitration procedure could end with the infliction of a sanction supported by a suspension of trade benefits.[321]

Instead, public submissions were initiated by any citizen submitting a complaint to another State's NAO. After accepting the proposal, the NAO would consult with others and issue a public opinion.[322] Unresolved issues were referred to ministerial consultations. If the consultation was unsuccessful, an ECE could be convened, but only for occupational safety and health, child labour, or minimum wage technical standards

[316] Occupational safety and health; child labour; migrant workers of the Parties; human resource development; labour statistics; work benefits; social programmes for workers and their families; programmes, methodologies and experiences regarding productivity improvement; labour-management relations and collective bargaining procedures; employment standards and their implementation; compensation for work-related injury or illness; legislation relating to the formation and operation of unions, collective bargaining and the resolution of labour disputes, and its implementation; the equality of women and men in the workplace; forms of cooperation among workers, management and government; the provision of technical assistance, at the request of a Party, for developing its labour standards; and such other matters as the Parties may agree.
[317] Articles 12-14, NAALC.
[318] Article 22, NAALC.
[319] Articles 23-26, NAALC.
[320] US Department of Labor, "North American Agreement on Labor Cooperation: A Guide."
[321] Article 27-41, NAALC.
[322] Article 21, NAALC.

issues.[323] The ECE would prepare opinion for the Council; the body would then either undertake further consultations or proceed to arbitration with possible sanctions.[324]

Early on, politicians, Trade Unionists, Non-Governmental Organizations (NGOs) and academics criticised the 'NAFTA system' for not being able to make a significant impact on improving labour standards. In a 2001 report, Human Rights Watch pointed out that the NAALC lacked independent bodies, NAOs had too much discretion in deciding which submissions to accept, and there were severe procedural and subject-matter limitations to arbitration.[325] Moreover, McGuinness argued that the 'NAFTA system' allowed the US and Canada to benefit from the Mexican labour force, while the Mexican government did not improve working conditions to continue attracting foreign investment.[326] Heredia was also critical, stating that the 'NAFTA system' was designed to facilitate capital investment while maintaining a cheap and available workforce.[327] During the election campaign, Trump instrumentally used these same criticisms to attack the 'NAFTA system' and US trade policy.[328]

Apart from the criticism, the 'NAFTA system' has had an important impact on subsequent trade agreements, serving as a model for the Bipartisan Trade Promotion Authority Act of 2002,[329] which governed US trade policy until 2007. Indeed, except for

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[323] US Department of Labor, "North American Agreement on Labor Cooperation: A Guide."
[324] Ibid.
[325] Human Rights Watch, "Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement," vol. 13 (London, Washington, D.C., 2001), 2–3.
[326] Matthew Edward Carnes, "The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico," *University of Pennsylvania Journal of International Law* 21, no. 1 (2000): 1–40.
[327] Carlos Heredia, "Downward Mobility Mexican Workers After NAFTA," *NACLA Report on the Americas* 30, no. 3 (November 1996): 34–40.
[328] Politico Staff, "Full Transcript: First 2016 Presidential Debate," POLITICO, September 27, 2016; Alan Rappeport, "U.S. Calls for 'Much Better Deal' in Nafta Overhaul Plan," The New York Times, July 17, 2017; Neil Irwin, "What Is Nafta, and How Might Trump Change It?," The New York Times, April 27, 2017.
[329] Conconi Paola, Giovanni Facchini, and Maurizio Zanardi, "Fast-Track Authority and International Trade Negotiations," *American Economic Journal: Economic Policy* 4, no. 3 (2012): 146-89.

the US-Jordan FTA (JOFTA), all US commercial treaties concluded by the Bush G.W. Administration were negotiated on the basis of this Act, which delegated negotiating power to the executive branch and reserved to Congress the power to accept or reject the agreement without defining the content of the social clause. Consequently, the Bush G.W. administration kept the social obligations of the NAALC essentially unchanged.

2.2. The Bush G. W. Administration's Free Trade Agreements

Chronologically, the first social clause entered into force during the Bush G.W. Administration was that of the JOFTA. However, this clause differs significantly from the others of the Bush G.W. Administration since the Clinton Administration negotiated it. In Article 6 of the JOFTA:[330]

> The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law.
> The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.
> Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in paragraph 6 and shall strive to improve those standards in that light.[331]

Therefore, the Parties agree to conform their domestic legislation to the principles of International Labour Law[332] and to ensure:

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[330] The full text of the Agreement is available at: SICE - Foreign Trade Information System, "Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area," Trade Agreements, 2000, http://www.sice.oas.org/Trade/us-jrd/text_e.asp#VI.
[331] Article 6.1-3, JOFTA.
[332] Article 6.3, JOFTA.

(a) the right of association;
(b) the right to organize and bargain collectively;
(c) a prohibition on the use of any form of forced or compulsory labor;
(d) a minimum age for the employment of children; and
(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[333]

Moreover, the JOFTA goes beyond its obligation to apply national labour standards, requiring compliance with international standards and submitting labour and economic disputes to the same dispute resolution mechanism.[334] However, the Bush G.W. Administration severely undermined this innovation.[335] Indeed, the US Trade Representative issued a side letter effectively removing "the possibility of enforcing labor and environmental violations by tough enforcement mechanisms of sanctions."[336]

The JOFTA is essentially unique; the subsequent agreements concluded by the Bush G. W. Administration have different characteristics (Table 2).[337] These agreements can be divided into two groups according to whether they were concluded before or after the May 10th Compromise. Indeed, this Compromise between the Republican Administration and the Democratic Congress changed the social obligations in US trade policy.

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[333] Article 6.6, JOFTA.
[334] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 832.
[335] Ambassador Robert B. Zoellick, the US Trade Representative, sent a letter to the Jordanian Ambassador to the US, Marwan Muasher, in which he Stated: "[M]y Government would not expect or intend to apply the Agreement's dispute settlement procedures to secure its rights under the Agreement in a manner that results in blocking trade.... [M]y Government considers that appropriate measures for resolving any difference that may arise regarding the Agreement would be bilateral consultations and other procedures, particularly alternative mechanisms, that will help to secure compliance without recourse to traditional trade sanctions." See Side Letter on Labor and Environment from Ambassador Robert B. Zoellick, US Trade Representative, to His Excellency Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan to the United States, July 23, 2001.
[336] "Congressional Record. Proceedings and Debates of the 107th Congress, First Session" (Washington, D.C., 2001), 4878, https://www.govinfo.gov/content/pkg/CREC-2001-07-31/pdf/CREC-2001-07-31-house.pdf.
[337] These FTAs have been agreed with Singapore, Chile, Australia, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Bahrain, Oman, Peru, Colombia, Korea and Panama.

Signed	In force	Free Trade Agreement
Before the May 10th Compromise		
2003	2004	Singapore-US Free Trade Agreement (SGFTA)
2003	2004	Chile-US Free Trade Agreement (CLFTA)
2004	2005	Australia-US Free Trade Agreement (AUFTA)
2004	2006	Morocco -US Free Trade Agreement (MAFTA)
2004	2005, 2006, 2007, 2009	CAFTA-DR (Costa Rica, The Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua)
2004	2006	Bahrain -US Free Trade Agreement (BHFTA)
2006	2009	Oman-US Free Trade Agreement (OMFTA)
After the May 10th Compromise		
2006	2009	Peru-US Trade Promotion Agreement (PETPA)
2006	2012	US-Colombia Free Trade Agreement (COTPA)
2007, 2010, 2018	2012	US-Korea Free Trade Agreement (KORUS FTA)
2007	2012	Panama-US Trade Promotion Agreement (PATPA)

Table 2: Agreements Negotiated by the Bush G.W. Administration.[338]

The agreements preceding the May 10th Compromise included social clauses similar to that of the CAFTA-DR,[339] which is analysed as a prototype of this phase.

The CAFTA-DR 'Labour Chapter' opens with a "Statement of Shared Commitment," where the Parties:

> reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration)[340] [and] strive to ensure that such labor principles and internationally recognized labor rights […] are recognized and protected by its law.[341]

Furthermore, the Parties recognise that CLS "should not be used for protectionist trade purposes"[342] and that each State may "establish its own domestic labour standards, and to adopt or modify accordingly its Labour Laws."[343] However, they commit themselves to conform their Labour Laws to international labour standards.[344]

[338] The JOFTA is excluded from this table because it is an agreement that chronologically straddles the Clinton and Bush-G.W. Administrations, having been negotiated by the former and ratified by the latter.
[339] The full text available at: SICE - Foreign Trade Information System, "Chapter Sixteen - Labor," Central America - Dominican Republic - United States Trade Agreement (DR-CAFTA), 2004, http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/Chapter13_22.asp#Chapter16.
[340] Article 16.1.1, CAFTA-DR.
[341] Article 16.1.1, CAFTA-DR.
[342] Article 16.1.1, note 1, CAFTA-DR.
[343] Article 16.1.2, CAFTA-DR.
[344] Article 16.1.2, CAFTA-DR.

Regarding Labour Law enforcement, Article 16.2 specifies that each Party:

> shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.[345]

To comply with this obligation:

> Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.[346]

The Parties acknowledge that it is inappropriate to support trade or investment at the expense of labour standards; therefore, they agree:

> to ensure that it does not waive or otherwise derogate from, or offer to waive o otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights [..] as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[347]

The States undertake to "ensure that proceedings before such tribunals for the enforcement of its Labour Laws are fair, equitable, and transparent."[348] Therefore, they refer to due process, the principle of publicity, the right of defence, the reasonable length of the trial, the written form, the right to review of decisions, the impartiality and independence of the judge and the right to enforce the decision.[349] Furthermore, the Parties agree to adequately inform workers of their rights.[350]

[345] Article 16.2.1 (a), CAFTA-DR.
[346] Article 16.2.1(b), CAFTA-DR.
[347] Article 16.2.2, CAFTA-DR.
[348] Article 16.3.2, CAFTA-DR.
[349] Articles 16.3.3-6, CAFTA-DR.
[350] Article 16.3.7, CAFTA-DR.

To foster cooperation and enforcement of commitments, CAFTA-DR creates an advisory Labour Affairs Council composed of government representatives and specialised officers from labour ministries.[351]

Regarding the labour dispute resolution mechanism, CAFTA-DR provides for the instrument of Cooperative Labor Consultations:

> [A Party] may request consultations [..] regarding any matter arising under this Chapter by delivering a written request to the contact point that the other Party has designated [..].[352]

If the Parties are unable to resolve the dispute, the matter is referred to the Council, which may consult experts, resort to good offices, conciliate, or mediate.[353] When the issue concerns the obligation to apply its Labour Law, and the consultations have not resolved the matter within sixty days, the complaining Party may request the convocation of a Commission.[354] The Commission has thirty days to solve the dispute; otherwise, the claimant may demand the establishment of an arbitration Panel,[355] which issues a final report identifying the measures to settle the dispute.[356] If the losing Party fails to implement the report, it must pay to a fund administered by the Commission a sum of money not exceeding $15 million per year.[357] This fund is spent:

> for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law. In deciding how to expend monies paid into the fund, the Commission shall consider the views of interested persons in the disputing Parties' territories.[358]

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[351] Article 16.4, CAFTA-DR.
[352] Article 16.6.1, CAFTA-DR.
[353] Article 16.6.4 and .5, CAFTA-DR.
[354] Article 16.2.1 (a) and Chapter Twenty, CAFTA-DR.
[355] Articles 20.6.1 (a) and 20.6.1, CAFTA-DR.
[356] Article 20.10, CAFTA-DR.
[357] Article 20.17.2, CAFTA-DR.
[358] Article 20.17.4, CAFTA-DR.

The CAFTA-DR is an economically relevant FTA, but according to Trade Unions, NGOs, and a part of the academic literature, it is socially inadequate.[359] The main criticism levelled at the CAFTA-DR is that it does not oblige the Parties to comply with the ILO CLS. Indeed, the CAFTA-DR requires Parties to apply their national Labour Law, to "strive to ensure" its conformity with ILO standards and to "strive not to weaken" their discipline to attract investment.[360] Furthermore, CAFTA-DR excludes the principle of non-discrimination among the rights to be enforced by the Parties' national Labour Law.[361] This choice is deplorable because in Central America, ethnic-racial, sexual and political-union discrimination is a grave scourge.[362]

Regarding dispute resolution mechanisms, the CAFTA-DR provides a significantly weaker procedure for labour than for trade disputes[363] since it only applies to complaints concerning the non-application of national Labour Law and not to cases of non-application of the CLS.[364] Moreover, commercial dispute resolution is less complex than labour dispute resolution and more effective because sanction has an "equivalent

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[359] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership;" American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), "The Real Record on Workers' Rights in Central America" (Washington, D.C., April 2005); "Testimony Regarding the Central America Free Trade Agreement (CAFTA) Prepared by Bama Athreya, Deputy Director International Labor Rights Fund" (April 12, 2005); Human Rights Watch, "CAFTA's Weak Labor Rights Protections: Why the Present Accord Should Be Opposed" (New York, March 2004); Labor Advisory Committee for Trade Negotiations and Trade Policy, "Report to the President, the Congress and the United States Trade Representative on the U.S.-Central America Free Trade Agreement" (Washington, D.C., March 19, 2004); Labor Advisory Committee for Trade Negotiations and Trade Policy, "Report to the President, the Congress and the United States Trade Representative on the U.S.-Australia Free Trade Agreement" (Washington, D.C., March 12, 2004); Labor Advisory Committee for Trade Negotiations and Trade Policy, "Report to the President, the Congress and the United States Trade Representative on the U.S.-Bahrain Free Trade Agreement" (Washington, D.C., July 14, 2004); Labor Advisory Committee for Trade Negotiations and Trade Policy, "Report to the President, the Congress and the United States Trade Representative on the U.S.-Oman Free Trade Agreement" (Washington, D.C., November 15, 2005).

[360] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 832.

[361] Ibid.

[362] Ibid.; American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), "The Real Record on Workers' Rights in Central America."

[363] Compare Chapters Sixteen and Twenty, CAFTA-DR.

[364] Article 16.6.8, CAFTA-DR.

effect"[365] to the damage suffered.[366] The "equivalent effect" principle does not apply in labour disputes. Instead, the sanction can reach a maximum of $15 million per year.[367] There are mitigating conditions that can significantly reduce the amount of the sanction; thus, the actual damage may be considerably higher than the sanction paid.[368]

A Commission employs labour dispute funds for labour programmes.[369] However, the CAFTA-DR allows States to budget for sanctions to be paid with the paradoxical effect of pushing the sanctioned Party to cut funds for labour policies by an amount equivalent to the sanction, thus nullifying deterrence and not improving working conditions.[370] Consequently, the obligation to implement national Labour Law is perceived "as woefully inadequate and an invitation to continued abuse."[371]

The critical points found in CAFTA-DR were common to all trade agreements concluded before the May 10th Compromise. They were the result of a policy aimed at emphasising mainly economic aspects. The CAFTA-DR model is an excellent example of this phase and provides insight into subsequent improvements.

2.3. The May 10th Compromise: A New Social Clause Template

In the midterm elections held in November 2006, the Democratic Party won the majority in both Houses of the US Congress.[372] A considerable number of newly elected

[365] The consequence of the "equivalent effect" principle is that the complaining Party may suspend all the commercial benefits.
[366] Article 20.16.2 and 20.17.5, CAFTA-DR.
[367] Article 20.17.2, CAFTA-DR.
[368] Compare Articles 20.16.2 and 20.17.2, CAFTA-DR.
[369] Article 20.17.4, CAFTA-DR.
[370] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 833.
[371] Ibid., 832.
[372] For an assessment of 2006 midterm election see: Gary C. Jacobson, *A Divider, Not a Uniter: George W. Bush and the American People, the 2006 Election and Beyond* (New York: Pearson Longman, 2007).

congresspersons campaigned by promising trade reforms, claiming that free and unregulated trade was the cause of manufacturing decline.[373]

In the early month of 2007, Trade Unions, NGOs, environmental, agricultural, health and social security, and consumers organisations released a platform for "fair trade" aiming at influencing legislators.[374] The platform provided the basis for the subsequent negotiation of trade policy between the lawmakers and the government.[375] At a press conference on 10 May 2007 it was announced that the Congress and the President had reached a Compromise.[376] The core principles of this agreement were released on 11 May 2007 by the two institutions in the document "Bipartisan Agreement on Trade Policy" (i.e., the May 10th Compromise).[377]

The May 10th Compromise was applied to the agreements between the US and Peru, Colombia, the Republic of Korea and Panama. This compromise innovated significantly regarding workers' rights protection and the dispute settlement system.

Regarding workers' rights protection, the May 10th Compromise required the introduction into the agreements of:

> Enforceable reciprocal obligation for the Countries to adopt and maintain in their laws and practice the five basic internationally-recognized labor principles, as stated in the ILO Declaration on Fundamental Principles and Rights at Work.[378]

[373] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 833.
[374] Ibid.
[375] Ibid.
[376] Ibid.; Ways and Means Committee - Democrats, "May 10th Agreement," Trade Resource Center, May 10, 2007, https://waysandmeans.house.gov/media-center/tpp-focus.
[377] US Trade Representative, "Bipartisan Agreement on Trade Policy" (Wahington, D.C., May 10, 2007); Ways and Means Committee, "May 10th Agreement" (Washington, D.C., May 10, 2007).
[378] US Trade Representative, "Bipartisan Agreement on Trade Policy," 1.

Under this provision, each Party would have been required to conform its Labour Law to the 1998 ILO Declaration. Furthermore, the compromise abandoned the reference to national standards.[379]

The reference to the 1998 ILO Declaration in the May 10th Compromise led to a debate in the literature on the nature of the new social clauses' provisions. This debate centred on the uncertainty over the nature of the CLS defined as "principles" in the 1998 ILO Declaration.[380] According to Alston, the term "principles" created an "extraordinary opaque formula"[381] that raised suspicions that the "normative content has been liberated or unhinged from the anchor of the ILO's painstakingly constructed jurisprudence in relation to these rights."[382] This interpretation was based on the consideration that the 1998 ILO Declaration was based "on the principles of the Constitution, reflected in the Conventions, but not on specific provisions of the Conventions" as expressed by the Canadian Ambassador, chairman of the drafting committee of the Declaration, and also shared by the Ambassador of Barbados.[383] Maupain, Agustí-Panareda, Ebert, and LeClerq countered this assertion by arguing that:

> There is no danger that the principles and their content be liberated from the 'anchor' of the relevant Conventions and 'painstakingly constructed jurisprudence' in relation to these rights for the simple reason that they are the anchors.[384]

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[379] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 834.
[380] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 834; Jordi Agustí-Panareda, Franz Christian Ebert, and Desirée LeClerq, "Labour Provisions in Free Trade Agreements: Fostering Their Consistency with the ILO Standards System" (Geneva, 2014), 17.
[381] Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime," *European Journal of International Law* 15, no. 3 (2004): 490.
[382] Ibid., 494.
[383] Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime"; ILO, "Report of the Committee on the Declaration of Principles, 86th Session," *The Committee on the Financial Aspects of Corporate Governance* (Geneva, June 1998).
[384] Francis Maupain, "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights," *European Journal of International Law* 16, no. 3 (2005): 450.

> [In the ILO context:] the general nature of the 1998 ILO Declaration's principles does not pose a problem. The principles were expressly designed to be translated into specific standards by the ILO's tripartite standard-setting machinery, in the form of legal instruments that would then be periodically reviewed and revised to ensure the adaptability of the labour standards system.[385]

However, in the case of CLS included in FTAs without reference to Conventions embodying them,[386] a problem of "conformity of conduct with legal obligations in concrete cases"[387] may arise. Vogt addressed this objection by noting that "the text of many of the fundamental Conventions are themselves little more than broadly stated principles."[388] The States can overcome the vagueness of the Conventions "through the accumulation of the observations and conclusions of the ILO supervisory system." [389] Unsurprisingly, the US has adopted the reforms necessary to implement the CLS by being guided by the "observations of the ILO supervisory system developed with regard to the ILO Conventions underlying the ILO Declaration's principles."[390]

Moving to the dispute settlement, the May 10th Compromise established three principles:

> Only a government can invoke dispute settlement against the other government for a labor violation under an FTA.
> Labor obligations subject to the same dispute settlement procedures and remedies as commercial obligations. Available remedies are fines and trade sanctions, based on amount of trade injury.
> As with commercial provisions, Panel decisions are not self-executing. That is, they would not alter U.S. law.[391]

The most relevant innovations concerned the decision that all employment obligations were subject "to the same dispute settlement procedures and remedies as

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[385] Agustí-Panareda, Ebert, and LeClerq, "Labour Provisions in Free Trade Agreements: Fostering Their Consistency with the ILO Standards System," 17.
[386] Ibid., 17–18.
[387] Ibid., 18.
[388] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 835.
[389] Ibid.
[390] Ibid.
[391] US Trade Representative, "Bipartisan Agreement on Trade Policy," 2.

commercial obligations" and that the "remedies [were] fines and trade sanctions, based on amount of trade injury." These provisions strengthened the Parties' compliance since they created an enforcement mechanism.[392]

2.4. From the Bush G. W. Administration to the Obama Administration

The first post-May 10th Compromise trade agreement was concluded between the US and Peru (PETPA). It is an emblematic agreement because it carries all the elements of the May 10th Compromise. The Agreement opens with a joint commitment by the Parties to respect ILO International Labour Law.[393] Then, Article 17.2 details the essential labour obligations:

> Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration):
> (a) freedom of association;
> (b) the effective recognition of the right to collective bargaining;
> (c) the elimination of all forms of compulsory or forced labor;
> (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and
> (e) the elimination of discrimination in respect of employment and occupation.
> Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.[394]

Additionally, the footnote to this article clarifies the burden of proof by stating that "a Party must demonstrate that the other Party has not adopted or maintained a law, regulation or practice affecting trade or investment between the Parties." [395] Thus, as clarified by the Arbitral Panel in the US v. Guatemala case, the Party must: "(1)

[392] See Article 16.6.8, CAFTA-DR.
[393] Article 17.1, PETPA.
[394] Article 17.2, PETPA
[395] Article 17.2, footnote 1, PETPA

demonstrate that the enterprise or enterprises in question export(s) to CAFTA-DR Parties in competitive markets or compete with imports from CAFTA-DR Parties; (2) identify the effects of a failure to enforce; and (3) demonstrate that these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises."[396]

Articles 17.5 to 17.7 deal with the creation of a robust system of institutional consultations aimed at fostering mutual control, cooperation in labour matters and the concrete application of labour rights obligations.

Regarding dispute settlements, the labour Chapter of the PETPA affirms:

> If the consulting Parties have failed to resolve the matter within 60 days of a request under paragraph 1, the complaining Party may request consultations under Article 21.4 (Consultations) or a meeting of the Commission under Article 21.5 (Intervention of the Commission) and, as provided in Chapter Twenty-One (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter. The Council may inform the Commission of how the Council has endeavored to resolve the matter through consultations.[397]

After the Agreement with Peru, the Bush G.W. Administration concluded agreements with Colombia, the Republic of Korea and Panama. These agreements have remarkably similar labour Chapters that support the PETPA by applying the innovations of the May 10th Compromise.

Under the Obama Administration, the US-Colombia Free Trade Agreement (COTPA), the US-Korea Free Trade Agreement (KORUS FTA) and the Panama-US Trade Promotion Agreement (PATPA) came into force. Furthermore, this Administration renegotiated the KORUS FTA; however, amending only the economic parts and not the

[396] June Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," *International Journal of Comparative Labour Law and Industrial Relations* 35, no. 4 (2019): 493-94; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," June 14, 2017, 63; Federico Ortino, "Trade and Labour Linkages and the US-Guatemala Panel Report. Critical Assessment and Future Impact," *ETUI Working Paper 2021.11* (Brussels, 2021), 14-17.
[397] Article 17.7.6, PETPA

labour commitments. Therefore, to identify a template for the Obama Administration's social clause, one has to look at the Trans-Pacific Partnership (TPP)[398] and the Transatlantic Trade and Investment Partnership (TTIP).[399]

Released in November 2015, the TPP labour Chapter was modelled on the May 10th Compromise. Nevertheless, the 'Labor Chapter' made significant innovations in social obligations, suspending those of many existing bilateral (Chile, Peru, Singapore, Australia) and multilateral (NAALC) agreements and setting up an innovative and advanced social clause template. Indeed, Article 19.3.2 stipulates:

> Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[400]

This provision was inspired by the ILO's Decent Work[401] Agenda and aimed to raise workers' conditions overall.[402] However, the absence of an explicit reference to standards for "acceptability" makes this provision extremely weak.[403] For instance, it would be sufficient to have rules regulating working hours regardless of whether these

[398] United States Trade Representative, "Trans-Pacific Partnership," Free Trade Agreements, February 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.
[399] European Commission, "Transatlantic Trade and Investment Partnership (TTIP) - Documents," EU trade relationships by Country/region, April 21, 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-Country-and-region/Countries-and-regions/united-States/eu-negotiating-texts-ttip_en.
[400] Article 19.3, para 2, TPP.
[401] Decent work is defined as "work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families, as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment." See: UN CESCR, "General Comment No. 18 on Article 6 of the International Covenant on Economic, Social and Cultural Rights," *E/C.12/GC/18* (Geneva, February 6, 2006).
[402] The ILO launched the Decent Work Agenda in 1999 with Director-General Somavia's report to the International Labour Conference. The Agenda ensures that all persons have access to productive work in conditions of freedom, equality, security and human dignity. See: International Labour Office, "Decent Work: Report of the Director-General. 87th International Labour Conference" (Geneva, 1999).
[403] Article 19.3.2, footnote 5, TPP: "For greater certainty, this obligation relates to the establishment by a Party in its statutes, regulations and practices thereunder, of acceptable conditions of work as determined by that Party."

hours are too long,[404] or it would be sufficient to have rules providing for a minimum wage regardless of whether this wage is adequate to ensure a decent existence for the worker.

Starting on the provisions of May 10th Compromise,[405] Article 19.4, letter b) prohibits any derogation from the CLS on the whole territory of the States, including Export Processing Zones (EPZs).[406] The EPZs are areas dedicated to the production of export commodities, where most foreign investment, industrial production, and workforce is concentrated. These areas have the highest level of labour rights violations.[407] Aware of this, the Parties have agreed that:

> […] no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations: […] (b) […] if

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[404] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 835.

[405] Article 19.4, TPP States: "The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws."

[406] The International Encyclopaedia of Human Geography defines Export Processing Zones (EPZs) as "[…] industrial estates that are fenced in for producing manufactured goods for export. In short, they are trade enclaves that import raw materials, process them, and then export them to the world market. The development of EPZs is justified by a number of motivations: to generate employment, to produce foreign exchange earnings, to promote exports, to provide a catalyst effect on local firms about how to export to the world market, to use trade enclaves to diffuse knowledge, know-how and management skills to local firms, and to stimulate industrial development in the host Country. EPZs are created under specific circumstances-developing Countries have abundant labor resources, while capital becomes mobile in the global economy. The combination of labor and capital in EPZs provides a chance for developing Countries to absorb foreign direct investment (FDI) and be linked to the global economy with the minimum impact on the domestic economy, as the goods produced in EPZs are exported." See: Fulong Wu, "Export Processing Zones," in *International Encyclopedia of Human Geography*, ed. Rob Kitchin and Nigel Thrift (Oxford: Elsevier, January 1, 2009), 691-96.

[407] On the EPZs, see: Xavier Cirera and Rajith W.D. Lakshman, "The Impact of Export Processing Zones on Employment, Wages and Labour Conditions in Developing Countries: Systematic Review," *Journal of Development Effectiveness* 9, no. 3 (July 3, 2017): 344-60; ILO International Training Centre, *Trade Union Manual on Export Processing Zones* (Turin: International Labour Organization, 2014); Jamie K. McCallum, "Export Processing Zones: Comparative Data from China, Honduras, Nicaragua and South Africa," *Working Paper* (Geneva, 2011); William Milberg and Matthew Amengual, "Economic Development and Working Conditions in Export Processing Zones: A Survey of Trends," *Working Paper* (Geneva, 2008); Committee on Sectoral and Technical Meetings and Related Issues, "Report of the Tripartite Meeting of Export Processing Zone-Operating Countries," *GB.273/STM/8/1* (Geneva, 1998); Ana Teresa Romero, "Export Processing Zones in Africa: Implications for Labour," *Competition and Change* 2, no. 4 (1997): 391-418; Elizabeth M. Remedio, "Export Processing Zones in the Philippines:A Review of Employment, Working Conditions and Labour Relations," *Working Paper* (Geneva, 1996); David M. Dror, "Aspects of Labour Law and Relations in Selected Export Processing Zones," *International Labour Review* 123, no. 6 (1984): 705-22.

> the waiver or derogation would weaken or reduce adherence to a right […], or to a condition of work […], in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory […].[408]

Moreover, the TPP social clause bans the importation of goods produced with forced and compulsory labour from non-TPP Countries:

> Each Party recognises the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour. […] each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.[409]

However, the ambiguity of the provision (i.e., "discourage") and the discretion allowed to States significantly reduce its efficacy.[410]

An important innovation is foreseen in Article 19.7, which requires States to promote voluntary corporate social responsibility initiatives at the national level. Although it is an encouragement, this provision is part of the logic of making companies responsible for protecting workers' rights.

The final improvement is contained in Article 19.9, which requires Parties to introduce measures for "written submissions from persons of a Party on matters related to [the Labour] Chapter in accordance with its domestic procedures."[411] This provision aims to diffuse the US practice of issuing "set of guidelines regulating the submission of trade complaints under the labor Chapter of FTAs."[412] The aim is to strengthen the

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[408] Article 19.4, letter b), TPP.
[409] Article 19.6, TPP.
[410] Section 1307 of the Tariff Act of 1930 provides that goods produced by forced and compulsory labour may be imported into the United States if US production of these goods is insufficient to satisfy the domestic market: "The provisions of this section relating to goods, wares, articles, and merchandise mined, produced, or manufactured by forced labor or/and indentured labor, shall take effect on January 1, 1932; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States." See: Tariff Act of 1930, 1930.
[411] Article 19.9.1, TPP.
[412] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 836.

monitoring of social clause implementation and to involve civil society and public opinion.

The remaining element to be considered is dispute settlement. On this point, the TPP maintains the model of the May 10th Compromise without any reinforcement. The TPP provides for a system of consultation between States, which, if the dispute is not settled, can lead to international arbitration and economic sanctions.[413]

The second Agreement of the Obama Administration is the TTIP. This Agreement has never been signed, and it has been strongly criticised for the backwardness of its social provisions by Trade Unions, environmental and civil society organisations, and some academics.[414] However, the proposed social clause of the TTIP innovates in social obligations but regresses in the dispute resolution as it does not provide for sanctions.[415]

Following the EU model, the proposed social clause refers to the ILO and UN Conventions protecting social rights. The clause considers CLS one by one and refers to the application of the relevant Conventions.[416] Furthermore, the proposed social clause recalls the Decent Work Agenda, the UN Universal Declaration of Human Rights, and the UN International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.[417] The clause is innovative because it commits the Parties to specific obligations and not to principles or national legislation. However, the proposed social clause deviates from the recommendations of the European Parliament to make ratification of the ILO Conventions on CLS mandatory.[418]

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[413] See Articles 19.11, 19.12, 19.15 and Chapter 28 (Dispute Settlement), TPP.
[414] Council of the European Union, "Decision n. 6052/19."
[415] Ferdi De Ville, Jan Orbie, and Lore Van Den Putte, "TTIP and Labour Standards," *IP/A/EMPL/2015-07 PE 578.992* (Brussels, 2016), 32-46; European Commission, "EU Textual Proposal - 'Trade And Sustainable Development' - TTIP" (Brussels, November 6, 2015).
[416] Section I, Articles 5-8, EU Textual Proposal Trade And Sustainable Development - TTIP.
[417] Section I, Articles 4-9, EU Textual Proposal Trade And Sustainable Development - TTIP.
[418] De Ville, Orbie, and Van Den Putte, "TTIP and Labour Standards," 41.

Regarding dispute settlement, the US and EU provide for governmental consultations, and international arbitration.[419] Contrary to the US, the template of the EU social clause does not provide for sanctions.[420] Since the proposed social clause follows the EU model, there is a regression from the May 10th Compromise.[421]

The failure in ratifying the TPP and TTIP did not stop the modernisation of the US social clause template; the innovations were transfused into the agreement that replaced NAFTA, the USMCA.

2.5. Innovation and Continuity: The USMCA 'Labor Chapter'

The election of President Trump has had a disruptive effect on the global trade policies pursued so far. Even during the election campaign, Trump strongly criticised the trade policies of his predecessors; once in office, he broke off the TTIP negotiations, withdrew the signature from the TPP and promoted the renegotiation of the Agreement with the Republic of Korea, Mexico and Canada.

The Trump Administration's social clause model is 'Chapter 23' of the Agreement between the United States of America, the United Mexican States and Canada (USMCA).[422] This Chapter consolidates the innovations of the Obama Administration and introduces several new provisions.[423]

Article 23.3.1 obliges the Parties to respect and apply the CLS, but specifies in a footnote that the ILO's interpretation of these principles shall be followed.[424] Moreover,

[419] Ibid., 35; European Commission, "EU Textual Proposal - 'Dispute Settlement (Government to Government)' - TTIP" (Brussels, January 7, 2015).
[420] De Ville, Orbie, and Van Den Putte, "TTIP and Labour Standards," 33.
[421] European Commission, "EU Textual Proposal - 'Dispute Settlement (Government to Government)' - TTIP."
[422] Agreement between the United States of America, the United Mexican States, and Canada, 2020.
[423] Article 23.1, USMCA.
[424] Article 2.3.1, footnotes 3 and 6, USMCA.

Article 23.3.2 requires the Parties to adopt legislation to ensure acceptable working conditions with respect to minimum wages, working hours and occupational safety and health.[425] Article 23.4(b) prohibits exceptions to CLS also in EPZs, thus taking over the rule introduced by the social clause of the TPP.[426] Additionally, Article 23.5.2 innovates by providing that:

> Each Party shall promote compliance with its labor laws through appropriate government action, such as by:
> (a) appointing and training inspectors;
> (b) monitoring compliance and investigating suspected violations, including through unannounced on-site inspections, and giving due consideration to requests to investigate an alleged violation of its labor laws;
> (c) seeking assurances of voluntary compliance;
> (d) requiring record keeping and reporting;
> (e) encouraging the establishment of labor-management committees to address labor regulation of the workplace;
> (f) providing or encouraging mediation, conciliation, and arbitration services;
> (g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor laws; and
> (h) implementing remedies and sanctions imposed for noncompliance with its labor laws, including timely collection of fines and reinstatement of workers.[427]

The US agreements have never gone into such detail about the measures to be taken to implement labour legislation. Moreover, this non-exhaustive list is illustrative, as can be seen from the wording "such as by," and is therefore susceptible to expansion.

A second innovation is the introduction of articles specifying the content of the obligations.[428] While Article 23.6 commits the Parties to eliminate forced and compulsory labour by cooperating "[…] for the identification and movement of goods produced by forced labor […]," [429] Article 23.7 engages the Parties to guarantee the right of association

[425] Compare Article 23.3.2, USMCA with Article 19.3.2, TPP.
[426] Compare Article 23.4 (b), USMCA with Article 19.4(b), TPP.
[427] Article 23.5.2, USMCA.
[428] Articles 23.6, 23.7, 23.8, 23.9, USMCA.
[429] Article 23.6.2, USMCA.

and to strike.[430] Furthermore, the Parties commit to both ensuring protection for migrants regardless of nationality[431] and combating discrimination at work. [432] However, none of these commitments is followed by a specific implementing modality, which limits their impact.

As the TPP, the USMCA provides for creating public submissions to promote the cooperation of civil society in enforcing the agreement.[433] The model is the US one where civil society (individuals or organisations) is allowed to complain about the violation of social rights under free trade agreements. Moreover, the Trump Administration increases and diversifies the subjects of labour cooperation while remaining consistent with the established procedures of the May 10th Compromise.[434]

Annex 23-A, dedicated to the system of labour relations in Mexico, is of particular interest. By 1 January 2019, the Annex requires Mexico to pass comprehensive legislation protecting Trade Unions and collective bargaining.[435] The legislation to be adopted includes prohibiting employer interference in trade unions, ensuring the election of trade union representatives, providing for independent monitoring bodies with sanctioning powers, regulating collective bargaining, introducing controls to ensure that collective agreements guarantee decent working and living conditions for workers, and promoting awareness of workers' rights.[436]

Turning to the dispute settlement, Annexes 31-A and 31-B to Chapter 31 'Dispute Settlement' create a "Facility-Specific Rapid Response Labor Mechanism"[437] between the

[430] Article 23.7, USMCA.
[431] Article 23.8, USMCA.
[432] Article 23.9, USMCA.
[433] Article 23.11, USMCA.
[434] Article 23.12, USMCA.
[435] Annex 23-A.3, USMCA.
[436] Annex 23-A.2, USMCA.
[437] Annex 31-A, USMCA.

US and Mexico (Annex 31-A) and between Mexico and Canada (Annex 31-B). These mechanisms pre-establish a Panel of independent, non-national arbitrators[438] and "[…] apply whenever a Party (the "complainant Party") has a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining […]."[439] The procedure of the two mechanisms comprises a 'verification' phase and a 'process and determination' phase.

The 'verification' phase starts after the submission of a suspected 'Denial of Rights' to the Secretariat.[440] The Secretariat appoints an investigating Panel[441] whose task is to verify the allegations of the complainant Party.[442] If the allegations are well-founded, the Panel dialogues with the respondent and the complainant; the respondent has to explain the 'Denial of Rights' and the actions taken to remove it.[443] If the violation persists, the 'process and determination' procedure applies. During this phase, the arbitration Panel hears the Parties, determines the 'Denial of Rights,' and, if requested by the respondent, "include[s] a recommendation on a course of remediation."[444] Based on the final report, the complaining Party may impose remedies:

> […] suspension of preferential tariff treatment for goods manufactured at the Covered Facility or the imposition of penalties on goods manufactured at or services provided by the Covered Facility.
> In cases where a Covered Facility […] has received a prior Denial of Rights determination, remedies may include suspension of preferential tariff treatment for such goods; or the imposition of penalties on such goods or services.
> In cases where a Covered Facility […] has received a prior Denial of Rights determination on at least two occasions, remedies may include suspension of preferential tariff treatment for such goods; the

[438] Article 31-A.3; Article 31-B.3, USMCA.
[439] Article 31-A.2; Article 31-B.2, USMCA.
[440] Article 31-A.4, Article 31-A.5, Article 31-A.6; Article 31-B.4, Article 31-B.5, Article 31-B.6, USMCA.
[441] Article 31-A.5; Article 31-B.5, USMCA.
[442] Article 31-A.6; Article 31-B.6, USMCA.
[443] Article 31-A.7.1, 31-A.7.2; Article 31-B.7.1, 31-B.7.2, USMCA.
[444] Article 31-A.8.4; Article 31-B.8.4, USMCA.

> imposition of penalties on such goods or services; or the denial of entry of such goods.[445]

These penalties are severe and target the State and the company directly responsible for the violation. Legally, the labour dispute resolution system appears to have improved considerably. However, this system remains confined to Trade Union matters. Moreover, this system is activated discretionally by States, which are the only ones entitled to act. These characteristics restrict the potential of the innovations introduced.

To sum up, the current US 'Labour Chapter' template improves social obligations, introduces procedural commitments and enforcement mechanisms, and strengthens dispute resolution. However, the clauses still lack an advanced legal framework and effective cooperation, while the dispute settlement system suffers from procedural and subject matter limitations. (Table 3)

Element	Obligations - 'Labor Chapter'
Social obligations/ content	• Conform national labour legislation to CLS; • Implement national labour standards (acceptable condition of work, minimum wage, hours of work, and occupational safety and health); • Prohibition of worsening national labour standards to attract trade and investment; • 1998 ILO Declaration.
Procedural commitments	• Dialogue • Cooperation
Implementation mechanisms	• Labour Affair Council; • Domestic Labour Advisory Committee (optional); • Open meeting civil society with Labour Affairs Council.
Dispute Settlement	• Cooperative labour consultation; • Commercial dispute settlement system with financial or trade sanctions (with procedural and subject matter limitations).

Table 3: Labour Obligations in US Social Clauses.[446]

[445] Article 31-A.10.2, 31-A.10.3, 31-A.10.4; Article 31-B.10.2, 31-B.10.3, 31-B.10.4, USMCA.
[446] De Ville, Orbie, and Van Den Putte, "TTIP and Labour Standards," 34–35.

3. The EU 'Trade and Sustainable Development Chapter': Balancing Promotion and Protection

The EU has always advocated liberalising international trade and market access, concluding trade agreements with more than 70 Countries (Table 4). These treaties are of three types: a) Customs Union, b) Free Trade Agreements (e.g., Association Agreement; Economic Partnership, Political Coordination and Cooperation Agreement; Trade Development and Cooperation Agreement; Economic Partnership Agreement; Comprehensive and Enhanced Partnership Agreement), and c) Partnership and Cooperation Agreements.[447]

The Customs Union (CU) is the deepest possible level of trade integration, unifying the internal markets and establishing a common customs tariff on imports.[448] The Free Trade Agreements (FTAs) establish a weaker link since they eliminate (or reduce) tariffs in bilateral trade while maintaining each Party's trade policy towards the third Countries.[449] These agreements generally include social commitments. The Partnership and Cooperation Agreements (PCAs) provide a platform for developing trade relations by establishing a general framework for bilateral economic relations without changing customs tariffs.[450] This study considers only FTAs that include social clauses.

[447] European Commission, "Negotiations and Agreements," EU trade relationships by Country/region, March 23, 2022, https://ec.europa.eu/trade/policy/Countries-and-regions/negotiations-and-agreements/.
[448] Ibid.
[449] Ibid.
[450] Ibid.

Signed	In force	Agreement Parties	Agreement Type	Mixed Agreement	Social Clause
1972	1973	EU-Switzerland-Liechtenstein	FTA	Yes	No
1972	1973	EU-Iceland	FTA	Yes	No
1973	1973	EU-Norway	FTA	Yes	No
1991	1991	EU-Andorra	CU	No	No
1991	2002	EU-San Marino	CU	No	Yes
1992	1994	European Economic Area (EEA) (Iceland, Liechtenstein, Norway)	FTA (EIA)	Yes	Yes
1995	1996	EU-Turkey	CU	Yes	Yes
1995	1998, Renegotiated since 2015	EU-Tunisia	FTA (AA)	Yes	Yes
1995	2000	EU-Israel	FTA (AA)	Yes	Yes
1996	2000, Renegotiated since 2013	EU-Morocco	FTA (AA)	Yes	Yes
1996	1997	EU-Faroe Islands	FTA	Yes	Yes
1997	1997	EU-Palestinian Authority	FTA (AA)	Yes	Yes
1997	2002	EU-Jordan	FTA (AA)	Yes	Yes
1997	2000, Renegotiated since 2016, "Agreement in principle" in 2018	EU-Mexico	FTA (EPOCA)	Yes	Yes
1999	2000	EU-South Africa	FTA (TDCA)	Yes	Yes
1999	1999, Renegotiated since 2017, On hold since 2019	EU-Azerbaijan	FTA	Yes	Yes
2001	2004 2021	EU - North Macedonia	FTA	Yes	Yes
2001	2004	EU-Egypt	FTA (AA)	Yes	Yes
2002	2005	EU-Algeria	FTA (AA)	Yes	Yes
2002	2003	EU-Lebanon	FTA (AA)	Yes	Yes
2002	2003 Renegotiated since 2017	EU-Chile	FTA (AA)	Yes	Yes
2006	2009	EU-Albania	FTA	Yes	Yes
2007	2010	EU-Montenegro	FTA	Yes	Yes
2008	2013	EU-Serbia	FTA	Yes	Yes
2008	2015	EU-Bosnia and Herzegovina	FTA	Yes	Yes
2008	Provisionally applied since 2008	CARIFORUM (Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; The Dominican Republic; Grenada; Guyana; Jamaica; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Suriname; Trinidad and Tobago.)	FTA (EPA)	Yes	Yes
2008	Provisionally applied since 2016	West Africa (Ivory Coast; Ghana;)	FTA (EPA)	Yes	Yes

2009	Provisionally applied since 2014	Central Africa (Cameroon)	FTA (EPA)	Yes	Yes
2009	Provisionally applied since 2014	EU-Pacific (Papua New Guinea; Fiji; Samoa; the Solomon Islands)	FTA (EPA)	Yes	Yes
2009	Provisionally applied since 2012, Renegotiated since 2019	EU-Eastern And Southern Africa (ESA) (Comoros; Madagascar; Mauritius; the Seychelles, Zambia; Zimbabwe)	FTA (EPA)	Yes	Yes
2010	2015	EU-Republic of Korea	FTA	Yes	Yes
2012	Provisionally applied since 2012	EU-Iraq	PCA	Yes	Yes
2012	Provisionally applied since 2013	Andean Community (Colombia; Ecuador; Peru)	FTA	Yes	Yes
2012	Provisionally applied since 2013	Central America (Costa Rica; El Salvador; Guatemala; Honduras; Nicaragua; Panama)	FTA (AA)	Yes	Yes
2014	2016	EU-Georgia	FTA (AA)	Yes	Yes
2014	2016	EU-Moldova	FTA (AA)		Yes
2014	Provisionally applied since 2016	EU-Ukraine	FTA (AA)	Yes	Yes
2016	Provisionally applied since 2016	Southern African Development Community (SADC) (Botswana; Eswatini; Lesotho; Mozambique; Namibia; South Africa)	FTA (EPA)	Yes	Yes
2015	Provisionally applied since 2016	EU-Kazakhstan	PCA	Yes	Yes
2016	Provisionally applied since 2017	EU-Canada	FTA (CETA)	Yes	Yes
2017	2021	EU- Armenia	FTA (CEPA)	Yes	Yes
2018	2019	EU-Japan	FTA	No	Yes
2018	2019	EU-Singapore	FTA	No	Yes
2018	2020	EU-Vietnam	FTA	No	Yes
2020	2021	EU-UK	FTA	No	Yes

Table 4: EU Agreements in force notified to the WTO.[451]
Key: a) CU: Custom Union, b) FTA: Free Trade Agreement (including: AA: Association Agreement; EPOCA: Economic Partnership, Political Coordination and Cooperation Agreement; TDCA: Trade Development and Cooperation Agreement; EPA: Economic Partnership Agreement; CEPA: Comprehensive and Enhanced Partnership Agreement; CETA: Comprehensive Economic and Trade Agreement) and c) PCA: Partnership Cooperation Agreement.

[451] Ibid.; WTO, "European Union Trade Agreements," Regional trade agreements, April 17, 2022, http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?membercode=918.

3.1. Geography of the EU Agreements

Geographically, the EU has agreements with Countries across all continents. However, the EU has favoured trade relations with African, Caribbean and Pacific Countries (ACP Countries).[452] These relations originated before decolonisation;[453] they evolved after the creation of the ACP Group of States and then the Organisation of African, Caribbean and Pacific States (OACPS).[454]

The relationship between the EU and the ACP Countries has been based on economic and industrial development logic. Since the 1990s, the EU has promoted economic, social and democratic development. For this reason, the Lomé IV Convention introduced a non-binding "human rights clause."[455] In 1995, the revised Lomé IV Convention made the clause a "political conditionality."[456]

Lomé IV did not achieve any of its objectives: it neither diversified the economies of the ACP countries, nor reduced export quotas, nor empowered the EU, nor solved the social problems of the signatory countries.[457] The 2000 Cotonou Agreement changed the EU's trade policy towards ACP Countries by adding "a comprehensive political

[452] The Organisation of African, Caribbean and Pacific States (OACPS), formerly known as the African, Caribbean and Pacific (ACP) Group of States, brings together 79 States, including 48 Countries from sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific. The OACPS was founded in 1975 with the Georgetown Agreement. Since its establishment, the OACPS has been a trading partner of the EU, concluding the Lomé Conventions (I-IV) and the Cotonou Agreement (ACP-EC Partnership Agreement). See: OACPS, "Secretariat of the Organisation of African, Caribbean and Pacific States (OACPS)," The Organisation of African, Caribbean and Pacific States (OACPS), April 2022, http://www.acp.int/content/secretariat-organisation-african-caribbean-and-pacific-States-oacps.
[453] Dirk De Bièvre and Sieglinde Gstöhl, "The Trade Policy of the European Union" (London: Palgrave Macmillan, 2018), 140–43.
[454] OACPS, "Secretariat of the Organisation of African, Caribbean and Pacific States (OACPS)."
[455] Bièvre and Gstöhl, "The Trade Policy of the European Union," 144.
[456] Ibid.
[457] John Ravenhill, *Collective Clientelism. The Lomé Conventions and North South Relations* (New York: Columbia University Press, 1985), 309; European Commission, "Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century. Challenges and Options for a New Partnership," *COM(96)570 Fina* (Brussels, 2000); Dirk De Bièvre and Arlo Poletti, "The EU in Trade Policy: From Regime Shaper to Status Quo Power," in *EU Policies in a Global Perspective: Shaping or Taking International Regimes?*, ed. Gerda Falkner and Patrick Müller (London and New York: Routledge, 2013), 20–37.

dimension to aid and trade, thus aiming at a more global partnership."[458] The agreement was based on "the concept of participatory development, involving civil society and local authorities, as well as private sector development, and it introduced a reform of financial cooperation […] and a new framework for trade."[459]

The four basic principles of the Cotonou Agreement were a) equality of partners and ownership of development strategies, b) participation, c) dialogue and mutual obligations, and d) differentiation and regionalisation.[460] Based on these principles, the EU has signed regional free trade, investment and cooperation agreements; i.e., Economic Partnership Agreements (EPAs).[461] These EPAs liberalise trade in goods and services, foreign investment and government procurement, govern competition, intellectual property, and protect labour and the environment.[462] The European Commission adapted to the new principles by shifting the competence of EPAs from the Directorate General for Development to the Directorate General for Trade and adopting a liberalisation perspective.[463]

So far, all seven trade areas identified in 2002 (CARIFORUM, Central Africa, East Africa Community, Eastern and Southern Africa, Pacific, Southern African Development Community, and West Africa) have concluded an agreement (Table 5). However, the EPA with the East Africa Community is not yet provisionally in force because it has not

[458] Bièvre and Gstöhl, "The Trade Policy of the European Union," 145.
[459] Ibid.
[460] European Council, "Cotonou Agreement," Policies, 2021; Bièvre and Gstöhl, "The Trade Policy of the European Union," 145; Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou on 23 June 2000, *OJ L317/3*, 2000.
[461] European Council, "Cotonou Agreement."
[462] Bièvre and Gstöhl, "The Trade Policy of the European Union," 147.
[463] Ole Elgström and Magdalena Frennhoff Larsén, "Free to Trade? Commission Autonomy in the Economic Partnership Agreement Negotiations," *Journal of European Public Policy* 17, no. 2 (2010): 2014.

reached the minimum number of ratifications.[464] Furthermore, a considerable number of States in each region have not adhered to the EPAs and remain in the GSP (Table 6).

Region	Countries
Caribbean Forum (CARIFORUM)	Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; The Dominican Republic; Grenada; Guyana; **Haiti**; Jamaica; St. Lucia; St. Vincent and the Grenadines; St. Kitts and Nevis; Suriname; Trinidad and Tobago
Central Africa	Cameroon; **Central African Republic**; **Chad**; **Congo (Brazzaville)**; **Democratic Republic of Congo (Kinshasa)**; **Equatorial Guinea**; **Gabon**; **São Tomé & Principe**
East Africa Community (not in force or provisionally applied)	Burundi; Kenya; Rwanda; Tanzania; Uganda
Eastern And Southern Africa	Comoros; **Djibouti**; **Eritrea**; **Ethiopia**; **Malawi**; Madagascar; Mauritius; Seychelles; **Somalia**; **Sudan**; Zambia; Zimbabwe
Pacific	**Cook Islands**; **East Timor**; Fiji; **Kiribati**; **Marshall Islands**; **Federated States of Micronesia**; **Nauru**; **Niue**; **Palau**; Papua New Guinea; Samoa; Solomon Islands; **Tonga**; **Tuvalu**; **Vanuatu**
Southern African Development Community (SADC)	**Angola**; Botswana; Lesotho; Mozambique; Namibia; South Africa; **Swaziland**
West Africa	**Benin**; **Burkina Faso**; **Cape Verde**; **Gambia**; Ghana; **Guinea**; **Guinea-Bissau**; Ivory Coast; **Liberia**; **Mali**; **Mauritania**; **Niger**; **Nigeria**; **Senegal**; **Sierra Leone**; **Togo**

Table 5: Table 5: Geographical Division of Countries and Regions According to the EU Trade Policy. In Bold: Countries Outside the EPA.[465]

Signed	In force	Parties
2008	Provisionally applied since 2008	EU-CARIFORUM (Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; The Dominican Republic; Grenada; Guyana; Jamaica; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Suriname; Trinidad and Tobago.)
2008 2016 (Ghana)	Provisionally applied since 2016	EU-West Africa (Ivory Coast; Ghana;)
2009	Provisionally applied since 2014	EU-Central Africa (Cameroon)
2009	Provisionally applied since 2014	EU-Pacific (Papua New Guinea; Fiji; Samoa; the Solomon Islands)
2009	Provisionally applied since 2012, Renegotiated since 2019	EU-Eastern And Southern Africa (ESA) (Comoros; Madagascar; Mauritius; the Seychelles, Zambia; Zimbabwe)
2016	Provisionally applied since 2016	Southern African Development Community (SADC) (Botswana; Eswatini; Lesotho; Mozambique; Namibia; South Africa)

Table 6: EU and ACP Countries' Agreements in Force or Provisionally Applied.[466]

[464] European Commission, "East African Community (EAC)," EU trade relationships by Country/region, April 26, 2021, https://ec.europa.eu/trade/policy/Countries-and-regions/regions/eac/.
[465] European Commission, "Regions," EU trade relationships by Country/region, February 15, 2019, https://ec.europa.eu/trade/policy/Countries-and-regions/regions/.
[466] European Commission, "Negotiations and Agreements."

The Cotonou Agreement expired in February 2020. On 15 April 2021, the EU and the OACPS signed the agreement (EU-ACP Partnership Agreement) [467] on the new legal framework for the EU's relations with the 79 ACP countries, which is intended to replace the previous Cotonou Agreement.[468] The new Agreement is mixed in nature and needs to be ratified by the EU and all Member States. Pending the entry into force of the new Agreement, the validity of the previous Cotonou Agreement has so far been extended.[469] The new Partnership consists of a general part for all ACP Countries and specific regional protocols following the model of regionalisation of programmes.[470] Six are the core areas: a) democracy and human rights, b) sustainable economic growth and development, c) climate change, d) human and social development, e) peace and security, and f) migration and mobility.[471] In each area, the agreement identifies actions to improve the economic and social conditions of the States Parties.[472] The new agreement devotes a lot of space to the issue of sustainable development, emphasising the need to improve working conditions and ensure decent work.

Turning to Latin America, except for the Caribbean, the EU has been slow in developing trade relations with Countries in the region for two reasons: [473] a) the dynamics

[467] European Commission, "ACP-EU Partnership," International Partnerships, April 19, 2022, https://ec.europa.eu/international-partnerships/acp-eu-partnership_en; OACPS, "OACPS-EU Initial Historic, New Partnership Agreement," April 16, 2021, http://www.acp.int/content/oacps-eu-initial-historic-new-partnership-agreement.
[468] Ministero degli Affari Esteri e della Cooperazione Internazionale, "Post-Cotonou," Politica Estera e Cooperazione allo sviluppo, 2021, https://www.esteri.it/it/politica-estera-e-cooperazione-allo-sviluppo/politica_europea/dimensione-esterna/accordo-post-cotonou-tra-ue-e-paesi-africa-caraibi-e-pacifico-acp/.
[469] Ibid.
[470] Partnership Agreement between the European Union and its Member States, of the one part, and Members of the Organisation of African, Caribbean and Pacific States, of the other part, *Negotiated Agreement Text Initialled by the EU and OACPS Chief Negotiators on 15th April 2021*, April 15, 2021.
[471] Ibid.; European Council, "Cotonou Agreement."
[472] Partnership Agreement between the European Union and its Member States, of the one part, and Members of the Organisation of African, Caribbean and Pacific States, of the other part.
[473] Bièvre and Gstöhl, "The Trade Policy of the European Union," 152.

of integration and the interests of member Countries, and b) the dominance of the United States on the continent.[474]

Regarding the dynamics of integration and the interests of the Member States, the EU neglected international relations in the early years because its primary interest was the growth and consolidation of the internal market.[475] Moreover, France unopposed promoted partnerships with its former colonies.[476] Only the 1986 admission of Spain permitted the development of trade relations with Latin America.[477] The late development of relations with Latin America was also due to the US dominance of the American continent, which made the region unattractive.[478] Until the 1980s, the EU policy for Latin America was limited to promoting development in the most disadvantaged areas.[479]

The 1984 San José Agreement between the EU and the Contadora Group (Colombia, Mexico, Panama and Venezuela) launched the European strategy for the democratisation and socio-economic development of Latin America. This new strategy presents the EU as a non-military, non-ideological actor that refuses US dominance of the Americas.[480]

In the 1990s, the new regional agreements between Latin American Countries contributed to dialogue and trade with the EU (Table 7).[481] In 1995, the EC signed a framework cooperation agreement with MERCOSUR. The Framework Agreement enabled the subsequent Free Trade Agreement signed on 28 June 2019, after 20 years of

[474] Mathew Doidge and Martin Holland, *Development Policy of the European Union* (London: Palgrave Macmillan, 2012), 134–35.
[475] Ibid., 135.
[476] Ibid., 134.
[477] Ibid.
[478] Bièvre and Gstöhl, "The Trade Policy of the European Union," 152; Doidge and Holland, *Development Policy of the European Union*, 135.
[479] Doidge and Holland, *Development Policy of the European Union*, 136–37 and 144–49.
[480] Ibid., 137.
[481] Ibid.

negotiations.[482] This agreement was (and is) contested due to its environmental, social and economic repercussions.

Besides MERCOSUR, the EU concluded an agreement with Mexico in 1997, and Chile, in 2002.[483] Both of these agreements lacked strong social commitments, yet they found no particular opposition. Since 2016, the EU has been renegotiating the agreements aiming to modernise them both economically and socio-environmentally.[484] In 2018, an 'agreement in principle' was reached with Mexico,[485] while on 9 December 2022, negotiations for the EU-Chile Advanced Framework Agreement were concluded.[486] In 2010, the EU started negotiating for an Association Agreement with Central America that was reached in 2012. In the same year, the EU concluded a free trade agreement with Colombia and Peru, joined in 2017 by Ecuador.[487] This Agreement was considered to be necessary following the failure of the Association Agreement with the Andean Community as a whole.[488]

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[482] European Commission, "EU-MERCOSUR Trade Agreement," EU trade relationships by Country/region, May 11, 2020, https://ec.europa.eu/trade/policy/in-focus/eu-mercosur-association-agreement/.

[483] Andreas Dür, "EU Trade Policy as Protection for Exporters: The Agreements with Mexico and Chile," *Journal of Common Market Studies* 45, no. 4 (2007): 833-55.

[484] Bièvre and Gstöhl, "The Trade Policy of the European Union," 152.

[485] European Commission, "Mexico," EU trade relationships by Country/region, April 28, 2021, https://ec.europa.eu/trade/policy/Countries-and-regions/Countries/mexico/; European Commission, "Chile," EU trade relationships by Country/region, May 6, 2021, https://ec.europa.eu/trade/policy/Countries-and-regions/Countries/chile/.

[486]The conclusion of the 2022 EU-Chile Advanced Framework Agreement (EU-Chile AFA) came at an advanced stage in the writing of this dissertation. Therefore, the author had to choose whether to keep or remove the EU-Chile Association Agreement (EU-Chile) from the description of the EU commercial policy. The decision was to retain the analysis because the EU-Chile AFA outlines the map of the changes in the economic, political and social chapters of the EU-Chile AA. These changes will take place later on through two separate treaties. Moreover, the social clause of the EU-Chile AA remains a significant example of the evolution of EU social clauses. See European Commission, "EU and Chile Comprehensive Political and Trade Partnership," Press corner. Press material from the Commission Spokesperson's Service, December 9, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7569.

[487] European Commission, "Andean Community," EU trade relationships by Country/region, July 27, 2021, https://ec.europa.eu/trade/policy/Countries-and-regions/regions/andean-community/.

[488] Bièvre and Gstöhl, "The Trade Policy of the European Union," 152; María García, "The European Union and Latin America: 'Transformative Power Europe' versus the Realities of Economic Interests," *Cambridge Review of International Affairs* 28, no. 4 (2015): 621–40.

Signed	In force	Parties to the Agreement
1997	2000, Renegotiated since 2016, "Agreement in principle" in 2018	EU-Mexico
2002	2003 Renegotiated since 2017	EU-Chile
2012	Provisionally applied since 2013	Andean Community (Colombia; Ecuador; Peru)
2012	Provisionally applied since 2013	Central America (Costa Rica; El Salvador; Guatemala; Honduras; Nicaragua; Panama)
2019	Not ratified	EU-MERCOSUR

Table 7: EU-Latin America Agreements.[489]

The relationship between the EU and Asian Countries was similar to that with Latin America. Indeed, Asia was not *a priori*ty for the EU until the late 1990s. Although sharing a colonial past, Asia was long forgotten and perceived as distant or economically weak, leading the EU to pursue a policy of development aid through the GSP:

> Under the 1971 GSP regime three South Asian States were categorized as least developed and gained the best market access […]. Other bilateral commercial cooperation agreements were subsequently signed during the 1970s with India, Sri Lanka, Pakistan and Bangladesh - but only on the MFN basis giving no special preferences. […] The bulk of European aid to Asia was concentrated on South Asia […].[490]

Grilli highlights the significant disparity in investment and treatment between the ACP and Asian Countries, indeed "with more than two and a half times the population of sub-Saharan Africa and a substantially lower per capita income, South Asia received five times less financial aid from the Community during 1976-88."[491]

The 1980 EC-Association of South-East Asian Nations (ASEAN) Economic and Trade Cooperation Agreement led the EU to modify its strategy towards Asian Countries

[489] European Commission, "Negotiations and Agreements."
[490] Doidge and Holland, *Development Policy of the European Union*, 161.
[491] Enzo R. Grilli, *The European Community and the Developing Countries* (Cambridge: Cambridge University Press, 1993), 280; Doidge and Holland, *Development Policy of the European Union*, 161.

by developing a multilateral approach.[492] The new strategy was consolidated by the 1994 Commission Communication "Towards a New Asia Strategy."[493] This instrument divided Asia into three areas (South Asia, East Asia and Southeast Asia) and provided an articulated legal framework for the new relationship based on regular Asia-Europe Meetings (ASEM).[494] The Asian financial crisis of 1997 distorted the EU-ASEAN trade balance.[495] Although European States contributed to the financial recovery of Asian partners,[496] the crisis slowed down the development of Euro-Asian relations, as evidenced by the absence of an ASEAN-EC Ministerial Meeting (AEMM) for four years.[497]

In 2003, the EU-ASEAN Trans-Regional Trade Initiative was launched as part of the European policy "A New Partnership with South-East Asia," which revived Euro-Asian relations.[498] This new policy aimed to "facilitate trade flow and market access, and reinforcing ASEAN's own economic integration initiatives"[499] and reached its goal in 2007 with the launch of the negotiations for an EU-ASEAN FTA.[500] The FTA was motivated by the growth of Eurasian trade relations; indeed, after the US and China, ASEAN was the EU's third largest market.[501] However, according to Meissner "A sense

[492] Jürgen Rüland, "ASEAN and the European Union: A Bumpy Inter- Regional Relationship," *Discussion Paper C95* (Bonn, 2001); Julie Gilson, "New Interregionalism? The EU and East Asia," *Journal of European Integration* 27, no. 3 (2005): 307-26.
[493] European Commission, "Communication From The Commission To The Council - Towards A New Asia Strategy," *COM (94) 314* (Brussels, July 13, 1994).
[494] Bièvre and Gstöhl, "The Trade Policy of the European Union," 153; Doidge and Holland, *Development Policy of the European Union*, 159.
[495] Doidge and Holland, *Development Policy of the European Union*, 164; Joergen Oerstroem Moeller, "ASEAN's Relations with the European Union: Obstacles and Opportunities," *Contemporary Southeast Asia* 29, no. 3 (2007): 466.
[496] Moeller, "ASEAN's Relations with the European Union: Obstacles and Opportunities," 467.
[497] Doidge and Holland, *Development Policy of the European Union*, 165.
[498] European Commission, "Communication from the Commission - A New Partnership with South-East Asia," *Com (2003) 399/4* (Brussels, 2003).
[499] Doidge and Holland, *Development Policy of the European Union*, 166.
[500] Katharina Luise Meissner, "A Case of Failed Interregionalism? Analyzing the EU-ASEAN Free Trade Agreement Negotiations," *Asia Europe Journal* 14, no. 3 (2016): 324.
[501] Ibid.

of dissatisfaction with the interregional negotiations […] has been present from the very beginning."[502]

By 2010, the EU-ASEAN FTA had failed. Therefore, the Commission changed its policy to bilateral negotiations and concluded the 2015 EU-Korea FTA, the 2016 EU-Kazakhstan FTA, the 2019 EU-Japan and EU-Singapore FTAs, and the 2020 EU-Vietnam FTA (Table 8).[503] These agreements introduced a new social clause template: the 'Trade and Sustainable Development Chapter' (TSD Chapter). Furthermore, the EU launched negotiations with India, Malaysia, the Philippines and Indonesia to conclude free trade agreements and with Myanmar for an investment protection agreement (Table 9). Despite the importance of trade with these Countries, negotiations have stalled and no agreement has been reached.[504]

Signed	In force	Parties to the Agreement	Type
2010	2015	EU-South Korea	FTA (EIA)
2015	Provisionally applied since 2016	EU-Kazakhstan	PCA
2018	2019	EU-Japan	FTA (EPA)
2018	2019	EU-Singapore	FTA (EIA)
2018	2020	EU-Vietnam	FTA (EIA)

Table 8: EU-Asia Agreements In Force.[505]
Key: FTA: Free Trade Agreement (including EIA: Economic Integration Agreement; EPA: Economic Partnership Agreement) and PCA: Partnership Cooperation Agreement

Status	Parties to the Agreement	Type
Negotiations started in 2007, last round in 2013	EU-India	FTA
Negotiations started in 2010, paused since 2012	EU-Malaysia	FTA
Negotiations launched in 2015	EU-Philippines	FTA
Negotiations launched in 2015	EU-Myanmar	FTA (IPA)
Negotiations launched in 2016	EU-Indonesia	FTA

Table 9: EU-Asia Agreements Under Negotiations or On Hold.[506]
Key: FTA: Free Trade Agreement (including IPA: Investment Protection Agreement).

[502] Ibid., 328.
[503] Bièvre and Gstöhl, "The Trade Policy of the European Union," 153.
[504] European Commission, "Negotiations and Agreements."
[505] Ibid.
[506] Ibid.

Turning to the EU-US relationship, the two sides of the Atlantic have forged a unique political and economic partnership over time. Although China has become the EU's largest exporter in 2021, the US remains the EU's most considerable trade and investment partner.[507] According to the European Commission, total US investment in the EU is three times higher than that in the whole of Asia, while EU investment in the US is about eight times higher than the sum of EU investment in India and China.[508] The World Bank data show that the combined GDP of the US and the EU accounts for more than 40% of world GDP. The US and EU are the most significant trade and investment partners of almost all other WTO members and represent 40% of global trade in commodities and services.[509]

To strengthen their partnership, the EU and US negotiated the TTIP starting in 2013.[510] This mega-regional agreement and its social clause have already been addressed in Section 2.4.

The TTIP aimed to integrate the EU and US markets more deeply, reducing customs duties and removing non-tariff barriers by enabling the free movement of goods, facilitating the investment flow and access to each other's services and public procurement markets.[511] The TTIP has been criticised by academics, civil society, Trade

[507] European Commission, "EU Trade Relations with United States," EU trade relationships by Country/region, February 4, 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-Country-and-region/Countries-and-regions/united-States_en; Congressional Research Service (CRS), "U.S.-EU Trade and Economic Relations" (Washington, D.C., December 21, 2021), https://sgp.fas.org/crs/row/IF10931.pdf; Congressional Research Service, "U.S.-EU Trade and Investment Ties: Magnitude and Scope."
[508] European Commission, "EU Trade Relations with United States."
[509] World Bank, "GDP (Current US$) - European Union, United States - Data;" European Commission, "EU Trade Relations with United States."
[510] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 830.
[511] European Commission, "EU Negotiating Texts in TTIP," EU trade relationships by Country/region, April 21, 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-Country-and-region/Countries-and-regions/united-States/eu-negotiating-texts-ttip_en.

Unions and environmental organisations.[512] During the 2016 presidential campaign, Trump attacked both Obama's trade policy and the TTIP; once elected, he interrupted negotiations.[513] However, the failure of the TTIP has not interrupted the EU-US relationship, relaunched by the Biden Administration. Indeed, the EU-US Summit on 15 June 2021 inaugurated the EU-US Trade and Technology Council (TTC), aimed at coordinating action on global trade, the economy, and technology and developing economic and political relations between the Parties.[514]

The relationship between the EU and Canada is among the strongest. According to the European Commission, in 2020, Canada was the 16th largest import partner and the 10th largest export partner for EU commodities, representing a market share of 8.2%.[515] The partnership's solidity is guaranteed by the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

Negotiated between 2009 and 2014, CETA was signed in 2016 and has been provisionally applied since the following year. Economically, CETA eliminated tariffs,

[512] Ferdi De Ville and Gabriel Siles-Brügge, "Why TTIP Is a Game-Changer and Its Critics Have a Point," *Journal of European Public Policy* 24, no. 10 (2017): 1491-1505; Rodrigo Polanco, Joëlle De Sépibus, and Kateryna Holzer, "TTIP and Climate Change: How Real Are Race to the Bottom Concerns?," *Carbon & Climate Law Review* 11, no. 3 (2017): 206-22; Roberto De Vogli and Noemi Renzetti, "The Potential Impact of the Transatlantic Trade and Investment Partnership (TTIP) on Public Health," *Epidemiologia e Prevenzione* 40, no. 2 (March 1, 2016): 95-102.

[513] To understand the Trump Administration's position on TTIP, among others, see: Congressional Research Service, "U.S.-EU Trade and Investment Ties: Magnitude and Scope;" Bilal and Imran, "Emerging Contours of Transatlantic Relationship under Trump Administration;" Schneider-Petsinger, "US-EU Trade Relations in the Trump Era Which Way Forward?;" Kanat, "Transatlantic Relations in the Age of Donald Trump;" Noland, "US Trade Policy in the Trump Administration;" Office of the United States Trade Representative, "2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program;" Office of the United States Trade Representative, "2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program," 136.

[514] European Commission, "EU Trade Relations with United States;" European Commission, "EU-US Launch Trade and Technology Council to Lead Values-Based Global Digital Transformation," Press release, June 15, 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2990.

[515] European Commission, "EU Trade Relations with Canada," EU trade relationships by Country/region, March 21, 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-Country-and-region/Countries-and-regions/canada_en.

protected EU geographical indications and liberalised the Canadian service market.[516] The Agreement introduced social provisions modelled on those of the EU-Republic of Korea FTA.[517] However, CETA's social clause was not secured by sanctions, which led to criticism. This criticism was partly dampened by the possibility of renegotiating the clause in case the TTIP provided a mechanism to implement the social clause.[518] However, the failure of TTIP has left the problem of CETA's enforcement unresolved.

Having concluded the geographical overview of EU trade relations, this Chapter focuses on the legal basis of the common commercial policy and the issue of Mixed Agreements. These profiles are relevant since the EU is based on the principle of conferral. Having clarified these elements, the research examines the existing EU social clauses.

3.2. Mix and Match: Legal Basis and Nature of the EU Free Trade Agreements

Unlike a state, the EU is based on the principle of conferral, so it only acts in matters conferred upon it by the Member States.[519] These competencies include trade, which has its legal basis in Title II, Articles 206 and 207 of the Treaty on the Functioning of the EU (TFEU).[520] However, Article 218 of the Treaty on the Functioning of the EU (TFEU)

[516] European Commission, "EU-Canada Trade Agreement (CETA)," EU trade relationships by Country/region, March 21, 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-Country-and-region/Countries-and-regions/canada/eu-canada-agreement_en.
[517] Vogt, "The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership," 850.
[518] Ibid., 851.
[519] Article 5.1 and 2, Treaty on European Union (TEU): "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. […]" See: Consolidated Version Of The Treaty On European Union, *OJ C 326, 26.10.2012, p. 13-390*, 2012.
[520] Article 206, Treaty on The Functioning of The European Union (TFEU): "By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers." Article 207, TFEU: " 1. The

provides for a special type of agreement, namely, Mixed Agreements.[521] These agreements are not strictly economic and also provide for ratification by Member States through their domestic procedures, which often require the approval of national and/or regional Parliaments and possible referenda (Table 10).[522]

common commercial policy shall be based on uniform principles […]. 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy. 3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. […]. 4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. […] The Council shall also act unanimously for the negotiation and conclusion of agreements: […] (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. […]. 6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation." See: Consolidated Version Of The Treaty On The Functioning Of The European Union, *OJ C 326, 26.10.2012, p. 47-390*, 2012.

[521] Article 218, TFEU: "[…] 2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them. 3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team. […] 5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force. 6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases: (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. […] (b) after consulting the European Parliament in other cases […]. 8. The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements. […] 11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

[522] Bièvre and Gstöhl, "The Trade Policy of the European Union," 33; Paola Conconi, Cristina Herghelegiu, and Laura Puccio, "EU Trade Agreements: To Mix or Not to Mix, That Is the Question," *Journal of World Trade* 55, no. 2 (2021): 232.

Although trade policy was 'communitarised' in the 1970s, almost all European agreements are mixed (Table 4). This situation can be explained by the interpretation of the Court of Justice, which has extended or limited the EU's trade competence over time.[523]

The first decision of the Court was issued in 1971 and concerned the European Road Transport Agreement (ERTA Case) The decision developed the "doctrine of implied powers":

> […] each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third Countries which affect those rules or alter their scope.
> With regard to the implementation of the provisions of the Treaty, the system of internal Community measures may not be separated from that of external relations.[524]

The ERTA case extended the trade competence of the EU, whose contours were not precisely established by the Treaty of Rome.[525] Subsequent treaties have incorporated the "doctrine of implied powers" by granting the EU exclusive competence in trade matters.[526]

The second decision of the Court occurred in 1975 with Opinion No. 1/75 (Local Cost Standard Opinion).[527] The Court stated that common commercial policy was conceived "[…] in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the

[523] Bièvre and Gstöhl, "The Trade Policy of the European Union," 27.
[524] Court of Justice of the European Communities, Judgment of 31 March 1971, Case 22-70, European Agreement on Road Transport, (ERTA Case) (1971).
[525] Bièvre and Gstöhl, "The Trade Policy of the European Union," 27–28.
[526] Ibid.
[527] Court of Justice of the European Communities, Opinion of 11 November 1975. Opinion 1/75, (Understanding on a Local Cost Standard) (1975).

Member States must endeavour to adapt to each other"[528] and that "[…] the Treaty […] show clearly that the exercise of concurrent powers by the Member States and the Community in this matter [trade policy] is impossible."[529] Thus, the Court confirmed the nexus between the single market and common commercial policy, granting the EU exclusive competence over the latter.

The third decision of the Court was delivered in 1994 in Opinion No. 1/94 (WTO Agreements Opinion).[530] Issued during the negotiations for creating the WTO, this Opinion confirmed the exclusive competence of the Community for agreements on commodities but stated a shared competence for agreements on services and in particular on transport.[531] The Court ruled against extending the "ERTA doctrine" to services, stating that:

> […] the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the AETR judgment (paragraphs 17 and 18), the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member Countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules.[532]

This principle is extended to all services covered by the GATT involving the movement of persons. There is shared competence between the EU and the Member

[528] Ibid., 1363.
[529] Ibid., 1364.
[530] Court of Justice of the European Communities, Opinion of 15 November 1994. Opinion 1/94, (WTO Agreements) (1994).
[531] Bièvre and Gstöhl, "The Trade Policy of the European Union," 29–31.
[532] Court of Justice of the European Communities, Opinion of 15 November 1994. Opinion 1/94, (WTO Agreements) paragraph 77.

States for "consumption abroad" services,[533] for "commercial presence" services,[534] and for "presence of natural persons" services.[535]

The fourth decision of the Court was rendered in Opinion No. 2/2015 of 16 May 2017 (Singapore Free Trade Agreement) and substantially modified the WTO Agreements Opinion.[536] The latest Opinion stemmed from a 2014 request by the European Commission regarding the legitimacy of the EU-Singapore FTA concerning new EU competencies.[537] The judges stated that the EU:

> enjoys exclusive competence regarding market access for goods and services (including all transport services), public procurement end energy generation from sustainable non-fossil sources, provisions concerning intellectual property rights, competition policy, the protection of FDI [foreign direct investment], dispute settlement other than non direct FDI and sustainable development.[538]

The Court recognises that the EU's exclusive competence includes the liberalisation of the services and transport market under the EU-Singapore FTA due to its impact on EU legislation.[539] Similarly, the EU has exclusive competence over trade provisions on labour and environmental protection that have an immediate direct effect on trade.[540] In this way, the Court applies the doctrine of implied powers developed in the ERTA decision by clarifying that:

> a European Union act falls within the Common Commercial Policy if it relates specifically to international trade in that it is essentially intended

[533] "[…] which entails the movement of the consumer into the territory of the WTO member Country in which this supplier is established […]" in Bièvre and Gstöhl, "The Trade Policy of the European Union," 30.
[534] "[…] that is to say, the presence of subsidiary or branch in the territory of the WTO member Country in which the service is to be rendered […]" in Ibid.
[535] "[…] enabling a supplier from one member Country to supply services within the territory of any other member Country […]" in Ibid.
[536] Court of Justice of the European Union, Opinion of 16 May 2017. Opinion 2/15, (Singapore Free Trade Agreement) (2017).
[537] Bièvre and Gstöhl, "The Trade Policy of the European Union," 32.
[538] Ibid.
[539] Ibid.
[540] Ibid.

> to promote, facilitate or govern trade and has direct and immediate effects on trade.[541]

The Court sets some limits by stating that the EU does not have exclusive competence in the field of portfolio investments,[542] investor-State dispute settlement systems, the energy market and security.[543] Specifically, agreements on security and investor-State dispute settlement require the approval of the State because they deprive it of control over strategic sectors by significantly limiting executive and judicial power.[544] Overall, Opinion No. 2/15 expands EU competence by reducing mixed agreements (Table 11), promoting legislative uniformity and preventing the risk of non-ratification (Table 10).

Having explained the Mixed Agreements, one might ask what their usefulness is. A large part of the literature States that the primary purpose of trade agreements is to liberalise the market.[545] According to this view, mixed agreements should be avoided because they slow down the negotiation process and delay liberalisation.[546] The solution is to exclude non-EU matters from trade agreements and thus speed up their entry into force.[547]

While not denying the economic objective, another part of the doctrine stresses the role of trade agreements as instruments to promote respect for civil, political and

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[541] Joris Larik, "No Mixed Feelings: The Post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)," *Common Market Law Review* 52, no. 3 (2015): 783.
[542] A portfolio investment is the acquisition of stocks or bonds for financial reasons. Unlike direct investment, portfolio investment in shares does not aim at controlling the company.
[543] Bièvre and Gstöhl, "The Trade Policy of the European Union," 33.
[544] Ibid.
[545] Gene Grossman and Elhanan Helpman, "The Politics of Free-Trade Agreements," *American Economic Review* 85, no. 4 (1995): 667-90; By Kyle Bagwell and Robert W Staiger, "A Theory of Managed Trade," *The American Economic Review* 80, no. 4 (1990): 779-95; Harry G. Johnson, "Optimal Tariffs and Re-Taliation," *Review of Economic Studies* 21 (1953): 142-53.
[546] Conconi, Herghelegiu, and Puccio, "EU Trade Agreements: To Mix or Not to Mix, That Is the Question," 231–33.
[547] Ibid.

social rights and to protect the environment.[548] In this view, mixed agreements are "a 'necessary evil' to achieve non-trade policy objectives."[549] This research adheres to this second approach and considers mixed agreements a necessity until all trade matters become 'communitarised.' However, this may result in non-ratification and the blocking of agreements. This issue has been studied by Van der Loo and Wessel, whose analysis is shared.[550] According to these authors, the major problem is that a mixed agreement must be ratified by the EU, its Member States and the State Party.[551] Failure to ratify can result in the agreement being blocked. Therefore, one may consider allowing a limited number of Member States not to join the agreement or opt-out of problematic clauses.[552] This solution is highly unsatisfactory because it makes accession uneven. Another strategy is to add interpretative protocols, as happened in the case of the Walloon Parliament's blocking of CETA.[553] This solution is more coherent with the aim of the common commercial policy.

[548] Ingo Borchert et al., "The Pursuit of Non-Trade Policy Objectives in EU Trade Policy," *EUI Working Paper RSCAS 2020/26* (San Domenico di Fiesole, 2020); Nuno Limão, "Are Preferential Trade Agreements with Non-Trade Objectives a Stumbling Block for Multilateral Liberalization?," *The Review of Economic Studies* 74, no. 3 (2007): 821-55.
[549] Conconi, Herghelegiu, and Puccio, "EU Trade Agreements: To Mix or Not to Mix, That Is the Question," 232.
[550] Guillaume Van der Loo and Ramses A. Wessel, "The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions," *Common Market Law Review* 54, no. 3 (2017): 735 - 770.
[551] Ibid., 768.
[552] Ibid., 768–70.
[553] Jean-Pierre Stroobants and Cécile Ducourtieux, "Le Rejet Wallon Du Traité Commercial CETA Avec Le Canada Plonge l'UE Dans Le Désarroi," *Le Monde*, October 20, 2016.

Member State	National Parliament Ratification	Legislative Cambers Voting	Regional Ratification	Referendum (Eventual)
Austria	Yes	2 out of 2	No	Yes
Belgium	Yes	2 out of 2	Yes	No
Bulgaria	Yes	1 out of 1	No	Yes
Croatia	Yes	1out of 1	No	Yes
Cyprus	Yes	1 out of 1	No	No
Czech Republic	Yes	2 out of 2	No	Yes
Denmark	Yes	1 out of 1	No	Yes
Estonia	Yes	1 out of 1	No	No
Finland	Yes	1 out of 1	No	Yes
France	Yes	2 out of 2	No	Yes
Germany	Yes	2 out of 2	No	No
Greece	Yes	1 out of 1	No	Yes
Hungary	Yes	1 out of 1	No	No
Ireland	Yes	1 out of 2	No	Yes
Italy	Yes	2 out of 2	No	No
Latvia	Yes	1 out of 1	No	No
Lithuania	Yes	1 out of 1	No	Yes
Luxembourg	Yes	1 out of 1	No	No
Malta	No	None	No	Yes
The Netherlands	Yes	2 out of 2	No	Yes
Poland	Yes	2 out of 2	No	Yes
Portugal	Yes	1 out of 1	No	Yes
Romania	Yes	2 out of 2	No	Yes
Slovakia	Yes	1 out of 1	No	No
Slovenia	Yes	1 out of 2	No	No
Spain	Yes	2 out of 2	No	No
Sweden	Yes	1 out of 1	No	No
TOTAL	**26/27 States**	**36/38 Chambers**	**1/27 State**	**15/27 States**

Table 10: Mixed Agreement ratification procedures.[554]

[554] See following footnote for sources.

Policy Area	Mixed Agreement
Market access commodities and services	No
Technical barriers to trade (TBT)	No
Sanitary and phytosanitary (SPS)	No
Foreign direct investment (FDI)	No
Trade-related aspects of energy	No
Competition and State-owned enterprises	No
Investor-State dispute settlement	Yes
Portfolio investment	Yes
Energy market	Yes
Security	Yes
Public procurement	Depends
Justice and home affairs	Depends
Sectoral regulatory cooperation	Depends
Transport services	Depends
Intellectual Property	Depends
Trade and Sustainable Development (Labour and Environment)	Depends
Culture	Depends

Table 11: Policies and Mixed Agreements.[555]

After clarifying the legal basis, nature and issues of EU trade agreements, the following sections analyse EU social clauses from an evolutionary perspective, highlighting their content and legal issues.

3.3. The First EU Model: From the 1990s to the Lisbon Treaty

The EU has a 30-year history of establishing social clauses in trade arrangements. Over these three decades, the evolution of EU social clauses has been slower than that of the US due to the nature of the EU's trade agreements (Mixed Agreements), the legal basis, the geographical approach, and the political leverage.

[555] Conconi, Herghelegiu, and Puccio, "EU Trade Agreements: To Mix or Not to Mix, That Is the Question;" Ondřej Svoboda, "The Common Commercial Policy After Opinion 2/15: No Simple Way to Make Life Easier For Free Trade Agreements in the EU," *Croatian Yearbook of European Law and Policy* 15 (2019): 189-214; Bièvre and Gstöhl, "The Trade Policy of the European Union," 32-34; Court of Justice of the European Union, Opinion of 16 May 2017. Opinion 2/15, (Singapore Free Trade Agreement); Legislative Dialogue Unit, "Procedures of Ratification of Mixed Agreements" (Brussels, November 2016).

The literature distinguishes two periods in the evolution of EU social clauses: [556] before and after the Lisbon Treaty.[557] In the first period, the EU's social ambitions are more limited than those of the US trade agreements negotiated before the 10 May Compromise. The main examples of this phase are the EU GSP and the agreements between the EU and South Africa, Chile, Mexico, Morocco, Tunisia and Israel. [558] In the second-period social obligations, procedural commitments, institutional mechanisms, and dispute resolution mechanisms have been considerably "deepened and widened."[559] The main examples of this new phase are the CARIFORUM FTA and the TSD Chapters of the agreement with the Republic of Korea, Vietnam, Japan and Singapore.[560]

The 1995 and 1999 GSP reforms introduced the first EU social clause. This clause made GSP trade benefits conditional on compliance with CLS.[561] Reformed in 2005 and 2012, the GSP has a limited number of beneficiaries (only economically least developed Countries); it is divided into three schemes (standard GSP, GSP plus, Everything But Arms or EBA) and includes labour, civil and political, and environmental conditionalities that increase as commercial benefits increase.[562] In the EU GSP, the social clause applies

[556] Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," 265; Lore Van Den Putte et al., "Social Norms in EU Bilateral Trade Agreements : A Comparative Overview," *Centre for the Law of Eu External Relations* 4, no. March 2016 (2013): 35.
[557] Harrison et al., "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda," 639; Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," 265.
[558] Harrison et al., "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda," 639; Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," 265.
[559] Tristan Kohl, Steven Brakman, and Harry Garretsen, "Do Trade Agreements Stimulate International Trade Differently? Evidence from 296 Trade Agreements," *World Economy* 39, no. 1 (2016): 97–131; Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," 265.
[560] Bart Kerremans and Myriam Martins-Gistelinck, "Labour Rights in EPAs : Can the EU-CARIFORUM EPA Be a Guide?," in *Beyond Market Access for Economic Development: EU-Africa Relations in Transition*, ed. Gerrit Faber and Jan Orbie, vol. 21 (London, New York: Routledge, 2009), 310.
[561] Harrison et al., "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda," 638.
[562] All GSP beneficiaries (GSP standard, GSP plus, and EBA) are required to comply with 15 conventions (Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All

to GSP standard and GSP plus Countries, but not to EBA Countries. The social obligations are listed in Annex VIII to Regulation (EU) No. 978/2012 and include the commitment of beneficiary Countries to ratify and implement a number of ILO and UN Conventions. In case of failure or systematic violation of social obligations, the EU can unilaterally withdraw the violating country from the GSP. Furthermore, the burden of proof is not on the EU but on the violating State according to the proof-proximity principle.[563]

Turning to the EU trade agreements, the primary example of the first phase is the social clause of the 1999 EU-South Africa Trade, Development and Cooperation Agreement (EU-South Africa TDCA). The social obligations were very modest and contained in Recital 16 of the Preamble and Articles 86 and 97 of the Agreement. Recital affirmed:

> […] the commitment of the Parties to economic and social development and the respect for the fundamental rights of workers, notably by promoting the relevant International Labour Organisation (ILO) Conventions covering such topics as the freedom of association, the

Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; ILO Convention on Forced or Compulsory Labour; ILO Convention on Freedom of Association and Protection of the Right to Organise; ILO Convention on the Application of the Principles of the Right to Organise and Collective Bargaining; ILO Convention on Equal Remuneration for Men and Women for Work of Equal Value; ILO Convention on the Abolition of Forced Labour; ILO Convention concerning Discrimination in Respect of Employment and Occupation; ILO Convention concerning Minimum Age for Admission to Employment; ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour); the GSP plus beneficiaries are required to comply with 12 additional conventions (Convention on International Trade in Endangered Species of Wild Fauna and Flora; Montreal Protocol on Substances that Deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Convention on Biological Diversity; Cartagena Protocol on Biosafety; Stockholm Convention or Convention on Persistent Organic Pollutants; Kyoto Protocol to the United Nations Framework Convention on Climate Change; United Nations Single Convention on Narcotic Drugs; United Nations Convention on Psychotropic Substances; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotic Substances; United Nations Convention against Corruption). A systematic violation of the principles laid down in these Conventions results in sanctions, which can lead to exclusion from the GSP. The burden of proof for exonerating oneself lies with the beneficiary Country, not the EU. See: Bièvre and Gstöhl, "The Trade Policy of the European Union," 153–62.

[563] "Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) No. 732/2008."

> right to collective bargaining and non-discrimination; the abolition of forced labour and child labour […].[564]

The Preamble was strengthened by Article 86 of the Treaty stating that:

> 1. The Parties will engage in a dialogue on social cooperation. […]
> 2. The Parties consider that economic development must be accompanied by social progress. They recognise the responsibility to guarantee basic social rights, which specifically aim at the freedom of association of workers, the right to collective bargaining, the abolition of forced labour, the elimination of discrimination in respect of employment and occupation and the effective abolition of child labour. The pertinent standards of the ILO shall be the point of reference for the development of these rights.[565]

The scope of social obligations is limited since the clauses lack a legal framework, implementing rules, and enforcement mechanisms. Article 97 provides for a cooperative promotional mechanism led by a Cooperation Council. This bilateral council acts as a point of contact, dialogue and mediation but lacks any executive power.[566]

The 2000 Cotonou Agreement followed the template developed by the EU-South Africa TDCA. Indeed, the 12th recital of the Preamble calls for compliance with ILO Conventions, while Article 50 States that the Parties undertake to respect "[…] the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions […]" and to "enhance cooperation" in exchanging "information on the respective legislation and work regulation; the formulation of national labour legislation and strengthening of existing legislation; educational and awareness-raising programmes; enforcement of adherence to national legislation and work regulation."[567] To address the concerns of developing Countries

[564] Recital 16, Preamble, EU-South Africa TDCA
[565] Article 86, EU-South Africa TDCA.
[566] Article 97, EU-South Africa TDCA.
[567] Article 50, Cotonou Agreement, the full text of the agreement available at: "Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou on 23 June 2000," *OJ L317/3*, 2000.

about losing their competitive advantage, the Cotonou Agreement States that the Parties "agree that labour standards should not be used for protectionist trade purposes."[568]

The 2003 EU-Chile Association Agreement (EU-Chile AA) is the last example of the EU social clauses' first period. Recital 4 of this Agreement recalls the "need to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements."[569] This declaration of intent is reflected in Title V on social cooperation.

Article 43 opens Title V by calling on the Parties to engage in social dialogue to improve living conditions and contrast discrimination.[570] The following article "recognise[s] the importance of social development, which must go hand in hand with economic development"[571] by committing the Parties to the need to create jobs while respecting social rights in line with the CLS. Therefore, the Parties agree to fight poverty and social exclusion, promote the role of women, contrast discrimination, develop labour relations to improve working conditions and safety at work, improve the health system, provide training for workers and promote the creation of sustainable employment.[572] Cooperation occurs both at the institutional and civil society levels (social partners and NGOs). Furthermore, civil society is consulted, financed and involved in the implementation of social projects.[573] The Parties engage in triangular or bi-regional cooperation by involving third Countries or areas of common interest in sustainable development programmes.[574] According to Kohl *et al*., the social clause of the EU-Chile

[568] Article 50, Cotonou Agreement.
[569] 4th Recital, Preamble, EU-Chile AA, full text of the agreement available at: "Agreement Establishing an Association between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part," *OJ L 352/3*, 2002.
[570] Article 43, EU-Chile AA.
[571] Article 44, EU-Chile AA.
[572] Article 44 and 45, EU-Chile AA.
[573] Article 48, EU-Chile AA.
[574] Article 50, EU-Chile AA.

AA is more enforceable than that of the EU-South Africa TDCA due to its cooperation mechanism.[575] However, this clause remains weak in social obligations, procedural commitments, institutional mechanisms, and dispute resolution mechanisms.

This assessment can also be extended to the other agreements of this period. For instance, EU-Mexico Agreement's social obligations are modelled on those of the EU-South Africa Agreement, which makes them non-enforceable. Similarly, the clauses of the EU-Israel, EU-Tunisia and EU-Morocco Agreements are only enforceable concerning specific technical labour standards.[576]

The first period of EU agreements ended in the mid-2000s following the approval of the Lisbon Treaty, which strengthened the role of the European Parliament in the common commercial policy.[577]

3.4. A New Model: The 'Trade and Sustainable Development Chapter'

The second period of the EU social clauses started with the 2006 Global Europe strategy, which shifted the common commercial policy from multilateralism to bilateralism and adopted a neo-liberal focus favouring free trade and economic growth.[578]

This strategy was counterbalanced in 2007 by the Treaty of Lisbon, which involved the European Parliament in the ratification of trade agreements and guaranteed that it

[575] Kohl, Brakman, and Garretsen, "Do Trade Agreements Stimulate International Trade Differently? Evidence from 296 Trade Agreements."
[576] Ibid.; Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," 265.
[577] Harrison et al., "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda," 639.
[578] European Commission, "Communication from The Commission to The Council, The European Parliament, The European Economic and Social Committee and The Committee of the Regions. Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy," *COM(2006) 567* (Brussels, 2006).

could influence the negotiation process and support social demands.[579] Thus, the European Parliament strengthened social obligations by connecting them to human rights.[580] This bipartisan Parliamentary strategy combined centre-right and centre-left Parties to reinforce the role of the Parliament in relation to the other EU institutions (the Commission and the Council).

The first Agreement of this new period is the EU-CARIFORUM EPA. This agreement consolidated the three key elements of the social clauses: social obligations, procedural commitments, institutional mechanisms, and dispute resolution mechanisms. However, social commitments "were not seen as a natural part of trade agreements by CARIFORUM […] negotiators;"[581] therefore, they "sought to safeguard against the provisions having significant impacts by clarifying that they could not become the basis for sanctions."[582]

The EU-CARIFORUM EPA mentions social obligations for the first time in Recital 6 of the Preamble, which recognises:

> […] the need to promote economic and social progress for their people in a manner consistent with sustainable development by respecting basic labour rights in line with the commitments they have undertaken within the International Labour Organisation and by protecting the environment in line with the 2002 Johannesburg Declaration […].[583]

Title IV, Chapter 5, Articles 191-196 reflects the commitment in the Preamble. While Article 191 commits to the ILO CLS, the ILO Decent Work Agenda and ethical

[579] Stelios Stavridis and Daniela Irrera (eds.) *The European Parliament and Its International Relations*, (London: Routledge, 2015).
[580] Van den Putte and Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," 280.
[581] Harrison et al., "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters," 265.
[582] Ibid.
[583] Recital 6, Preamble, EU-CARIFORUM EPA, full text of the agreement available at: International Labour Organization, *Assessment of Labour Provisions in Trade and Investment Agreements*, 2016, 23; De Ville, Orbie, and Van Den Putte, "TTIP and Labour Standards," 21.

trade products,[584] Article 192 allows Parties to adopt their own national labour norms as long as they ensure "high levels of social and labour standards consistent with the internationally recognised rights."[585] This Article is worded similarly to the US social clauses adopted after the May 10th Compromise. Furthermore, Article 193 prohibits worsening labour standards to attract investment or trade and Articles 194, 195, and 196 regulate cooperation, monitoring and consultation mechanisms to promote compliance with social obligations.[586]

The EU-CARIFORUM EPA social clause is similar to the US ones in that it separates labour and the environment and does not have a developed legal framework. However, the US adopts a conditional approach by providing for sanctions in case of violation of social obligations; in contrast, the EU follows a promotional approach that focuses on cooperation and collaboration without punitive mechanisms. This promotional approach is a distinctive feature of all EU social clauses.

Concurrently with the EU-CARIFORUM EPA, the EU negotiated a free trade agreement with the Republic of Korea. Like the Caribbean Countries, the Republic of Korea regarded labour obligations in a trade agreement as incoherent, therefore "Korean negotiators successfully demanded fewer references [than in the EU-CARIFORUM Agreement] to international standards and the removal of any immediate obligation to ratify all fundamental ILO Conventions."[587] The Korean request was accepted both because it did not meet with substantial opposition from Korean trade unions and civil society organisations, and because it was consistent with the viewpoint of the EU

[584] Article 191, EU-CARIFORUM EPA.
[585] Article 192, EU-CARIFORUM EPA.
[586] Articles 193-196, EU-CARIFORUM EPA.
[587] Harrison et al., "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters," 265.

negotiators.[588] EU negotiators received pressure to introduce social obligations from the European Parliament, but they were also inclined to limit their scope. The balancing point was found in the current wording of the TSD Chapter. The latter remains one of the most advanced in terms of social obligations, procedural commitments, institutional mechanisms and dispute settlement mechanisms; therefore, it has served as a template for all subsequent TSD Chapters.[589]

The EU-Republic of Korea FTA opens with the Parties' commitment "to sustainable development in its economic, social and environmental dimensions, including economic development, poverty reduction, full and productive employment and decent work for all […]."[590]

Framing social obligations in the context of UN and ILO programmes, the TSD Chapter commits the Parties to cooperate in implementing the 2006 UN Economic and Social Council Ministerial Declaration on Full Employment and Decent Work, the obligations arising from membership of the ILO, the principles set out in the 1998 ILO Declaration, and the CLS Conventions.[591] Thus, the Parties shall:

> […] facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers. The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability.[592]

However, Article 13.3 guaranties:

> the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws

[588] Ibid., 266.
[589] Ibid.
[590] Recital 5, Preamble, EU-Republic of Korea FTA.
[591] Articles 13.1 and 13.4, EU-Republic of Korea FTA.
[592] Article 13.6.2, EU-Republic of Korea FTA.

> and policies, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements […], and shall strive to continue to improve those laws and policies.[593]

To promote social commitments, the TSD Chapter requires transparency, dialogue, cooperation and impact assessment.[594] Dialogue occurs at three levels: bilateral (Committee on Trade and Sustainable Development and Government Consultations), national (Domestic Advisory Group on Sustainable Development), and civil society (Domestic Advisory Group and Civil Society Forum meetings).[595] Each level is mandatory and has a monitoring function. In the event of a dispute, Article 13.14 provides for governmental consultations involving the Committee on Trade and Sustainable Development and National Advisory Groups.[596] If the dispute persists, the Parties can refer it to an independent Panel of Experts charged with finding a mutually satisfactory solution.[597] The Committee on Trade and Sustainable Development monitors the implementation of the Experts' solution.[598] However, no sanctions are foreseen and recourse to the dispute settlement system for commercial matters is excluded.

Having established the TSD Chapters model, the EU started to replicate it in other trade agreements such as the 2018 EU-Japan EPA.[599] Chapter 16 of this agreement frames social obligations by recalling:

> the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference on 18 June 1998, the Plan of Implementation adopted by the World Summit on Sustainable

[593] Article 13.3, EU-Republic of Korea FTA.
[594] Articles 13.9, 13.10, 13.11, 13.12, 13.13, and 13.14, EU-Republic of Korea FTA.
[595] Articles 13.12, 13.13, and 13.14, EU-Republic of Korea FTA.
[596] Article 13.14, EU-Republic of Korea FTA.
[597] Article 13.15, EU-Republic of Korea FTA.
[598] Article 13.15.3, EU-Republic of Korea FTA.
[599] Agreement between the European Union and Japan for an Economic Partnership, *OJ L 330, 27.12.2018, p. 3–899*, 2018.

> Development on 4 September 2002, the Ministerial Declaration entitled "Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development" adopted by the Economic and Social Council of the United Nations on 5 July 2006, the ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference on 10 June 2008, the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want" adopted by the General Assembly of the United Nations on 27 July 2012, and the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, entitled "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly of the United Nations on 25 September 2015.[600]

This article widens the legal framework compared to the EU-Republic of Korea FTA.[601] Article 16.2 grants the Parties the right to regulate their own levels of protection,[602] commits them to international standards, and prohibits the worsening of the level of labour protection to attract investment.[603] Furthermore, the Parties undertake to implement the principles of the CLS, to ratify the CLS Conventions, and to promote the principles of Corporate Social Responsibility.[604] In implementing their social obligations, Japan and the EU are committed to a policy of transparency,[605] dialogue, cooperation,[606] and assessment of the impact "of the implementation of this Agreement on sustainable development through their respective processes and institutions."[607] The dialogue and cooperation are carried out by the bilateral Committee on Trade and Sustainable Development and the Points of Contact,[608] the Domestic Advisory Group,[609] and the Joint Dialogue with civil society.[610]

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[600] Article 16.1, EU-Japan EPA.
[601] Articles 16.2.1 and 16.2.2, EU-Japan EPA.
[602] Cf. Article 16.3, EU-Japan EPA and Article 13.4.4, EU-Republic of Korea FTA
[603] Article 16.5 (e), EU-Japan EPA.
[604] Articles 16.3, 16.5, 16.6, 16.7, and 16.8, EU-Japan EPA.
[605] Article 16.10 and Chapter 17, EU-Japan EPA.
[606] Article 16.12, EU-Japan EPA.
[607] Article 16.11, EU-Japan EPA.
[608] Articles 16.13 and 16.14, EU-Japan EPA.
[609] Article 16.15, EU-Japan EPA.
[610] Article 16.16, EU-Japan EPA.

Compared to the EU-Republic of Korea FTA, the EU-Japan EPA dispute settlement mechanism has been improved, although it is still based on cooperation and does not provide for sanctions. The procedure starts with government consultations, possibly followed by a Panel of Experts.[611] After the investigation, the Experts issue "an interim and a final report to the Parties setting out the findings of facts, the interpretation or the applicability of the relevant Articles and the basic rationale behind any findings and suggestions."[612] This report serves as the basis for the actions that the Parties agree to take to resolve the dispute.[613] The Committee on Trade and Sustainable Development, the Domestic Advisory Group(s), and the Joint Dialogue monitor the implementation of the agreed actions.[614]

The EU-Japan FTA served as the basis for two other TSD Chapters, the EU-Singapore FTA[615] and the EU-Vietnam FTA.[616] Both agreements commit the Parties to ratify the CLS Conventions, to promote decent work and corporate social responsibility, and to avoid lowering labour standards to attract trade and investment.[617] Furthermore, FTAs bind the Parties to transparency, dialogue, cooperation and impact assessment.[618] These obligations are implemented through institutional mechanisms of bilateral, national, and civil society dialogue.[619] Dispute resolution is entrusted to government

[611] Articles 16.17 and 16.18.1, EU-Japan EPA.
[612] Article 16.18.5, EU-Japan EPA.
[613] Article 16.18.6, EU-Japan EPA.
[614] Articles 16.18.6 and 16.19, EU-Japan EPA.
[615] Free Trade Agreement Between the European Union and the Republic of Singapore, *OJ L 294, 14.11.2019, p. 3–755*, 2019.
[616] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, *OJ L 186, 12.6.2020, p. 3-1400*, 2020.
[617] Articles 12.1, 12.3, 12.11, and 12.12, EU-Singapore FTA; Articles 13.1, 13.2-13.4, and 13.10, EU-Vietnam FTA.
[618] Articles 12.4, 12.11, 12.12-12.16, EU-Singapore FTA; Articles 13.12-13.16 and Chapter 16, EU-Vietnam FTA.
[619] Articles 12.15 EU-Singapore FTA; Articles 13.14, EU-Vietnam FTA.

consultations and a Panel of Experts.[620] The latter has no sanctioning power, as the EU adopts a promotional approach.

To sum up, the current EU social clause model is advanced in terms of social obligations, procedural commitments, enforcement mechanisms and dispute resolution.[621] However, TSD Chapters still lack a sanctioning mechanism to enforce social obligations (Table 12).

Element	Obligations - Trade and Sustainable Development Chapter
Social obligations/ content	a) Conform national labour legislation to CLS by ratifying and implementing CLS Conventions, Decent Work Agenda. b) Prohibition of worsening national labour standards to attract trade and investment. c) Legal framework: • 1998 ILO Declaration; • ILO CLS Conventions; • 2006 UN ECOSOC Ministerial Declaration on Employment and Decent Work for All; • UN and OECD Corporate Social Responsibility recommendations; • 2008 ILO Declaration on Social Justice for a Fair Globalization.
Procedural commitments	a) Transparency b) Dialogue c) Cooperation d) Impact assessment
Implementation mechanisms	a) Committee on Trade and Sustainable Development/ Transnational Advisory Committee on Sustainable Development b) Domestic Advisory Committee(s)/Group(s) on Sustainable Development c) Meetings between the Civil Society Forum and the National Advisory Group on Sustainable Development (mandatory).
Dispute Settlement	a) Cooperative labour consultation b) A Panel of experts without sanction possibility

Table 12: Labour obligations TSD Chapters[622]

[620] Articles 12.15-12.17 EU-Singapore FTA; Articles 13.14-13.17, EU-Vietnam FTA.
[621] European Commission, "Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements" (Brussels, 2018).
[622] Barbu et al., "The Trade-Labour Nexus: Global Value Chains and Labour Provisions in European Union Free Trade Agreements," 264; Giovanni Gruni, "Labor Standards in the EU-South Korea Free Trade Agreement Pushing Labor Standards into Global Trade Law?," *Korean Journal of International and Comparative Law* 5, no. 1 (2017): 110-12; De Ville, Orbie, and Van Den Putte, "TTIP and Labour Standards," 34-35.

4. Preliminary Remarks

This Chapter studied with a comparative legal-historical approach the two main existing social clause models, i.e. that of the US and the EU, to highlight similarities and differences and the strengths and weaknesses of the two systems

Section 2 illustrated the historical and legal evolution of US social clauses. Starting with NAFTA, NAALC and NAEC and studying the evolution of the 'labour chapters', the analysis highlighted the key role of the May 10th Compromise as a watershed between earlier and later social clauses. Indeed, the clauses agreed before this Compromise included the obligation to apply national labour standards, while the later clauses required national legislation to comply with and implement the CLS. However, the reference to CLS was not followed by a solid legal framework.

Section 3 outlined the historical and legal development of the EU social clauses. The watershed in the history of EU clauses is the reinforcement of Parliament's role in trade policy in the Lisbon Treaty. The first EU social clause was introduced in the 1999 EU-South Africa Agreement and had a very faded and weak character. After the Lisbon Treaty, social clauses have become more protective of labour rights through the introduction of the TSD chapters, launched by the EU-Republic of Korea Free Trade Agreement. These Chapters bind the parties to respect and implement international labour and environmental conventions to promote sustainable development.

Both models are, in their own way, incomplete and leave room for criticism (Table 13). Despite the emphasis on labour protection, the US social clauses fail to establish precise and verifiable obligations, as they lack a binding legal framework. However, this model provides, at least in theory, for sanctions and an enforcement apparatus. In contrast, the EU is extremely precise with regard to the legal framework, but largely lacks

enforcement. This inadequacy stems from the negotiating mechanism, the political interests of the parties, the main objective of the agreement (market liberalisation), the balance of power between the EU and the member states in the EU, and parliamentary and institutional political compromises in the US.

To assess the efficacy of the US and EU social clauses, the following chapter examines the US v. Guatemala and EU v. Republic of Korea case.

Element	USA - Labour Chapter	EU - Trade and Sustainable Development Chapter

Social obligations	• Conform national labour legislation to CLS
	• National labour standards (acceptable condition of work, minimum wage, hours of work, and occupational safety and health)
	• Prohibition of worsening national labour standards to attract trade and investment.
	• Legal framework:
	  o 1998 ILO Declaration;
		• Conform national labour legislation to CLS by ratifying and implementing CLS Conventions, Decent Work Agenda.
		• Prohibition of worsening national labour standards to attract trade and investment.
		• Legal framework:
		  o 1998 ILO Declaration;
		  o ILO CLS Conventions;
		  o 2006 UN ECOSOC Ministerial Declaration on Employment and Decent Work for All;
		  o UN and OECD Corporate Social Responsibility recommendations;
		  o 2008 ILO Declaration on Social Justice for a Fair Globalization.

Procedural commitments	• Dialogue • Cooperation	• Transparency • Dialogue • Cooperation • Impact assessment
Implementation mechanisms	• Labour Affair Council; • Domestic Labour Advisory Committee (optional); • Open meeting civil society with Labour Affairs Council.	• Committee on Trade and Sustainable Development (mandatory); • Domestic Advisory Group(s) on Sustainable Development (mandatory); • Meetings between the Civil Society Forum and the National Advisory Group on Sustainable Development (mandatory).
Dispute Settlement	• Cooperative labour consultation; • Commercial dispute settlement system with financial or trade sanctions (with procedural and subject matter limitations).	• Cooperative labour consultation; • A Panel of experts without sanction possibility.

Table 13: Labour obligations in US and EU social clauses.[623]

[623] De Ville, Orbie, and Van Den Putte, "TTIP and Labour Standards," 34–35.

Chapter III.
United States v. Guatemala and European Union v. Republic of Korea

Summary: 1. Introduction; 2. United States v. Guatemala; 2.1. Background of the Case and Procedural History; 2.2. "Labour Laws": Disputing Parties' Arguments and Arbitral Panel's Analysis; 2.3. "Not Fail to Effectively Enforce": Disputing Parties' Arguments and Arbitral Panel's Analysis; 2.4. "Sustained or Recurring Course of Action or Inaction": Disputing Parties' Arguments and Arbitral Panel's Analysis; 2.5. "In a Manner Affecting Trade Between the Parties": Disputing Parties' Arguments; 2.6. "In a Manner Affecting Trade Between the Parties": Arbitral Panel's Analysis; 2.7. Relationship Between Letter (a) and (b) of Article 16.2.1 and Temporal Issues; 2.8. Arbitral Panel Conclusions; 2.9. Preliminary Remarks on the US v. Guatemala case; 3. European Union v. Republic of Korea; 3.1. Procedural Background and the Panel's Interpretative Framework; 3.2. Preliminary Issue: Jurisdiction; 3.3. First Substantive Issue: The First Sentence of Article 13.4.3 of the EU-Republic of Korea FTA; 3.3.1 Analysis of the Seven Legal Units of the First Sentence of Article 13.4.3 of the EU-Republic of Korea FTA; 3.3.2 Application of the Panel's Findings; 3.4. Second Substantive Issue: The Last Sentence of Article 13.4.3 of the EU-Republic of Korea FTA; 3.4.1 Analysis of the Legal Units of the Last Sentence of the Article 13.4.3 EU-Republic of Korea FTA; 3.4.2. Application of the Panel's Findings; 3.5. Preliminary Remarks on the EU v. Republic of Korea case.

1. Introduction

The previous Chapters of this dissertation conceptualised the social clause, described its evolution, and assessed the labour provisions of the US and EU Trade Agreements in a comparative perspective. This Chapter analyses the efficacy of social clauses by studying the Reports of the Arbitral Panel in the US v. Guatemala (Section 2) and the Panel of Experts in the EU v. Republic of Korea (Section 3).

On 14 June 2017, the Arbitral Panel issued its Final Report on the dispute between the US and Guatemala over the Central American State's alleged violation of its labour obligations under Article 16.2.1(a) of the CAFTA-DR. As the first arbitral Report ever issued concerning the violation of a social clause, this decision is a milestone in

international trade law.[624] Unfortunately, the Report did not bear the fruit expected and hoped for by workers' rights advocates. The Panel concluded that "the United States has not proven that Guatemala failed to comply with its obligations under Article 16.2.1(a) of the CAFTA-DR."[625]

The Final Report recognised Guatemala's violation of its obligations under the social clause. This violation was perpetrated through the failure to enforce labour court decisions sanctioning dismissals and anti-union conduct, as well as the denial of justice to workers. However, the Panel found that violations of labour rights in Guatemala did not fulfil the "affecting trade" clause.[626] Indeed, the social clause in Article 16.2.1(a) of CAFTA-DR establishes an inseparable legal link between social obligation and trade:

> A Party shall not fail to effectively enforce its Labour Laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.[627]

As emphasised by the Panel, "in a manner affecting trade" is the set standard of all US Trade Agreements since NAFTA, as well as one of the four essential element constituting the legal obligation under Article 16.2.1(a) of CAFTA-DR.[628] The elements are the "obligation to [i] not fail to effectively enforce those measures [ii] through a sustained or recurring course of action or inaction [iii] in a manner affecting trade between

[624] Tequila J. Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," *International Labor Rights Case Law* 4, no. 1 (March 9, 2018): 45-46.
[625] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," June 14, 2017, 200.
[626] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 483-84; Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 45-46.
[627] Article 16.2.1(a), CAFTA-DR.
[628] Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 46.

the Parties [iv] after the date of entry into force of CAFTA-DR."[629] In interpreting the contents of the concept of "affecting trade," the Panel also sheds light on the rationale of social clauses manifesting its ancillary to trade and its unique function of preventing unfair competition.[630]

The burden of proof played an essential role in the decision of the Arbitral Panel. According to Rule 65 of the Rules accepted by the Parties, the burden of proof lay with the Complaining Party (i.e., the US).[631] The US proved the violations of Labour Laws[632] but failed to prove the link between these violations and the trade affection.[633] In Brooks' view, the Panel found significant problems in the evidence presented by the US to prove Guatemala's liability, which may explain the failure:[634]

> Much of the evidence submitted by the United States was obtained from the Guatemalan workers and trade union representatives who filed the original petition with the U.S. government. The Panel was required to make credibility determinations based on evidence in which witness names were removed to protect them from retaliation by employers and government authorities.[635]

On 20 January 2021, the Panel of Experts issued its Final Report on the dispute between the EU and the Republic of Korea over South Korea's alleged violation of the

[629] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 60.
[630] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 485.
[631] Rule 65 of the Rules of Procedure: "A Complaining Party asserting that a measure of the Party complained against is inconsistent with its obligations under the Agreement, that the Party complained against has otherwise failed to carry out its obligations under the Agreement, or that a benefit that the Complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 20.2(c) (Scope of Application) shall have the burden of establishing such inconsistency, failure to carry out obligations, or nullification or impairment, as the case may be."
[632] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 72.
[633] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 483-84; Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 45-46.
[634] Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 49-50.
[635] Ibid., 46.

fundamental right to freedom of association and collective bargaining under Article 13.15 of the EU-Republic of Korea FTA. This is the second (and so far last) social clause dispute case resolved by an International Panel.

This Report concluded that the Republic of Korea was violating its commitment to:

> respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining […].[636]

The Panel of Experts perspective is of paramount importance since it established that "the TSD Chapter has implications and commitments that bond beyond the narrow interpretation of labour matters that impact trade […]."[637]

On 20 April 2021 - three months after the issues of the Final Report - the Republic of Korea ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Convention No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Convention No. 98) and the ILO Forced Labour Convention, 1930 (No. 29) (Convention No. 29).[638] Moreover, the Republic of Korea expressed its intention to start a research project concerning the amendments needed to comply with the ILO Abolition of Forced Labour Convention, 1957 (No. 105).[639]

While it may have had a more favourable outcome for the protection of workers' rights, the Korean case suffers from an underlying problem related to the inherent weakness of the Report of the Panel of Experts. Indeed, the Korean case is based on the

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[636] Article 13.4.3, "Free Trade Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part."
[637] María J. García, "Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case," *Politics and Governance* 10, no. 1 (January 26, 2022): 64.
[638] ILO, "Ratifications for Republic of Korea," Ratifications of ILO Conventions - Ratifications by Country, 2022, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103123.
[639] García, "Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case," 64.

practice of naming and shaming that does not guarantee any concrete enforcement.[640] The Asian country has only begun the process of reforming its domestic law along the lines of the CLS but has not completed it.[641] The weakness of this mechanism is its non-coercive and voluntary nature.[642] Before turning to the analysis of the two cases, it is useful to recall the methodological framework.

Methodologically, this Chapter adopts a non-doctrinal comparative objective, assessing the efficacy of social clauses. The analysis is a micro-comparison of an external nature, as two specific disputes are investigated. The approach is functional because the study assumes that both cases address the same legal issue, namely the protection of labour rights, but with different developments and outcomes. Central to this comparison is the study of how disputes are structured from a legal viewpoint because this shows social clauses' efficacy.

The *tertia comparationis* of these two cases are four: a) the US v. Guatemala and EU v. Republic of Korea are the most relevant (and, so far, unique) disputes concerning violations of social clause obligations settled by an International Panel; b) the US v. Guatemala case served as a forerunner and a model (from which to depart) for the EU v. South Korea case; c) the objectives, obligations, supervision, and dispute-resolution mechanisms of the social clauses are sufficiently similar to be compared; d) the outcomes of these decisions are relevant for assessing the efficacy of social clauses.

[640] Ibid.
[641] See note 128.
[642] García, "Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU-Korea Case," 64; Trade and Sustainable Development Committee, "Summary of Discussions of the 6th Committee on Trade and Sustainable Development under the EU-Korea FTA," 2018; Trade and Sustainable Development Committee, "Joint Statement of the 4th Meeting of the Committee on Trade and Sustainable Development under the EU-Korea FTA," 2015, 2.

2. United States v. Guatemala

The first case study concerns the international arbitration between the US and Guatemala in relation to the latter's alleged violation of the social clause.

The Initial Written Submission was filed by the United States on 3 November 2014.[643] This submission was of paramount importance because it outlined the dispute and introduced all the key arguments.[644] The US stated that Guatemala breached its obligation under Article 16.2.1(a) of CAFTA-DR:

> A Party shall not fail to effectively enforce its Labour Laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.[645]

According to US Submission, Guatemala failed to effectively enforce its "labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of the CAFTA-DR"[646] in a triple way:

> a) By failing to secure compliance with court orders requiring employers to reinstate and compensate workers wrongfully dismissed for union activities, and to pay a fine for their retaliatory action;
> b) By failing to properly conduct investigations under the Guatemalan Labor Code (GLC) and by failing to impose the requisite penalties when Ministry of Labor inspectors identified employer violations; and,
> c) By failing to register unions or institute conciliation processes within the time required by law.[647]

[643] US Initial Written Submission, 2014.
[644] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 14-15.
[645] Article 16.2.1(a), CAFTA-DR.
[646] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," para. 15.
[647] US Initial Written Submission, para. 17.

However, the Arbitral Panel only examined complaints about (a) non-compliance with court orders and (b) the conduct of adequate inspections and the imposition of sanctions.[648] The Final Report found that Guatemala was liable for the negligent application of its Labour Law and that there was no evidence of an affection on trade. Thus, the US did not fulfil its burden of proof and Guatemala was not sanctioned.

Regarding the reasoning structure, the Panel identifies seven interpretative issues:

> a) Which laws are encompassed by the obligation to not fail to effectively enforce "Labor Laws"? In particular, does the obligation pertain to laws susceptible to enforcement by judicial action, and not just to laws that are enforced by executive action?
> b) What is required for a Party not to fail to "effectively enforce" its labor laws?
> c) What is required for a failure to effectively enforce labor laws to constitute a "course" of action or inaction?
> d) What is required for a course of action or inaction to be "sustained or recurring"?
> e) What must be shown to establish that a failure to enforce labor laws through a sustained or recurring course of action or inaction is "in a manner affecting trade between the Parties"?
> f) How does subparagraph (b) of Article 16.2.1 relate to subparagraph (a)? In particular, is it a Complaining Party's burden to show that the complained of conduct is not the result of a "reasonable exercise of. .. discretion" or "a bona fide decision regarding the allocation of resources"? Or, is it a responding Party's burden to show that the complained-of conduct, even if otherwise contrary to subparagraph (a), is the result of a "reasonable exercise of. .. discretion" or "a bona fide decision regarding the allocation of resources"?
> g) What temporal limits are there on the claims within our terms of reference?[649]

Each one of these seven issues shaped the Panel's conclusion; however, the most decisive issue was the meaning of "in a manner affecting trade between the Parties."

[648] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," para. 490.
[649] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 34.

The following subsections first consider the historical context of the dispute, and then review these interpretive issues by placing a greater emphasis on the issue of "affecting trade" as it is crucial.

2.1. Background of the Case and Procedural History

On 10 March 2005, Guatemala ratified the CAFTA-DR, which entered into force on 1 July 2006.[650] In Article 16.2.1(a), the Parties committed to respect, promote and implement the CLS established by the ILO.

On 23 April 2008, the American Federation of Labor and Congress of Industrial Organisations (AFL-CIO), together with the Union of Port Quetzal Company Workers (STEPQ), Union of Izabal Banana Workers (SITRABI), Union of International Frozen Products, Inc. Workers (SITRAINPROCSA), Coalition Avandia Workers, Union of Fribo Company Workers (SITRAFRIBO) and the Federation of Food and Similar Industries Workers of Guatemala (FESTRAS) submitted a petition under Chapter 16 and 20 of the CAFTA-DR to the Office of Trade and Labour Affairs (OTLA) concerning the failure of Guatemala to effectively enforce its Labour Laws and comply with its commitments under the ILO Declaration on Fundamental Principles and Rights at Work.[651]

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[650] American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), "Public Submission Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply with Its Commitments under the Ilo Declaration on Fundamental Principles and Rights at Work," 2008, 2; Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 45-46.

[651] American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), "Public Submission Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply with Its Commitments under the Ilo Declaration on Fundamental Principles and Rights at Work," 2.

In this petition, the trade unions listed cases of violations of freedom of association and the right to collective bargaining,[652] pointing out that between 2006 and 2008, there had been a significant increase in violence against trade unionists. Specifically, the petition Reported that employers boycotted the union, carried out anti-union activities, and threatened and committed violence against trade unionists. Specifically, the petition cited cases of a) denial of negotiation of collective Agreements with legally recognised unions; b) failure to enforce legally binding collective Agreements; c) unlawful suspensions and dismissals of trade unionists, union members, or union supporters; d) blocking of subscriptions and subsidies to trade unions; e) failure to contribute to the social security fund for workers' medical care; f) threats and assaults on trade unionists; and g) murders of trade unionists on company premises.[653]

The violations complained of by the Guatemalan trade union STEPQ were also raised before the ILO Committee on Freedom of Association (CFA) by the International Trade Union Confederation (ITUC), International Transport Workers' Federation (ITF) and Trade Union of Workers of Guatemala (UNSITRAGUA). The CFA expressed recommendations in Report No. 348, Case No. 2540, which were ignored by Guatemala.[654]

Furthermore, the petition listed in the Annex six cases of violence against trade unionists justifying an international arbitration for violation of the CAFTA-DR labour clause.[655] Based on the unions' petition, on 30 July 2010, the US Trade Representative

[652] Ibid.
[653] Ibid., 2–3, 5–21.
[654] ILO Governing Body, "348th Report of the Committee on Freedom of Association" (Geneva, 2007), 788–821.
[655] American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), "Public Submission Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply with Its Commitments under the Ilo Declaration on Fundamental Principles and Rights at Work," 24-25.

Kirk and the US Secretary of Labour Solis requested consultations with Guatemala under Article 16.6.1 of the CAFTA-DR, which states: "[a] Party may request consultations with another Party regarding any matter arising under this Chapter [16] [..]."[656] In this letter of formal notice and opening of the pre-litigation phase, it was noted that:

> Article 16.2.1(a) of the CAFTA-DR requires that "[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting the trade between the Parties, after the date of entry into force of this Agreement." Over the last 11 months, the United States has conducted an extensive examination of Guatemala's compliance with its obligations under Chapter Sixteen. […]
> Based on this examination and the review of matters of law and fact, the government of Guatemala appears to be failing to meet its obligations under Article 16.2.1(a) with respect to effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and the acceptable condition of work.[657]

With this letter, the US aimed to obtain "the Government of Guatemala to take specific and effective action – including, if appropriate, legislative reforms – to improve the systemic failures in enforcement of Guatemalan Labour Law [..]."[658] In the announcement, the Trade Representative Kirk pointed out that "request for consultations also expresses [the US] grave concerns about [labour-related violence] and indicates that [the US] intend to take this issue up with the Government of Guatemala in the near future."[659]

In the intergovernmental consultations held in September and December 2010, the Guatemalan government tried to meet US demands but failed to show any real will for change:

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[656] US Trade Representative, "Letter from Ambassador Ron Kirk and Secretary of Labor Hilda Solis Requesting Consultations," 2010.
[657] Ibid.
[658] US Trade Representative, "USTR Kirk Announces Labor Rights Trade Enforcement Case Against Guatemala," The USTR Archives, July 30, 2010, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2010/july/united-States-trade-representative-kirk-announces-lab.
[659] Ibid.

> At various times since the filling of the consultations request, the government of Guatemala has presented proposed workplans and other information regarding the enforcement of labor laws in Guatemala. The United States notes that while some positive steps have been taken, the overall actions taken and proposals presented have been insufficient to address the apparent systemic failures to enforce Guatemalan's labor laws. We have seen little evidence of concrete enforcement actions that have resulted in measurable progress in addressing our identified areas of concern.[660]

Therefore, on 16 May 2011, the US Trade Representative sent a letter to the Guatemalan Minister of Economy requesting a Free Trade Commission under Article 20.5.2 of CAFTA-DR to discuss the alleged violations of workers' rights as defined in the letter of formal notice of 30 July 2010.[661] For the Obama Administration, the issue of social rights in Guatemala was politically very relevant:

> The Obama Administration is committed to vigorously enforcing the labor obligations under U.S. Trade Agreements. We will hold our trading partners accountable in order to maintain the fairness that creates a level-playing field upon which American workers can compete and win. We expect to see the Government of Guatemala take concrete actions to improve its labor law enforcement to protect the rights of workers as agreed under CAFTA-DR.[662]

On 7 June 2011,[663] the Intergovernmental Free Trade Commission's work began to establish an appropriate enforcement plan for Guatemalan Labour Law. Unfortunately, this work foundered on 9 August 2011, leading to the litigation phase by establishing an

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[660] US Trade Representative, "Letter from Ambassador Kirk to Guatemala Requesting Free Trade Commission Meeting," 2011, 1.

[661] Article 20.5.2, CAFTA-DR: "[…] 2. A consulting Party may also request in writing a meeting of the Commission where consultations have been held pursuant to Article 16.6 (Cooperative Labor Consultations), Article 17.10 (Collaborative Environmental Consultations), or Article 7.8 (Committee on Technical Barriers to Trade). […]."

[662] US Trade Representative, "USTR Kirk Seeks Enforcement of Labor Laws in Guatemala," The USTR Archives, May 16, 2011, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/may/ustr-kirk-seeks-enforcement-labor-laws-guatemala.

[663] US Trade Representative, "U.S. Trade Representative Ron Kirk Announces Next Step in Labor Rights Enforcement Case against Guatemala," The USTR Archives, August 9, 2011, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/august/us-trade-representative-ron-kirk-announces-next-ste; US Trade Representative, "In the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," Bilateral and Regional Trade Agreements, October 15, 2019, https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr.

Arbitral Panel under Article 20.6 of the CAFTA-DR.[664] The perimeter of the dispute was Guatemala's failure "to comply with its obligations under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to the right of association, the right to organise and bargain collectively, and acceptable conditions of work."[665] The Commission took the preliminary decisions necessary for a possible dispute, approving on 23 February 2011: a) the model rules of procedure of an arbitration Panel, b) the roster from which the Parties could choose arbitrators and c) the code of conduct for arbitrators.[666] The purpose of this action was manifested in the words of US Trade Representative Kirk:

> With this case, we are sending a strong message that the Obama Administration will act firmly to ensure effective enforcement of labor laws by our trading partners […] While Guatemala has taken some positive steps, its overall actions and proposals to date have been insufficient to address the apparent systemic failures. We need to see concrete actions to protect the rights of workers as agreed under our Trade Agreement, and we are prepared to act to obtain enforcement of those rights when and where necessary.[667]

The Arbitral Panel was officially constituted on 30 November 2012 without becoming operational as the Parties attempted new negotiations to develop a Mutually Agreed Enforcement Plan (Enforcement Plan) for Guatemalan labour legislation.[668] Adopted on 25 April 2013,[669] the Enforcement Plan had five key objectives: a)

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[664] US Trade Representative, "U.S. Trade Representative Ron Kirk Announces Next Step in Labor Rights Enforcement Case against Guatemala;" US Trade Representative, "In the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR."
[665] US Trade Representative, "In the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR."
[666] CAFTA-DR Free Trade Commission, "Decision of the Free Trade Commission Establishing Model Rules of Procedure," 2011; CAFTA-DR Free Trade Commission, "Decision of the Free Trade Commission on Appointment to the Rosters," 2011; CAFTA-DR Free Trade Commission, "Decision of the Free Trade Commission Establishing a Code of Conduct," 2011.
[667] US Trade Representative, "U.S. Trade Representative Ron Kirk Announces Next Step in Labor Rights Enforcement Case against Guatemala."
[668] US Trade Representative, "United States Proceeds with Labor Enforcement Case Against Guatemala," The USTR Archives, September 18, 2014, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala.
[669] "Mutually Agreed Enforcement Plan between the United States and Guatemala," 2013.

strengthening the ministry of labour to enforce Labour Laws; b) ensuring payment to workers when factories suddenly close; c) improving enforcement of court orders; d) ensuring export companies comply with Labour Laws; e) transparency and coordination.[670] To follow up on this Enforcement Plan, Guatemala agreed to a very tight timeframe of six months in which a series of reforms were to be implemented to improve the enforcement of labour legislation.[671]

Guatemala's failure to implement the Enforcement Plan and growing pressure from the trade unions prompted the Obama Administration to break any further delay by asking the Arbitral Panel to resume work effectively as of 19 September 2014.[672] At the 18 September 2014 press conference organised to announce the decision to proceed with the litigation, US Trade Representative Froman stated:

> As President Obama has made clear, our Trade Agreements must advance both our interests and our values, they must be monitored closely, and the obligations of our trading partners must be enforced. Central to that commitment are strong, enforceable labor standards. These standards level the playing field for American workers and help ensure that global competition is driven by entrepreneurship and innovation, not by exploitation or injustice. These standards protect the fundamental rights of workers around the world and promote trade and investment that lifts the futures of all, not the fortunes of a few. […] key commitments under the Enforcement Plan remain outstanding, such as passing legislation that enhances the authority of the Ministry of Labor to impose sanctions when it finds a violation of Guatemala's labor laws and reduces the time it takes to bring labor law violators to justice. Even despite our close collaboration with Guatemala's Labor Ministry, the

[670] US Trade Representative, "Guatemala Agrees to Comprehensive Labor Enforcement Plan," The USTR Archives, April 11, 2013, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/april/guatemala-labor-enforcement; "Mutually Agreed Enforcement Plan between the United States and Guatemala."
[671] US Trade Representative, "In the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR."
[672] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 3; US Trade Representative, "In the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR;" US Trade Representative, "United States Proceeds with Labor Enforcement Case Against Guatemala."

> record that Guatemala has presented is insufficient to demonstrate that the changes made have had the desired impact on the ground.[673]

The resumption of the dispute was perceived very positively by politicians and public opinion,[674] especially by the US trade unions that stated:

> We welcome today's historic decision by the U.S. government to resume the arbitration process with Guatemala, to ensure that the government of Guatemala will live up to the commitments made under CAFTA to enforce workers' basic rights and Guatemalan labor laws. […] Since the filing, the government of Guatemala has repeatedly made promises to protect and respect labor rights, but has consistently failed to act. This is why we applaud today's resumption of the arbitration Panel.[675]

Following the US request, the Arbitral Panel resumed its work by proposing a timetable for submissions and rebuttals on 26 September 2014.[676] On 3 November 2014, the US filed its Initial Written Submission, while Guatemala's was submitted on 2 February 2015.[677] On 16 March 2015, the US issued its Rebuttal Submission, while the Guatemalan submission was sent to the Panel on 27 April 2015.[678] The national written submissions were joined by those of eight non-governmental organisations, followed by a public hearing in Guatemala City in June 2015.[679] Due to the resignation of Arbitrator Destarac, the Panel's work was suspended and resumed on 27 November 2015. [680]

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[673] US Trade Representative, "Remarks by Ambassador Michael Froman on Labor Enforcement Case Against Guatemala," The USTR Archives, September 18, 2014, https://ustr.gov/about-us/policy-offices/press-office/speeches/2014/September/Remarks-by-Ambassador-Froman-on-Labor-Enforcement-Case-Against-Guatemala.
[674] US Trade Representative, "What They're Saying: U.S. Proceeds with Labor Enforcement Case Against Guatemala," The USTR Archives, September 18, 2014, https://ustr.gov/about-us/policy-offices/press-office/blog/2014/September/What-Theyre-Saying-US-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala.
[675] AFL-CIO, "AFL-CIO President Trumka's Remarks on USTR Announcement," AFL-CIO Press Release, September 18, 2014, https://aflcio.org/press/releases/afl-cio-president-trumkas-remarks-ustr-announcement.
[676] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 3-14.
[677] Ibid.
[678] Ibid.
[679] Ibid.
[680] Ibid.

On 27 September 2016, the Panel issued its First Report to which the Parties replied on 12 December 2016.[681] The Panel then reviewed the replies and evidence collected and issued its Final Report on 14 June 2017,[682] establishing that:

> The United States has proven that […] Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders, but not that these instances constitute a course of inaction that was in a manner affecting trade. The United States has not proven sufficient failures to adequately conduct labor inspections to constitute a course of action or inaction. The Panel has no jurisdiction over the other claims advanced by the United States in these proceedings, as they were not included in the Panel request. We therefore conclude that the United States has not proven that Guatemala failed to conform to its obligations under Article 16.2.1(a) of the CAFTA-DR.[683]

Having concluded the review of the history of the dispute, the next subsections deal with all the interpretive issues.

2.2. "Labour Laws": Disputing Parties' Arguments and Arbitral Panel's Analysis

The first interpretative issue considered by the Panel concerned the legal content of "labor laws." This question emerged in the context of Guatemala's Initial Written Submission. Indeed Guatemala argued that a Party's obligation to "not fail to effectively enforce its Labour Laws" fell solely on the Government, strictly construed to include only the legislative and executive branch of the State.[684] Thus, the obligation relating to the enforcement of Labour Law did not lie with the judiciary or other non-executive bodies.[685] The reasoning behind this argument was based on two elements: the definition of "Labour

[681] Ibid.
[682] Ibid.
[683] Ibid., 201.
[684] Ibid., 36.
[685] Guatemala Initial Written Submission, 2015, paras. 128–140.

Laws" in Article 16.8 and the Guatemalan constitutional notion of "statutes or regulations."[686]

According to the definition in Article 16.8, "Labor Laws" were to be understood as "statutes or regulations, or provisions thereof" that gave national application to specific "internationally recognized labor rights."[687] Guatemala defined "statutes or regulations" according to its constitution as "laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body."[688] In support of its restrictive reading of the notion of "labor laws," Guatemala recalled Article 16.2.1(b):

> (b) Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.[689]

In this Article, Guatemala found a reference to discretionary actions of the type taken by a Party's executive branch agencies.[690] Moreover, the Central American State argued that this reading was confirmed in several other places in Chapter 16 of CAFTA-DR where specific reference was made to acts of judicial power.[691] Therefore, by *a contrario* interpretation, if the judiciary power was mentioned in those points then in relation to "labor laws" reference was made to acts of the legislative and executive branch.[692]

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[686] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 36.
[687] Article 16.8, CAFTA-DR.
[688] Guatemala Initial Written Submission, paras. 128–140.
[689] Article 16.2.1(b), CAFTA-DR.
[690] Guatemala Initial Written Submission, para. 144.
[691] Ibid., paras. 145–150.
[692] Ibid., paras. 180–192, 399–400.

Guatemala's interpretation of "labor laws" was strongly contested by the US that argued that the wording "enforceable by action of the executive body" in the definition of "statutes or regulations" was to be understood in broad terms to determine "whether a particular measure qualifies as a statute or regulation and, hence, a 'labor law.'" [693] The US submitted that the obligation to enforce Labour Law fell on the Government, broadly understood to include the legislative, executive and judicial branches.[694]

The US interpretation relied on International Law, while the Guatemalan interpretation relied on domestic Constitutional Law. According to International Law, the State "is an effective and independent governing body over a territorial community"[695] and "[..] may not coincide with the State in the sense of the constitutional law."[696] In this perspective, Government was understood as "the political system by which a country or community is administered and regulated"[697] encompassing the legislative, executive and judicial. In support of this all-encompassing notion, the US adduced the argument of the literal and systematic interpretation of Article 16.2.1(a).

In its Rebuttal Submission, the US argued that Article 16.2.1(a) does not limit "the kind of conduct that could constitute a failure to effectively enforce labor laws."[698] Under a systematic interpretation, "the Parties acknowledge "that enforcement of labor laws is something that may be accomplished (or neglected) not only by executive bodies, but by

[693] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," para. 37.
[694] US Rebuttal Submission, 2015, paras. 40–46.
[695] James R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006); Carlo Focarelli, *Trattato Di Diritto Internazionale* (Torino: UTET, 2015), para. 74.
[696] Focarelli, *Trattato Di Diritto Internazionale*, para. 69.
[697] Hugh Brogan, "Government," in *Encyclopædia Britannica* (Encyclopædia Britannica, Inc., 2022).
[698] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 37; US Rebuttal Submission, para. 40.

other organs of the State as well."[699] Reading Article 16.2.1(a). in conjunction with Article 16.3, which deals with "administrative, quasi-judicial, judicial or labour courts," it seemed that the judicial arm also fell within the scope of Article 16.2.1(a) and the notion of Government.[700]

The Arbitral Panel agreed with the US, adopting the International Law perspective that the Government "is not limited to conduct of Guatemala's executive body."[701] In support of this interpretation, the Panel stated that the main characteristic of the Law is its enforceability.[702] This characteristic implies the obligation to enforce a statute or regulation by the organs of the State, whether executive or judicial.[703]

Regarding how a State violates the enforceability of Labour Law, Article 16.2.1(a) neither predetermined any conduct or omission nor preidentified the actors who may commit them. According to the Panel, it was therefore irrelevant whether the violation of the social prescription was caused by the executive, legislative or judicial arm.[704]

Finally, the Panel stated that an all-encompassing interpretation of Government was more consistent with the objectives and purposes stated in the CAFTA-DR Preamble[705] to "protect, enhance, and enforce basic workers' rights, [..] promote conditions of fair competition in the free trade area, [..] strive to ensure that [..]the internationally recognised labour rights set forth in Article 16.8 are recognised and protected by [each Party's] law."[706]

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[699] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 37.
[700] Ibid., para. 37; US Rebuttal Submission, para. 43.
[701] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 37.
[702] "Enforceable," in *The Oxford English Dictionary* (Oxford University Press, 1996).
[703] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 38.
[704] Ibid.
[705] Ibid., 39.
[706] Preamble, CAFTA-DR.

2.3. "Not Fail to Effectively Enforce": Disputing Parties' Arguments and Arbitral Panel's Analysis

The dispute between the US and Guatemala over the meaning of the phrase "not fail to effectively enforce" is closely related to "labor laws," as it is a development of the initial arguments.

In their Written Initial Submission, the US argued that the term "fail" meant to "miss attainment," or to "fall short," or to "neglect" the obligatory outcome.[707] Regarding the effective enforcement of Labour Laws, the US affirmed that "a government must compel compliance with the Law in a way that produces results, putting an end to the conduct that was contrary to the Law."[708] Thus, for the US Article 16.2.1(a) "requires each Party to follow through with its commitment to put an end to conduct contrary to law; it must attain compliance."[709] In other words, the US affirms that the Parties to the CAFTA-DR committed themselves to "compel compliance with its labor laws so as to enforce those laws with substantial effect or result," consequently when a Party does not remediate labor laws violations it fails to "effectively enforce them."[710]

Guatemala challenged the US interpretation, arguing that, under Article 16.2.1(a) "a Party may not to neglect to compel observance of or compliance with its labor laws in a manner that accomplishes or executes."[711] This interpretation was based on the understanding that the ordinary meaning of "enforce" is to "[c]ompel observance of or compliance with … to [c]ompel the occurrence or performance of; impose (a course of

[707] US Initial Written Submission, 29.
[708] Ibid., para. 29; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 40.
[709] US Initial Written Submission, 29.
[710] Ibid., para. 32; US Rebuttal Submission, paras. 38, footnote 186 to 144.
[711] Guatemala Initial Written Submission, para. 123.

action) on a person … [c]ompel the observance of (a law, rule, practice, etc.); support (a demand, claim, etc.) by force."[712] While the meaning of the term "effectively" is "[c]oncerned with or having the function of accomplishing or executing."[713]

The Panel analysed the legal construct "not to fail to effectively enforce." This negative obligation was composed of three elements: "(not) fail," "effectively" and "enforce." According to the Panel, "fail" meant "to be or become deficient in; to fall short in performance or attainment," while "enforce" meant "[to] compel compliance or obedience" as defined by the two Parties.[714]

The most problematic element of the obligation is "effectively;" to define it, the arbitrators distinguished it from "enforce" by stating that:

> the CAFTA-DR drafters modified the word "enforce" by placing the word "effectively" before it reflects an understanding that inherent to enforcement is an element of discretion (an understanding also reflected in paragraph (b) of Article 16.2.1) and that, accordingly, there may be different levels of enforcement. In recognition of that fact, merely requiring that a Party enforce its labor laws would not have accomplished the labor-related objectives articulated in the CAFTA-DR. Rather, to fulfill those objectives, the drafters required that a Party not fail to effectively enforce its labor laws.[715]

The arbitrators interpreted "effectively" in relation to the objectives and purposes of the treaty stating that the "context supports an interpretation of Article 16.2.1(a), and in particular the term "effectively enforce," as requiring enforcement in a manner that promotes the protection by law of internationally recognized labor rights."[716] There remained a margin of ambiguity in the relationship between "effective enforcement and

[712] Ibid., para. 122.
[713] Ibid.
[714] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 41.
[715] Ibid., 42.
[716] Ibid., 43.

compliance."[717] This ambiguity could be eliminated by assessing the circumstances of the case. However, the arbitrators enunciated four applicable general propositions:

> First, effective enforcement generally will be evident in results […]
> Second, […] effective enforcement generally will require that when enforcement authorities find an employer to be out of compliance they will take appropriate action to bring it into compliance.
> Third, if a Party is effectively enforcing its labor laws, its enforcement authorities will both detect and remedy non-compliance with the law sufficiently that employers will reasonably expect that other employers will comply with the law. The absence of that expectation will tend to suggest a failure of effective enforcement.
> Lastly, individual instances of non-compliance do not ipso facto prove that enforcement is ineffective. […] Conversely, high rates of compliance do not always prove that there is effective enforcement. A law that demands little of its subjects seldom requires enforcement. The effectiveness of enforcement may only be evident where non-compliance is likely in its absence.[718]

According to the arbitrators, Article 16.2.1(a) was not intended to create an undue burden on employers; therefore:

> the phrase "not fail to effectively enforce" in Article 16.2.1(a) imposes an obligation to compel compliance with labor laws (or, more precisely, not neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well. [719]

2.4. "Sustained or Recurring Course of Action or Inaction": Disputing Parties' Arguments and Arbitral Panel's Analysis

The third interpretative issue concerned the Parties' definition of a "sustained or recurring course of action or inaction."[720]

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[717] Ibid.
[718] Ibid., 43–44.
[719] Ibid., 44.
[720] Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 48.

In its Initial Written Submission, the US stated that the term "sustained" had the meaning of "maintained at length without interruption, weakening, or losing in power or quality: prolonged, unflagging."[721] In conjunction with "course," this term indicated the situation of "a consistent or ongoing course of action or inaction"[722] Furthermore, the US claimed that "recurring" was related to "sustained" and that the occurrences were interrelated because "recurring" indicated the situation of "coming or happening again [..] 'to recur' [..] means 'to happen, take place or appear again: occur again […]; occur or appear again; periodically, or repeatedly."[723] Thus, for the US "a recurring course of action differs from a sustained course of action or inaction in the interruption between occurrences."[724] Regarding "course," the US submitted that the term meant "a "manner of conducting oneself" or a "way of acting: behavior."[725] Hence, "a course of action can be understood as conducting oneself in an active or affirmative manner, whereas a course of inaction is conducting oneself without acting, or through omission."[726]

To the US position, Guatemala responded by stating that "sustained" meant "[c]ontinuing for an extended period or without interruption [...] [t]hat has been sustained; […] maintained continuously or without flagging over a long period."[727] However, according to the Guatemalan Initial Submission "recur" meant "[to] [o]ccur or appear again, periodically, or repeatedly." [728] Regarding "course," Guatemala submitted that the

[721] US Initial Written Submission, para. 88.
[722] Ibid.
[723] Ibid., para. 89; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 45.
[724] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 45-46; US Initial Written Submission, para. 89.
[725] US Initial Written Submission, para. 87.
[726] Ibid.
[727] Guatemala Initial Written Submission, para. 130.
[728] Ibid.

term meant: "[h]abitual or regular manner of procedure; custom, practice […] [a] line of conduct, a person's method of proceeding […] [a] procedure adopted to deal with a situation, […]."[729]

In its Initial and Rebuttal Submissions, Guatemala argued that the phrase "course of action or inaction" presupposed a continuing unlawful activity composed of a series of active or omissive conducts that demonstrated an unlawful intent and pattern.[730] Guatemala referred to the criminal law concept of 'continuing crime':

> 1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements […] 2. A crime (such as driving a stolen vehicle) that continues over an extended period.[731]

During the hearings, Guatemala made it clear that it understood the obligation in Article 16.2.1(a) as aimed "to capture a deliberate policy of action or inaction adopted by the relevant Party."[732]

The Arbitrators recognised that the phrase "sustained or recurring course of action or inaction" in the context of a systematic interpretation meant "a line of connected, repeated or prolonged behavior by an enforcement institution or institutions."[733] The nexus supporting the unlawful conduct was produced by acts or omissions that had to show a sufficiently high degree of similarity *ratione loci et temporis* to demonstrate that

[729] Ibid., para. 134.
[730] Ibid.; Guatemala Rebuttal Submission, 2015, para. 107.
[731] Bryan A. Garner, ed., "Continuing Crime," in *Black's Law Dictionary* (Eagan, Minnesota: West Publishing, 2019).
[732] Guatemala Initial Written Submission, para. 135; Panel of Experts Proceeding Established under Article 13.15 of the Korea-EU Free Trade Agreement, "Contents of the Hearing of 8 and 9 October 2020," 2020, 34, 113, https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159077.pdf; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Panel Hearing Transcription" (Guatemala City, 2015), 34 and 113.
[733] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 49.

the similarity was not accidental.[734] Therefore, the Panel concluded that the commissive or omissive conduct had to consist of:

> (i) a repeated behavior which displays sufficient similarity, or (ii) prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior by a labor law enforcement institution, rather than isolated or disconnected instances of action or inaction.[735]

2.5. "In a Manner Affecting Trade Between the Parties": Disputing Parties' Arguments

The fourth and decisive interpretative issue concerned the definition of "in a manner affecting trade between the Parties."

In its Initial Written Submission, the US argued that labour rights violations were capable of "affecting trade" because they altered the conditions of competition.[736] The US based this understanding on the WTO case law,[737] on Article III:4 of the 1994 General Agreement on Tariffs and Trade (GATT)[738] and Article I:1 of the General Agreement on

[734] Ibid.
[735] Ibid.
[736] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 490; US Initial Written Submission, paras. 97-98.
[737] US Initial Written Submission, paras. 97-98; The General Agreement on Tariffs and Trade (GATT), WTO legal texts, 1994; General Agreement on Trade in Services (GATS), WTO legal texts, 1994; General Agreement on Tariffs and Trade Panel, "Italian Discrimination Against Imported Agricultural Machinery," *Report L/833 - 7S/60*, 1958; WTO Panel Report, "European Communities -Regime for the Importation, Sale and Distribution of Bananas," *Report WT/DS27/R*, 1997; WTO Appellate Body, "European Communities -Regime for the Importation, Sale and Distribution of Bananas," *Report WT/DS27/AB/R*, 1997, para. 220; WTO Appellate Body, "US - Tax Treatment for 'Foreign Sales Corporations' - Recourse to Article 21.5 of the DSU by the European Communities," *Report WT/DS108/AB/RW*, 2002.
[738] Article III:4, GATT: "The products of the territory of any contracting Party imported into the territory of any other contracting Party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product"

Trade in Services (GATS).[739] These two Articles were interpreted in the light of Article 31.1 of the 1969 Vienna Convention on the Law of Treaties:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[740]

Accordingly, under WTO law, the notion of "affecting" includes:

> measures that might adversely affect conditions of competition between domestic and imported products on the internal market for the purposes of GATT Article III:4, and any measure bearing upon conditions of competition in the supply of a service for the purposes of the GATS.[741]

The US argued that this same meaning was to be found in Article 1.2 of the CAFTA-DR, which stated the treaty's objective to "promote conditions of fair competition in the free trade area." Furthermore, US submitted that the treaty did not require an econometric analysis of the effects on trade of a failure to effectively enforce Labour Law.

The US considered that "in a manner affecting trade" meant that "has a bearing on, influences or changes cross-border economic activity, including by influencing conditions of competition within and among the CAFTA-DR Parties."[742]

In responding to the US, Guatemala broke down the phrase in its units stating that:

> the term "manner" means "the way in which something is done or happens; a method of action; a mode of procedure," that the term "affect" means "to influence, make a material impression upon" and to "have an effect upon," and that the ordinary meaning of "trade" is "the action of buying and selling goods and services."[743]

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[739] Article I:1, GATS: "This Agreement applies to measures by Members affecting trade in services."
[740] United Nations, *Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into Force on 27 January 1980)*, Treaty Series, vol. 1155 (Vienna: United Nations, 2005).
[741] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 490; US Initial Written Submission, paras. 100-101.
[742] US Initial Written Submission, para. 108.
[743] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 51.

Thus, Guatemala argued that there was a causal relationship between the breach of the social obligation and the impact on trade and that the burden of proof rested on the Complaining Party.[744] Furthermore, Guatemala challenged the interpretation of CAFTA-DR relying on WTO case law and the GATT and GATS Articles, arguing that there was "no basis for an expansive interpretation of affecting trade in Article 16.2.1(a)."[745] Consequently, the US interpretations were erroneous because they did not take into account the relationship between "in a manner affecting trade" and "a sustained or recurring course of action or inaction."[746] By virtue of this relationship, a decisive element in assessing the existence of the violation was the State's intention to affect trade between the Parties by violating social obligations. [747]

Concerning the phrase "between the Parties," the United States considered that it meant "within and among the CAFTA-DR Parties,"[748] adding – in the Rebuttal Submission – that the correct interpretation was that "trade must be affected between any of the CAFTA-DR Parties, which would necessary include at least two Parties."[749] Guatemala countered this interpretation by stating that, in the absence of a definition of "Parties," this term "must be understood as referring to all of the States that are Party to the CAFTA-DR, and that therefore a course of action or inaction must have an effect on FTA trade as a whole and not simply on trade flows between two Parties."[750] Moreover

[744] Guatemala Initial Written Submission, paras. 137, 458.
[745] Ibid., para. 458.
[746] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 52; Guatemala Initial Written Submission, para. 461.
[747] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 52; Guatemala Initial Written Submission, para. 461.
[748] US Initial Written Submission, para. 103.
[749] US Rebuttal Submission, para. 68.
[750] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 64.

Guatemala affirmed that the term "between the Parties" referred to all the CAFTA-DR Parties and not to just two Parties as suggested by the US.[751]

As to the burden of proof, the United States argued that it could be satisfied by proving a) the commercial relationship between the Parties and b) even a potential change in the conditions of competition resulting from the non-application of Labour Law. [752] In addition, the United States argued the impossibility and unreasonableness of proving the actual commercial effects resulting from the complaining Party's inability to access the Guatemalan companies' internal books and records. According to the US, even if it were possible to identify a reduction in the price of a good, it would be impossible to prove that it was due to the non-enforcement of Guatemalan Labour Laws.[753]

According to Guatemala, the burden of proof had to include the intentionality of the Labour Law violation, the causal link, and the actual change in internationally traded prices and quantities.[754] Furthermore, Guatemala denied the necessity for proof of access to the internal accounting books of Guatemalan companies as inconclusive,[755] arguing that studies or investigations of the US importing companies were sufficient.[756]

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[751] Guatemala Rebuttal Submission, para. 123.
[752] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 53; US Responses to the Panel's Questions Following the Hearing, 2015, 23.
[753] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 53; US Responses to the Panel's Questions Following the Hearing, 29.
[754] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 53; Guatemala Final Submission, 2016, paras. 54-66.
[755] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 53; Guatemala Final Submission, para. 64.
[756] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 492.

2.6. "In a Manner Affecting Trade Between the Parties": Arbitral Panel's Analysis

In defining the meaning and the burden of proof related to the phrase "in a manner affecting trade between the Parties," the Panel started by identifying the non-controversial elements. Indeed, the Panel concurred with the Parties on the two definitions of "manner" and "trade" and pointed out that the central concept is the phrase "affecting trade."[757] On the latter, the Parties defined "affecting" as "influencing or making a material impression upon that which is affected."[758] However, the Parties inferred different consequences of an action or inaction "affecting trade":

> One disputing Party contends that a course of action or inaction is "in a manner affecting trade" if it modifies conditions of competition, while the other contends that it is "in a manner affecting trade" only if it causes a change in prices of or trade flows in particular goods or services. [759]

To give an unambiguous meaning to the concept of "affecting trade," the Panel used the rules of interpretation provided for in Articles 31, 32 and 33 of the Vienna Convention.[760] Specifically, the Panel primarily adopted a literal interpretation giving the words their ordinary meaning, then a systematic interpretation clarifying the obligation in relation to the context, and finally a teleological interpretation explaining the obligation in relation to the purpose of the treaty.[761]

According to the literal interpretation, "affect" meant "to influence or make a material impression upon some aspect of trade, that is, upon the cross-border exchange of goods and services."[762] Consequently, an interpretation of Article 16.2.1(a) of the

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[757] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 54.
[758] Ibid.
[759] Ibid.
[760] "Vienna Convention on the Law of Treaties (with Annex). Concluded at Vienna on 23 May 1969," in *United Nations Treaty Series*, vol. 1155 (New York: United Nations, 1981), 331–514.
[761] Article 31.1, Vienna Convention on the Law of Treaties.
[762] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 55.

CAFTA-DR that made the non-implementation of labour standards a violation of treaty obligations could not be accepted, as this would be inconsistent with the legal text.[763] The scope of the obligation to effectively enforce Labour Law was limited by the phrase "in a manner affecting trade;" this limitation could be understood by applying a systematic and teleological interpretation.

According to the systematic interpretation, the first relevant provision was the "declaration of common commitment" at the beginning of Chapter 16.[764] Here, the Parties undertook to implement internationally recognised labour rights. This provision was followed by Articles shaping and concretising the commitment (Articles 16.2-16.5).

The Panel added that from a teleological viewpoint, the relevant objectives for the obligation were "to strive to ensure […] labor principles and the internationally recognized labor rights […]," [765] to "enforce basic worker rights," to "build on their respective international commitments in labor matters," [766] and to "promote conditions of fair competition in the free trade area." [767] Without a solid argument,[768] the Panel considered the latter to be the most appropriate objective of Article 16.2.1(a) because only failures that threaten the free trade area are relevant to the treaty.[769]

According to the panel, there has been a violation of the objective of protecting fair competition and the free trade area when one or more companies have gained a competitive advantage over other companies by not respecting labour standards. Moreover, this advantage should motivate complying companies to stop respecting labour

[763] Ibid.
[764] Ibid.
[765] Article 16.1.1, CAFTA-DR.
[766] Preamble, CAFTA-DR.
[767] Article 1.2.1(a), CAFTA-DR.
[768] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 492.
[769] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 56.

standards, thereby eroding the system of labour protection.[770] Consequently, in the case of a 'race to the bottom,'[771] no appreciable effect on trade flows or market shares could be inferred, apart from reduced wages and less favourable working conditions for all workers involved.[772] Therefore, the Panel rejected Guatemala's interpretation as too restrictive, as it did not include the effects on working conditions and wages within the scope of Article 16.2.1(a).[773] For the same reason, the Panel rejected Guatemala's proposed interpretation of the phrase "between the Parties" as referring only to the totality of the Parties to CAFTA-DR (i.e. all Central American States, the Dominican Republic and the United States).[774]

After rejecting Guatemala's restrictive interpretation, the Panel also partially rejected the US interpretation. Regarding the notion of "affecting trade," the Panel agreed that the phrase had a broad sense, but considered that reference to WTO case law and the GATT and GATS Articles was not appropriate because the term assumed a different meaning in those contexts:

> As the Appellate Body explained in its US - Tax Treatment for "Foreign Sales Corporations" - Recourse to Article 21.5 of the DSU Report, in GATT 1994 Article III:4, the word "affecting" "serves to define the scope of application of Article III:4." It "assists in defining the types of measure that must conform to the obligation not to accord 'less favourable treatment' to like imported products, which is set out in Article III:4."131 Likewise, "[t]he word 'affecting' serves a similar

[770] Ibid., 56–57.
[771] Concerning the debate on the impact of globalisation on labour, the "race to the bottom" and the "race to the top" see: Werner Sengenberger, *Globalization and Social Progress: The Role and Impact of International Labour Standards* (Bonn: Friedrich Ebert Stiftung, 2005); Kucera, "The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the 'Conventional Wisdom';" Kevin Banks, "Globalization and Labour Standards: A Second Look at the Evidence," in *Globalization and the Future of Labour Law*, ed. John D. R. Craig and S. Michael Lynk (Cambridge: Cambridge University Press, 2006); Langille, "Imagining Post 'Geneva Consensus' Labor Law for Post 'Washington Consensus' Development."
[772] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 493.
[773] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 58.
[774] Ibid., 66.

> function in Article I:1 of the [GATS], where it also defines the types of measure that are subject to the disciplines set forth elsewhere in the GATS but does not, in itself, impose any obligation."[775]

Namgoong pointed out that in Article 16.2.1(a) of CAFTA-DR the term "affecting" was part of the obligation because the type of measure covered by the Article was "Labour Law."[776] In other words, "affecting trade" was one "prong of the obligation to which such measures [were] subject;"[777] namely, an obligation to: a) not to fail to effectively enforce those measures, b) through sustained or recurring course of action or inaction, c) in a manner affecting trade between the Parties, d) after the date of entry into force of the Treaty.[778]

The panel noted that the function of the term "affect" in the GATT and GATS articles as compared to the CAFTA-DR was different. In the case of the GATT and GATS, the analysis was theoretical and focused on whether the conduct could adversely change the conditions of competition. In contrast, in CAFTA-DR the analysis was factual and focused on whether the conduct was actually detrimental to trade. Therefore, recognising the potential breadth of the term "affect" – as in the GATT and GATS article – would have been misleading.[779]

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[775] Ibid., 60.
[776] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 493; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 60.
[777] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 60.
[778] Ibid.
[779] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR"; WTO Panel, "India – Measures Affecting the Automotive Sector," *Report WT/DS146/R, WT/DS175/R*, 2002; WTO Appellate Body, "US – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Article 21.5 of the DSU by the European Communities"; WTO Panel, "Canada –Measures Affecting the Automotive IndustrY," *Report WT/DS139/R, WT/DS142/R*, 2000; WTO Panel, "China –Measures Affecting Imports of Automobile Parts," *Report WT/DS339/R, WT/DS340/R, WT/DS342/R*, 2009.

The Panel's conclusion on the meaning of "affecting trade" was a mediation between the Guatemalan and U.S. positions. Indeed, the Panel held that the non-enforcement of Labour Law affected trade when it conferred a competitive advantage on one or more employers engaged in trade between the Parties, regardless of the weight or importance of that employer within its particular economic sector.[780] However, an impact on trade could not be presumed as a result of every failure to enforce Labour Law, since the specific effects caused by the competitive advantage had to be demonstrated.[781]

After ascertaining the meaning of "affecting trade," the Panel determined the content of the burden of proof by stating that the Complaining Party must:

> (1) prove that the enterprise or enterprises in question export(s) to CAFTA-DR Parties in competitive markets or compete with imports from CAFTA-DR Parties; (2) identify the effects of a failure to enforce; and (3) demonstrate that these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.[782]

Furthermore, the Panel argued that a comparative advantage did not necessarily result from every failure in the effective enforcement of Labour Law, for instance when the violation affected a limited number of workers for a limited period of time without affecting trade.[783] The arbitrators determined that competitive advantage could be presumed from the demonstration of the consequences of the Labour Laws violations and/or from the totality of the circumstances without the need to prove the costs or the extent of the advantage.[784]

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[780] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 62.
[781] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 493-94.
[782] Ibid.; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 63.
[783] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 63.
[784] Ibid.; Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 47-48.

2.7. Relationship Between Letter (a) and (b) of Article 16.2.1 and Temporal Issues

The last two interpretative issues concerned the relationship between letters (a) and (b) of Article 16.2, paragraph 1 and the temporal validity of evidences. These were relatively minor issues.

The relationship between sub-paragraphs (a) and (b) of Article 16.2.1 was relevant for the allocation of the burden of proof between the Parties. The crucial question concerned whether subparagraph (b) should be read as a limitation of the obligation in subparagraph (a) or whether it should be read as a justification of that obligation.[785]

In Guatemala's submission, subparagraph (b) constituted a limitation of the obligation established because there was an explicit reference to subparagraph (a) in the text of subparagraph (b). Guatemala inferred from this reference that the Claimant was required to "establish that the exercise of discretion was unreasonable or that a decision regarding the allocation of resources was improper."[786]

Countering this argument, the United States argued that subparagraph (b) provided the Respondent Party with a justification: the Respondent Party had to invoke subparagraph (b) as a defence to a *prima facie* showing that it has acted contrary to its obligation under subparagraph (a).[787]

Relying on a literal and functional interpretation, the Panel rejected the Guatemalan position stating that subparagraph (b) served as a possible justification for a conduct

[785] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 67.
[786] Ibid., 66–67; Guatemala Initial Written Submission, para. 143; Guatemala Responses to the Panel's Questions Following the Hearing, 2015, para. 2 and 4.
[787] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 67; US Responses to the Panel's Questions Following the Hearing, para. 67.

otherwise unlawful under subparagraph (a).[788] The Arbitrators reasoned that there was no legal basis to justify the imposition of the burden of proof on the Complaining Party as it would be an unreasonable burden, violating the principles of good faith and proof-proximity.[789]

The temporal issue on the admissibility of evidences concluded the Panel's framework analysis. The Panel observed that in a significant number of cases the events referred to by the US in support of its claims occurred after 9 August 2011, the date on which the US had requested Guatemala to establish an arbitral Panel.[790] There is a general principle in international law that prohibits a dispute resolution body from basing its decision on facts and evidences generated after the date of formal notice. However, this principle is tempered by the principle of continuity of breach of an obligation.[791] The latter is enunciated in the long-standing case law of the Appellate Body of the WTO and in Article 14, paragraph 2 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts that states that a breach "having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."[792]

Therefore, the Panel concluded that to determine whether the United States had established a violation of Guatemala's obligation under Article 16.2.1(a) of the CAFTA-DR, it would only examine evidence of conduct occurring on or before the date of the US

[788] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," para. 68.
[789] Ibid., para. 69.
[790] Ibid.
[791] Ibid., 70.
[792] Ibid., 70 and 71; Appellate Body, "European Communities – Selected Customs Matters," *Report WT/DS315/AB/R*, no. 13 November (2006): para. 188.

request to the Panel.[793] However, the arbitrators stipulated that they would also examine evidence of conduct subsequent to the US request to determine whether the existing unlawful conduct was continuing.[794]

2.8. Arbitral Panel Conclusions

The Panel found that several labour rights violations occurred in Guatemala. However, these violations were not considered sufficient to integrate the "affecting trade" clause. Therefore, the Panel held that the US (the Complaining Party) had not satisfied its burden of proof.[795]

In their Submissions, the US argued that Guatemala failed, through sustained and recurring action or inaction (a) to ensure compliance with court orders, (b) to conduct adequate inspections and impose sanctions.[796]

Regarding non-compliance with court orders, the US maintained that Guatemala neither enforced reinstatement and compensation decisions for employees unlawfully dismissed for joining a union, nor enforced fines imposed on employers.[797] To support this claim, the US introduced testimonial and documentary evidences regarding eight employers: Industria de Representaciones de Transporte Maritimo (ITM), Negocios

[793] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," para. 71.
[794] Ibid.
[795] Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 47.
[796] US Initial Written Submission, para. 17; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 60.
[797] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 494.

Poruatrios S.A. (NEPORSA), Operaciones Diversas (ODIVESA), Representaciones de Transporte Maritimo, S.A (RTM), Fribo, Alianza, Avandia and Solesa.[798]

The Panel found the evidence insufficient and affirmed that the US failed to prove that the companies' cost reductions resulting from the violation of Guatemalan Labour Law were passed on to their exporting customers to an extent sufficient to constitute a competitive advantage.[799] However, the Panel recognised that the violations of labour rights occurred in the Avandia case fulfilled the requirements of CAFTA-DR. Indeed, the company dismissed union members and trade unionists, thus ending strikes and blocking collective bargaining. The Panel concluded that the Avandia case fulfilled the burden of proof through presumptive reasoning. Indeed, the arbitrators ruled that if the violation of trade union rights undermined the collective bargaining mechanism, it must be presumed that a competitive advantage has been granted without requiring proof for each component of the clause "affecting trade." Hence, in the Avandia case, the Panel mitigated the burden of proof.[800]

Having deprived all other cases except Avandia of probative value, the Panel concluded that the burden of proof was not satisfied because the element of sustained or recurring action or inaction was missing.[801]

Regarding the inadequacy of inspections and sanctions, the US complained of minimum wage violations, mistreatment, and infringements of agricultural and industrial health and safety standards in Guatemala. These allegations concerned (i) inspections of

[798] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 98.
[799] Ibid., 155–56.
[800] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 494-95.
[801] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 169.

Las Delicias and other coffee companies; (ii) a response to a Ministry of Labour decision that certain coffee companies were not paying the minimum wage; (iii) inspections of clothing manufacturer Koa Modas; (iv) a response to findings of violations found during September 2007 inspections of clothing manufacturer Fribo; and (v) a response to findings of violations found during July 2009 inspections of clothing manufacturer Fribo.[802] As evidence, the US submitted redacted and anonymised declarations of union members and trade unionists.[803] According to Guatemala, these evidences undermined the cross-examination principle and therefore they were inadmissible.[804] However, the Panel rejected Guatemala's claim and admitted the US redacted declarations stating that CAFTA-DR did not provide for the principle of cross-examination.[805] The redacted declarations were treated with particular caution because they limited the investigation.[806]

While admitting the redacted Statements and finding that infringements occurred,[807] the Panel found the evidence incapable of demonstrating the continuity and affection of trade. Similarly to the Avandia case, the Panel found that the violations carried out by the Fribo company fulfilled the requirements of CAFTA-DR. This apparel company obstructed labour inspections in September 2007 in violation of the Labour Code (another inspection took place in 2009 with no serious violations).[808] Despite the blatant violation, the inspectorate did not impose sanctions or other follow-up action.[809] Based on

[802] Ibid., 199.
[803] US Responses to the Panel's Questions Following the Hearing, para. 14; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 79.
[804] Guatemala Initial Written Submission, paras. 171, 177, 178; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 80.
[805] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 82.
[806] Ibid., 83.
[807] Ibid., 199–200.
[808] Ibid., 192–95.
[809] Ibid., 196–98.

presumptive reasoning, the Panel found that Fribo case integrated the treaty requirements.[810]

The Panel concluded that the US proved the existence of violations but failed to prove the requirement of a sustained and recurring violation of Labour Law and the impairment of international trade.[811]

2.9. Preliminary Remarks on the US v. Guatemala case

The Panel decision is not entirely convincing as it has three weaknesses: (a) the interpretation of the clause "in a manner affecting the trade between the Parties" does not support the imposition of a condition of actual trade effect, (b) the object and purpose of the CAFTA-DR do not support the imposition of a condition of "actual" trade effect, and (c) the application of the "trade link" requirement remains ambivalent.[812]

(a) The first weakness concerns the lack of justification for the interpretation that "in a manner affecting the trade between the Parties" requires an actual trade effect on the enterprises involved. As a matter of fact, the phrase "in a manner affecting trade" "neither specifies that the effects (of the failure to effectively enforce Labour Laws) should have actually materialised nor refers to an effect on any individual employer."[813] The Panel justifies the inclusion of the requirement of the existence of actual effects on one or more employers by adopting a literal interpretation of the term "affecting" as "having an effect on" or "making a difference to" without giving relevance to other

[810] Ibid., 198–99.
[811] Ibid., 200.
[812] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact," 14–17.
[813] Ibid., 14.

contextual elements.[814] However, this interpretation does not justify reading "affecting" as "having had actual effects on an individual employer."[815]

The undervaluation of contextual elements and the importance given to the literal meaning of the term "affecting" is evident when the Panel refers to Articles 29 and 36 of the NAALC.[816] The Panel States that if the Parties had wanted to emphasise contextual elements not related to trade they would have written it, as in the case of the NAALC.[817] Thus, the Panel does not valorise the efforts made in the US framework to make the clauses more effective, in particular it does not give sufficient emphasis to the May 10th Compromise in which the US had effectively improved the legal framework.[818] Even ignoring the historical evolution, the Panel could still have adopted a teleological interpretation and acknowledged the Parties' effort to impose an effective obligation to enforce their Labour Laws. Such an approach could have found a theoretical foothold in the May 10th Compromise (see previous Chapter). Furthermore, there were no particular legal limits to a teleological approach, which is also provided for in the Vienna Convention referred to by the Panel.[819] Suffice it to say that the Panel of Experts on the EU-Republic of Korea dispute adopted this interpretation by stating:

> The Panel's examination […] based on the ordinary meaning of the terms, read in context and in light of the object and purpose of Chapter 13 […] reveals that an interpretation which suggests that its terms are limited to trade-related aspects of labour cannot be sustained.[820]

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[814] Ibid.
[815] Ibid.
[816] Ibid.
[817] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 55.
[818] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact," 14.
[819] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 35, 54.
[820] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 2021, 18.

Concerning the meaning that could be attributed to the phrase "in a manner affecting trade," reference should be made to footnotes 11 and 12 to Article 23.5.1 of the labour Chapter of the USMCA:

> 11. For greater certainty, a 'course of action or inaction' is 'in a manner affecting trade or investment between the Parties' if the course involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.[821]
> 12. [f]or purposes of dispute settlement, a Panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise. [822]

Although this is a later text, the decision to introduce these two footnotes is clearly linked to the need to prevent that in the event of a new dispute a Panel could find itself deciding, as was the case in Guatemala, against a broad interpretation of the term.

(b) The second weakness concerns the fact that the object and purpose of the CAFTA-DR do not support the imposition of a condition of 'actual' trade effect.[823] The Arbitral Panel affirmed that CAFTA-DR objectives are: "the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) […] to strive to ensure […] such labor principles and the internationally recognized labor rights […],"[824] the commitment to "enforce basic worker rights," and to "build on their respective international commitments in labor matters,"[825] and to "promote conditions of fair competition in the free trade area."[826] According to the Panel, these objectives serve to understand the meaning of the phrase "in a manner affecting trade." However, none of

[821] Footnote 11, Article 23.5.1, USMCA.
[822] Footnote 12, Article 23.5.1, USMCA.
[823] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact," 14–17.
[824] Article 16.1.1, CAFTA-DR.
[825] Preamble, CAFTA-DR.
[826] Article 1.2.1(a), CAFTA-DR.

them seem to support the interpretation of "in a manner affecting trade" as requiring "actual trade effects" or that a competitive advantage was actually conferred on an employer.[827]

The Panel's position is mediated between that of the US and Guatemala, but in this sense not satisfactory in terms of argumentation. A more accurate interpretation would have been one that recognised as sufficient the lack of effective enforcement of Labour Laws, which has the potential to change the conditions of competition in the free trade area.[828] Although the Panel does not provide for an econometric evaluation as requested by Guatemala, the choice to require a demonstration of "actual effects" makes the evidentiary burden too heavy to be fulfilled.[829] The justification given for this choice is the rejection of the relevance of the broad interpretation of "affecting" given in the context of Article III:4 of the GATT and Article I:1 of the GATS. According to the arbitrators, the term "affecting" in the GATT allows the scope of the national treatment obligation to be circumvented, whereas in the GATS it is used in a phrase that constitutes an essential part of the obligation itself.[830] The loophole in the reasoning lies in the fact that the Panel does not explain why the allegedly different function justifies a different interpretation of the same sentence.[831] Pushing the Panel's reasoning to the extreme, one would have to conclude that "a broad interpretation is appropriate when it comes to the 'scope of

[827] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact," 14.
[828] Ibid., 15.
[829] Ibid.
[830] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 493; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 60.
[831] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact," 16.

application' of an obligation, while it [is] not [..] appropriate with regard to an essential part of the obligation itself."[832]

A further problematic aspect of the reasoning related to the object and purpose of the CAFTA-DR concerns the implication of interpreting the expression "affecting trade" on the basis of the CAFTA-DR's objective of promoting fair conditions of competition in the free trade area, in the sense of "affecting the conditions of competition in international trade." This reasoning suggests, without providing grounds, that failures in the effective application of Labour Law that have an "actual impact" and those that have a "potential impact" on trade should be treated differently. Thus, failures with an "actual impact" would be included in the notion of "impact" and would be sanctioned, while those with a "potential impact" would be excluded and not sanctioned. This result is incoherent and detrimental to the objective of protecting and promoting fair competition conditions in the free trade area, because it does not sanction potential distortions that may affect future rather than existing flows.[833]

The final issue regarding the object and purpose of the treaty concerns the requirement to have real effects on specific employers. This requirement is not in line with the primary objective of Article 16.2.1(a) to "protect, enhance, and enforce basic workers' rights."[834] Moreover, there is no textual basis in the CAFTA-DR to justify the requirement to have actual effects on specific employers. Consequently, the Panel opts for a particularly restrictive interpretation. This view is consistent with the arbitrators' understanding of the notion of "affecting trade" as encompassing only violations with

[832] Ibid.
[833] Ibid.
[834] Preamble, CAFTA-DR.

actual and not potential effects on trade, but contrasts with the teleological interpretation of the CAFTA-DR.[835]

(c) The third weakness concerns the ambivalence of the application of the "trade link" requirement.[836] The issue emerges during the phase of analysis of the evidence. At this stage, the Panel is forced to soften its interpretation of 'affecting' when confronted with the Avandia and Fribo cases. Indeed, the Panel admits that:

> There may nonetheless be circumstances in which the consequences of a failure to remedy serious violations would be so evident on the face of the failure that further proof would not be necessary, and a Panel could conclude that the failure was in a manner affecting trade.[837]

This softening of the burden of proof facilitates a claim based on the non-application of Labour Laws and occurred in the case of Avandia and Fribo (for the 2007 inspections), two apparel companies whose violations were indeed "affecting trade."[838] However, the main problem with this softening is the opacity of its consequences on the burden of proof. The Panel does not clarify whether the softening *de facto* transforms the required "actual" effect test into a "potential" effect test for purposes of a claim under Article 16.2(1)(a) of the CAFTA-DR.[839] If this were the case, theoretical argumentative framework would be deeply flawed. Thus, the Panel's position is ambivalent in nature.[840]

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[835] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact," 16.
[836] Ibid., 14–17.
[837] CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 162.
[838] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact," 17.
[839] Ibid., 18.
[840] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 495; Ortino, "Trade and Labour Linkages and the US-Guatemala Panel Report. Critical Assessment and Future Impact," 17-18; Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement," 50-51.

3. European Union v. Republic of Korea

The second case study concerns the international arbitration between the EU and the Republic of Korea concerning the latter's alleged violation of the social obligation established in Article 13.4.3 of the EU-Republic of Korea FTA.

The EU filed the Initial Written Submission on 20 January 2020.[841] This submission outlined the dispute and introduced all the key arguments. In its submission, the EU affirmed that the provisions of the Trade Union and Labour Relations Adjustment Act (TULRAA)[842] adopted by the Asian State were incompatible with Article 13.4.3 of the EU-Republic of Korea FTA since they beached the freedom of association and the right to collective bargaining.[843] Article 13.4.3 of the EU-Republic of Korea FTA establishes:

> 3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.
>
> The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified, respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions and the other Conventions classified as 'up-to-date' by the ILO.

According to the EU submission, the Republic of Korea failed to respect, promote and realise the principle of freedom of association and the right to collective bargaining in its legislation, especially concerning:

[841] First Written Submission by the European Union, 2020.
[842] Act No. 5310 of the 13 March 1997 as successively amended.
[843] First Written Submission by the European Union, 1.

1) Article 2 paragraph 1 of the Korean Trade Union Act defining a "worker" as a person who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job. This definition, as interpreted by the Korean courts, excludes some categories of self-employed persons such as heavy goods vehicle drivers, as well as dismissed and unemployed persons from the scope of the freedom of association.
2) Article 2 paragraph 4 d) of the Korean Trade Union Act stating that an organisation shall not be considered as a trade union in cases where persons who do not fall under the definition of "worker" are allowed to join the organisation.
3) Article 23 paragraph 1 of the Korean Trade Union Act stating that trade union officials may only be elected from among the members of the trade union.
4) Article 12 paragraphs 1 to 3 of the Korean Trade Union Act, in connection with Article 2 paragraph 4 and Article 10, providing for a discretionary certification procedure for the establishment of trade unions.[844]

Furthermore, the EU maintained that the Republic of Korea breached its obligation to make "continued and sustained efforts towards ratifying the fundamental ILO conventions." Effectively, the Asian state had so far only ratified one of the eight ILO CLS Conventions.

Faced with these allegations, the panel drafted a report divided into jurisdictional and substantive issues. This structure allowed the Experts to settle the dispute by interpreting the content, scope and legal commands set forth in Article 13.4.3, first sentence and last sentence, of the EU-Republic of Korea FTA.[845]

Responding to the preliminary question, the Experts affirmed their jurisdiction over the matter. Subsequently, the Experts examined the substantive issues, stating that all the provisions challenged by the EU were contrary to the freedom of association and the right to collective bargaining, as interpreted by the ILO.[846] Moreover, the Panel recommended that the Republic of Korea "bring the TULRAA into conformity with the principles of

[844] European Union, "Request for the Establishment of a Panel of Experts by the European Union" (Brussels, 2019), 1, https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf.
[845] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 2-3.
[846] Ibid., 78–79.

freedom of association."[847] Regarding the obligation to "make continued and sustained efforts towards ratifying the fundamental ILO Conventions [..]," the Panel recognised the efforts of the Asian State and did not hold it responsible for the violation of this last sentence of Article 13.4.3.[848]

Although the Panel recognised the Republic of Korea's liability for violating its obligations under the social clause of the FTA, it did not impose any sanctions because it was precluded from doing so. This preclusion was severely detrimental to the enforceability of the conclusions reached by the Panel of Experts and represented a significant difference compared to the powers of the Arbitral Panel in US v. Guatemala.

The following subsections summarise the historical context of the dispute and analyse the reasoning and interpretation followed by the Panel of Experts.

3.1. Procedural Background and the Panel's Interpretative Framework

On 6 October 2010, the EU and the Republic of Korea signed a free Trade Agreement (mixed Agreement), which has been provisionally applied since 1 July 2011 and entered into force on 13 December 2015 after the conclusion of the ratification procedure by the EU Member States.[849]

The EU-Republic of Korea FTA established sustainable development as the cornerstone of its principles.[850] Therefore, the FTA provided for a dedicated Chapter on Trade and Sustainable Development (TSD Chapter)[851] and a system of permanent

[847] Ibid., 79.
[848] Ibid.
[849] Notice Concerning the Provisional Application of the Free Trade Agreement between the European Union and Its Member States, of One Part, and the Republic of Korea, of the Other Part. *OJ L 168/1, 2011*; Notice Concerning the Entry into Force of the Free Trade Agreement between the European Union and Its Member States, of One Part, and the Republic of Korea, of the Other Part. *OJ L 307/1, 2015*.
[850] Article 1(g), EU-Republic of Korea FTA.
[851] Chapter 13, Trade and Sustainable Development, EU-Republic of Korea FTA.

dialogue to involving the treaty Parties and civil society.[852] Among the core provisions enshrined in the TSD Chapter there is Article 13.4.3 where the Parties committed to respect, promote and realise, in its law and practice, the principles concerning the fundamental rights as established by the 1998 ILO Declaration.[853] These principles include the trade union rights that the Republic of Korea intended to implement through the TULRAA.

The EU considered that some Articles of the TULRAA were incompatible with the freedom of association and the right to collective bargaining as established in the ILO legislation and practice due to the substantial limitations imposed.[854] According to the EU, there were essentially three grounds for incompatibility: the very restrictive notion of worker adopted, the discretion provided for public authorities to recognise a trade union, and the limits on the freedom of selection of trade union representatives.[855] Furthermore, the EU considered that the Republic of Korea had not made sufficient efforts to ratify Convention No. 87, Convention No. 98, Convention No. 29 and Convention No. 105.[856]

As provided for by Article 13.14(1) of the EU-Republic of Kore FTA, on 17 December 2018, the EU requested consultations with the Republic of Korea regarding

[852] See for reference: Trade and Sustainable Development Committee, "Joint Statement of the 4th Meeting of the Committee on Trade and Sustainable Development under the EU-Korea FTA;" Trade and Sustainable Development Committee, "Minutes of the 5th Meeting of the Committee on Trade and Sustainable Development under the EU-Korea FTA," 2017; Trade and Sustainable Development Committee, "Summary of Discussions of the 6th Committee on Trade and Sustainable Development under the EU-Korea FTA."
[853] The EU-Republic of Korea FTA recalls the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its sequels. However, due to the construction of the legal obligation, it is impossible for the amendment to the Declaration adopted in 2022 to be relevant, so occupational health and safety cannot be included in the TSD Chapter of the FTA. Furthermore, there is no dynamic reference and, thus, no automatic adaptation to changes in the reference text. Indeed, after referring to the 1998 Declaration, the provision States the principles for reference.
[854] First Written Submission by the European Union, para. 4.
[855] Ibid.
[856] Ibid., para. 5.

inter alia the provisions of the TULRAA and the insufficient efforts to ratify the ILO fundamental Conventions.[857] On 21 January 2019, the EU and Korea unsuccessfully met in Seoul to find a mutually satisfactory solution to the issue.[858] Therefore, on 4 July 2019 the EU sent a formal request for the establishment of a Panel of Experts to deal with the Labour Law issues. [859] This letter had the dual purpose of notifying the Republic of Korea and defining the scope of the dispute.

The Panel was formally established on 30 December 2019.[860] On 20 January 2020, the EU presented its First Written Submission under Rule 7 of the Rules of Procedure, and, on 14 February 2020, the Republic of Korea submitted its First Written Submission in response to the EU.[861]

With the outbreak of the Covid-19 pandemic, the work of the Panel of Experts stalled.[862] The proceedings were further prolonged due to the need to substitute the Panel Chairperson, who unfortunately passed away. [863]

Panel hearings were held on 8 and 9 October 2020, during which witnesses were examined and the Parties presented several exhibits.[864] After the hearings, both Parties provided their answers to oral questions and the consolidated Report.[865] In mid-November

[857] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 5; First Written Submission by the European Union, para. 6; European Commission, "EU-Korea dispute settlement over workers' rights in Korea enters next stage," News archive, 2018, https://policy.trade.ec.europa.eu/news/eu-korea-dispute-settlement-over-workers-rights-korea-enters-next-stage-2019-12-19_en.
[858] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 5.
[859] Ibid., 1; European Commission, "EU Moves Ahead with Dispute Settlement over Workers' Rights in Republic of Korea," News archive, 2019, https://policy.trade.ec.europa.eu/news/eu-moves-ahead-dispute-settlement-over-workers-rights-republic-korea-2019-07-05_en.
[860] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 6.
[861] Ibid., 7; European Commission, "Procedural Information Related to EU-Korea Dispute Settlement on Labour" (Brussels, 2019), https://trade.ec.europa.eu/doclib/docs/2019/december/tradoc_158534.pdf.
[862] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 6–10.
[863] Ibid., 7–8.
[864] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 10-12.
[865] Oral Statement by the European Union, 2020.

2020, the Republic of Korea submitted an action plan to amend its legislation that was admitted by the Panel as evidence.[866]

As in US v. Guatemala, the Panel defined its scope of jurisdiction and its interpretive approach.[867] Concerning jurisdiction, the Experts emphasised that the Panel was constituted under Article 13.15 of EU-Republic of Korea FTA and operated *in lieu* of the international arbitration procedures under Chapter 14 of the EU-Republic of Korea FTA. Thus, the Panel's jurisdiction was limited to the interpretation of Chapter 13, and it can only conclude with recommendations.[868]

Concerning the interpretation, the Experts stated that they would apply the general rules of interpretation outlined in Articles 31 and 32 of the Vienna Convention.[869] The Experts pointed out that the prevailing view in the doctrine concerning Article 31 of the Vienna Convention requires "a holistic approach based on examining the ordinary meaning of the terms together with their context in light of the object and purpose of the treaty, all under the rubric of good faith."[870] It followed that the Panel had to adopt a

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[866] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 10-12.
[867] Ibid., 13.
[868] Ibid.
[869] Article 31 of the Vienna Convention on the Law of Treaties: "General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the Parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more Parties in connection with the conclusion of the treaty and accepted by the other Parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the Parties. 4. A special meaning shall be given to a term if it is established that the Parties so intended."
Article 32 of the Vienna Convention on the Law of Treaties: "Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."
[870] International Court of Justice, Judgment of 3 February, No. 83, Territorial Dispute (Libyan Arab Jamahiriya/Chad) (1994); WTO Appellate Body, "United States - Standards for Reformulated and

threefold line of interpretation – literal, systematic and teleological (general means of interpretation) – identifying the intention of the Parties as expressed in the text of the treaty.[871] According to Article 32 of the Vienna Convention, the Panel could only refer to other sources of interpretation, including preparatory works, to confirm the interpretation developed through the general means of interpretation.[872]

To influence the outcome of the interpretation process, the Republic of Korea submitted several documents containing the text of the FTA negotiating minutes. However, the Panel refused to admit the preparatory work because it was controversial among the Parties and chose to rely only on the general means of interpretation.[873]

3.2. Preliminary Issue: Jurisdiction

The first pitfall for the Panel of Experts was the sensitive issue of its jurisdiction over labour matters. The issue was important because it determined when an international body could intervene in the domestic law of a State Party to an international treaty.

In its letter of 4 July and its First Written Submission, the EU argued that four Articles of the TULRAA were incompatible with the first sentence of Article 13.4.3 of the EU-Republic of Korea FTA and that the Asian State had not made sufficient efforts

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Conventional Gasoline," *Report WT/DS2/AB/R*, 1996; WTO Panel, "United States-Sections 301-310 of the Trade Act of 1974," *Report WT/DS152/R*, 1999; WTO Appellate Body, "United States - Section 211 Omnibus Appropriations Act of 1998," *Report WT/DS176/R*, 2002; WTO Appellate Body, "United States - Countervailing Duties on Certain Corrosion -Resistant Carbon Steel Flat Products from Germany," *Report WT/DS231/AB/R*, 2002; "Case Concerning the Audit of Accounts between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1986," *Reports of International Arbitral Awards*, vol. XXV, 2004; WTO Appellate Body, "European Communities-Customs Classification of Frozen Boneless Chicken Cuts," *Report WT/DS269/AB/R, WT/DS286/AB/R*, 2005.

[871] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 14.

[872] Ibid., 15.

[873] Ibid.

to ratify the ILO CLS as required by the last sentence of Article 13.4.3 of the EU-Republic of Korea FTA.[874]

In responding to the EU's claims, the Republic of Korea argued that the Panel did not have jurisdiction: because the EU failed to determine the scope of the dispute;[875] because the EU's allegations were not trade-related while the Article that formed the basis of the dispute was limited to trade-related labour aspects; [876] and because the EU's purpose was to harmonise labour standards (contrary to Article 13.1.13)[877] and to use labour standards for protectionist purposes or to challenge comparative advantage (contrary to Article 13.2.2).[878] More specifically, the Korean understanding of "trade-related aspects of labour" was based on the *Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, in which the "Panel in essence took the view that the failure to comply or enforce Labour Laws does not necessarily and automatically result in trade diversions or distortions or affect trade flows."[879] This is a key element, as the Experts rejected the Korean interpretation, thus departing from the reading of the "affecting trade" clause in US v. Guatemala.

The EU rejected the Republic of Korea's arguments that the letter of formal notice was not in conformity with the Treaty and invalid for purposes of determining the scope of the dispute. Furthermore, the EU argued that the legal basis of its complaint, Article 13.4.3, was in no way subject to the "commercial effect test." Furthermore, the EU argued that Article 13.4.3 legitimised both its request for a Panel because it concerned issues

[874] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 1–2; First Written Submission by the European Union, paras. 4–5.
[875] First Written Submission by the Republic of Korea, 2020, para. 2.
[876] Ibid., para. 17.
[877] Ibid., 25.
[878] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 25.
[879] First Written Submission by the Republic of Korea, para. 22.

arising under the FTA and the jurisdiction of the Experts.[880] Concerning harmonisation, the EU responded that each Party was "free to choose its own level of protection in its domestic Labour Laws, regulations and standards."[881]

With regard to the Panel's decision on jurisdiction, the experts rejected the Republic of Korea's arguments through a literal, systematic and teleological interpretation of the first sentence of Article 13.4.3:[882]

> 3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation. […]

This sentence concerned the obligations of the EU Member States and the Republic of Korea deriving from their ILO membership. The Panel considered that the Parties to the FTA had intended to accept and reaffirm their obligations under the ILO Constitution and the 1998 ILO Declaration in full and in accordance with ILO interpretations.[883] Therefore, the EU and the Republic of Korea accepted that Article 13.4.3 incorporated the universal principles established by the ILO into the FTA,[884] going beyond the mere trade connection. Indeed, the Panel noted that:

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[880] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 17.
[881] Oral Statement by the European Union, para. 22.
[882] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 18.
[883] Ibid.
[884] The fundamental human right to freedom of association is recognised within the United Nations system. Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966.

> The Parties have drafted Article 13.4.3 in such a way as to exclude the possibility that this domestic commitment to achieve or work towards these key international labour principles and rights exists only in relation to trade-related aspects of labour.[885]
> Further, it [was] not legally possible for a Party to aim to ratify ILO Conventions only for a segment of their workers: the ILO [did] not permit ratification subject to reservations.[886] This fact [meant] that progress towards ratification, in its ordinary meaning, must extend to the full scope of the relevant international instruments. It [defied] the clear logic of Article 13.4.3 to State otherwise.[887]

From this analysis the Panel inferred that Article 13.4.3 was not limited to "trade-related labour," as suggested by the Republic of Korea. Moreover, the ethical framework within which the Parties placed their commercial partnership was that of the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, establishing that the economic and social factors are interrelated in the project of achieving "sustained economic growth and sustainable development of all nations, and a fully inclusive and equitable globalization."[888] According to Panel the ethical framework included several other international instruments, among them: the Charter of the United Nations and notably its Preamble, the Universal Declaration of Human Rights (UDHR) and the Agenda 21 on Environment and Development of 1992.[889] Fundamental to the teleological and systematic interpretation of Article 13.4.3 was

[885] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 19.
[886] On this matter, please consider that "International Labour Conventions are adopted and enter into force by a procedure which differs from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour Conventions intrinsically incapable of being ratified subject to any reservation." In "Memorandum by the International Labour Office on the Practice of Reservations to Multilateral Conventions to the International Court of Justice," *International Labour Organisation Official Bulletin*, vol. XXXIV, 1951.
[887] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 19.
[888] United Nations Economic and Social Council, "Ministerial Declaration on 'Creating an Environment at the National and International Levels Conducive to Generating Full and Productive Employment and Decent Work for All, and Its Impact on Sustainable Development,'" 2006; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 20.
[889] United Nations Charter, 1945; Universal Declaration of Human Rights; UN Conference on Environment and Development, "Agenda 21 on Environment and Development," 1992.

Agenda 21, which indicated the interconnection between the social and environmental dimension and economic development:

> For workers and their trade unions to play a full and informed role in support of sustainable development, Governments and employers should promote the rights of individual workers to freedom of association and the protection of the right to organize as laid down in the ILO Conventions. Governments should consider ratifying and implementing those Conventions, if they have not already done so.[890]

Regarding the limitation in Article 13.4.1, the Parties agreed to explicitly limit the subject matter of the Joint Cooperation Forum to "trade-related labour and employment issues." Conversely, the Parties did not intend to place any limitation on the content of Articles 13.4.2 and 13.4.3, so the Panel inferred that they did not intend to limit their commitments to "trade-related labour and employment issues."[891]

Concerning the Korean argument about harmonising labour standards and using the dispute for protectionist purposes, the Panel addresses the two issues separately.

The Panel first considers the question of harmonisation, rejects it and explains that:

> [t]he concept of harmonisation of labour standards suggests a bringing into alignment of actual standards such as minimum rates of pay, maximum hours of work, or access to job security procedures.[892] The fundamental principles and rights and core labour standards mentioned in Article 13.4.3 do not require harmonisation of domestic Labour Laws or outcomes.[893]

Moreover, the Panel recalled the ILO explanation of the contemporary relationship between trade and labour standards, affirming that the CLS established by the 1998 ILO Declaration were to be seen as "a pre-condition to the attainment of some of the

[890] Article 29.4 - Promoting Freedom of Association, Agenda 21.
[891] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 20-21.
[892] Jill Murray, *Transnational Labour Regulation: The ILO and EC Compared* (Den Haag: Kluwer Law International, 2001), 27.
[893] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 23.

aspirational goals enumerated in the multilateral declarations and Statements referred to by the Parties. Once the rules of the game are set, domestic Labour Law may then be set in accordance with local economic and social conditions, norms and cultures."[894]

From this consideration, the Panel draws a distinction between the rules of the game established by the ILO and the regime and practices of national labour law as a whole; this distinction is contained in the preamble and Chapter 13 of the EU-Republic of Korea FTA.[895] Indeed, Article 13.4.3 referred to fundamental labour rights while Article 13.3 granted Parties to set their level of labour protection. It followed that it belonged to national sovereignty to define the level of labour protection, which, however, must conform to the internationally established core of rights.[896] The EU's request for the Panel's establishment neither questioned national competence over Labour Law nor imposed harmonisation, but dealt with the rules of the game at a general level. [897]

The Panel considers the Korean claim about the use of labour standards for protectionist purposes and dismisses it arguing that Article 13.2.2 wording reflected that of the 1996 Singapore Ministerial Declaration,[898] "which accepted that the promotion of core ILO labour standards should not be construed as protectionism *per se*."[899] Furthermore, the Panel recalled the conclusions of an empirical study conducted in 1996 by the OECD according to which:

> Any fears that the application of these standards [the core labour standards and fundamental principles and rights referred to in Article 13.4.3] might influence the competitive positioning of these countries

[894] Ibid., 23–24; "The ILO, Standard Setting and Globalization," *Director General's Report to the International Labour Conference 85th Session* (Geneva, 1997).
[895] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 24.
[896] Ibid.
[897] Ibid.
[898] Singapore Ministerial Declaration.
[899] Emphasis in the original text. Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 25.

> in the context of [trade] liberalization are unfounded. On the contrary, they might even in the long term tend to strengthen the economic performance of all countries.[900]

In concluding its analysis, the Panel considered the relevance as an interpretative tool of the *Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* and the limitation of the trade and labour link. The Experts deprived the US v. Guatemala case of relevance on the grounds of a formal difference. Indeed, the US v. Guatemala dispute concerned Article 16.2.1(a) of the CAFTA-DR, which paralleled Article 13.7.1(a) of the EU-Republic of Korea FTA:

Article 16.2.1(a), CAFTA-DR	Article 13.7.1(a), EU-Republic of Korea FTA
"[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting the trade between the Parties, after the date of entry into force of this Agreement."	"(a) Party shall not fail to effectively enforce its environmental and Labour Laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties."

Table 14: Article 16.2.1(a), CAFTA-DR and Article 13.7.1(a), EU-Republic of Korea FTA

However, the Panel pointed out that the EU request referred neither to Article 13.7.1(a) nor to any failure to implement Korean domestic labour legislation. The Experts considered that the Korean interpretation of the phrase "in a manner affecting trade between the Parties" of the CAFTA-DR does not have the same meaning as the phrase "measures affecting trade-related aspects of labour" of Article 13.2.1 of the EU-Republic of Korea FTA.[901] Finally, the Panel underlined the importance of context. Although the disputed subjects in the Guatemala case and the Korea case were the same, the legal obligations under the two treaties and the legal framework were radically different.[902]

Regarding the limitation of the link between trade and labour, the Panel rejected the argument stating that: "the Parties have drafted the Agreement in such a way as to create

[900] Organization for Economic Cooperation and Development, "Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade" (Paris: OECD, 1996).
[901] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 26.
[902] Ibid.

a strong connection between the promotion and attainment of fundamental labour principles and rights and trade."[903] Moreover, the legal framework referenced in the FTA showed that "decent work is at the heart of their aspirations for trade and sustainable development […];"[904] hence, "national measures implementing [labour] rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA."[905]

Finally, the Panel concluded that its jurisdiction covered all labour-related issues and all submissions, arguments, answers to questions and exhibits filed by the Parties and the *amicus curiae* and all duly submitted.[906]

3.3. First Substantive Issue: The First Sentence of Article 13.4.3 of the EU-Republic of Korea FTA

Having established its jurisdiction, the Panel considered the substantive issues. The first issue related to the compliance of Articles 2.1, 2.4(d), 23.1, 12.1-12.3 of the TULRAA with the obligations of the first sentence of Article 13.4.3 of the EU-Republic of Korea FTA and particularly with the principle of freedom of association and the right to collective bargaining.[907] As a matter of fact, the EU claimed that:

> The EU considers that the restrictive definition and interpretation of the notion of "worker" operated by the measures identified under 1) and 2), as well as the requirement that trade union officials be elected from among trade union members stipulated by the measure identified under 3), are inconsistent with the above mentioned principles of freedom of association and, therefore, with Article 13.4 paragraph 3 of the EU-Korea FTA.
> The EU further considers that the discretion accorded by the measures identified under 4) to the administrative authorities when certifying trade unions is also inconsistent with the above mentioned principles of

[903] Ibid., 27.
[904] Ibid.
[905] Ibid.
[906] Ibid.
[907] Ibid., 28–29.

> freedom of association and, therefore, with Article 13.4 paragraph 3 of the EU-Korea FTA.[908]

In dealing with the EU claim, the Panel's starting point was the systematic analysis of the wording of the first sentence of Article 13.4.3 EU-Republic of Korea FTA:

> 3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining; […]

The Panel identified and analysed seven "legal units" in this sentence: 1) "in accordance with the obligations deriving from membership of the ILO;" 2) "the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up;" 3) "commit to;" 4) "respecting;" 5) "promoting;" 6) "realising;" 7) "the principles concerning the fundamental rights."

Following the Panel's reasoning, the following subsection analyses these seven "legal units," while the next deals with the application of the Panel's conclusions..

3.3.1. Analysis of the Seven Legal Units of the First Sentence of the Article 13.4.3 EU-Republic of Korea FTA

The first "legal unit" the Panel analysed was the phrase "the obligations deriving from membership of the ILO." According to the EU, this phrase obliged ILO membership to respect and apply the fundamental principles interpreted by ILO bodies, including freedom of association and the right to collective bargaining.[909] Regarding the correct interpretation of this principle, the EU maintained that reference should be made to the

[908] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 2.
[909] First Written Submission by the European Union, para. 13.

case law of the CFA.[910] The Republic of Korea disputed this view, stating that ILO Member States were only obliged to fulfil the obligations expressly set out in the ILO Constitution.[911]

The Panel established that the phrase "the obligations deriving from membership of the ILO" in the context of the first sentence of Article 13.4.3 legally bound the EU and the Republic of Korea to undertake to respect, promote and realise the principles of freedom of association and the right to collective bargaining as understood in the context of the ILO Constitution.[912] In other words, the EU and the Republic of Korea made the obligations arising from their participation in the ILO, as interpreted by the organisation, separate and independent obligations under Chapter 13 of the Agreement. [913]

The Panel analysed the obligations assumed by the Parties in connection with their membership of the ILO, noting that such membership entailed an obligation to adhere to the principles of freedom of association:[914]

> *Since the establishment of (the ILO's) Governing Body Committee on Freedom of Association in 1951, all ILO members have been obliged to observe the principles of freedom of association spelled out in Conventions 87 and 98. This obligation inheres in ILO members regardless of whether they have ratified the instruments concerned [Conventions 87 and 98]: it is an incident of membership, which implies subscription to the values proclaimed in the ILO Constitution. It will be instantly apparent that this is a highly unusual situation in international*

[910] Ibid., paras. 19–22.
[911] First Written Submission by the Republic of Korea, para. 48.
[912] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 30.
[913] Ibid.
[914] Hector G. Bartolomei de la Cruz, Geraldo Von Potobsky, and Lee Swepston, *The International Labour Organization: The International Standards System and Basic Human Rights* (Boulder: Westview Press, 1996); Geraldo Von Potobsky, "Protection of Trade Union Rights: 20 Years Work by the CFA," *International Labour Review*, no. 105 (1972): 69; Lammy Betton, *International Labour Law. Selected Issues* (Deventer: Kluwer Law International, 1993); Wilfred C. Jenks, "International Protection of Trade Union Rights," in *The International Protection of Human Rights*, ed. Evan Luard (London: Thames & Hudson, 1967), 212 – 214.

law: States are bound to respect principles contained in human rights instruments whether or not they have ratified them.[915]

Regarding the substantive content of the ILO's constitutional obligation concerning freedom of association, the Panel stated that the CFA's general declarations and its "body of principles" should be relied upon. Moreover, in rejecting the Republic of Korea's argument, the Panel found that the Asian State had always cooperated with the CFA in cases of violations of trade union rights without contesting its jurisdiction.[916]

The second "legal unit" the Panel analysed was the phrase "the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up." In its submission, the EU referred to the 1998 ILO Declaration, stating that this legal instrument served as a reference point for determining the obligations under Chapter 13 of the EU-Republic of Korea Core FTA.[917]

The Republic of Korea emphasised that the 1998 ILO Declaration was not binding. Instead, only the obligations under the Conventions relating to freedom of association and the right of collective bargaining were binding.[918]

The Panel stated that it was clear from the Parties' submissions that none of them regarded the 1998 ILO Declaration as binding *per se*. The Parties have defined a new and autonomous obligation arising from the phrase: "the commitment in Article 13.4.3 to respect, promote and realise the principles relating to fundamental rights, including the

[915] Emphasis in the original text. Colin Fenwick, "Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002), 59.
[916] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 31-34.
[917] First Written Submission by the European Union, para. 16; Oral Statement by the European Union, para. 54.
[918] First Written Submission by the Republic of Korea, paras. 54, 55, 57.

right to freedom of association."[919] Accordingly, the EU Panel's request was based on the legal obligation of Article 13.4.3 and not on the 1998 ILO Declaration *per se*.[920]

The third "legal unit" the Panel analysed was the phrase "commit to." In its First Written Submission, the EU treated "commit to" as unproblematic and did not submit any definition.[921] Conversely, the Republic of Korea submitted that "commit to" meant "something less than 'shall respect, promote and realise.'"[922] The Korean interpretation derives from a comparison of the expression "commits to" with the use of "shall" in Article 13.7 ("shall not fail to effectively enforce") and "shall" in Article 13.12 ("shall designate an office […] which shall serve as a contact point").[923] The Responding Party concluded that under Article 13.4.3 the "the Parties merely undertook a commitment to engage in good faith behaviour toward the overall objective of respecting, promoting and realising the principles concerning fundamental rights such as the freedom of association."[924]

The Panel held that the ordinary meaning of "commit to" was "to bind oneself to a course of action."[925] Therefore, under Article 13.4.3 "commit to" represented a legally binding obligation of commitment "to respecting, promoting and realising" the obligations derived from the ILO membership and the 1998 ILO Declaration.[926] The Panel concluded that:

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[919] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 35.
[920] Ibid.
[921] First Written Submission by the European Union, para. 12.
[922] First Written Submission by the Republic of Korea, paras. 39, 41.
[923] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 36.
[924] First Written Submission by the Republic of Korea, para. 41.
[925] "[To] Commit," in *Shorter Oxford English Dictionary* (Oxford University Press, 2002); Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 36.
[926] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 36.

> The construction 'commit to respecting' etc. (rather than, for example, 'will respect') is appropriate given that the Parties have chosen to refer to an external, pre-existing source of obligation, which is then made legally binding by the terms of their Agreement.[927]

Accordingly, the Panel stated that the nature of the phrase "commit to" did not qualify or restrict "respecting, promoting, and realising;" instead, it established a binding link between the actions referred to in the 1998 ILO Declaration and the obligations in Article 13.4.3 of the FTA.[928] Hence, the Panel determined the meaning of "respecting, promoting, and realising" under the FTA by addressing each term as a "legal unit."[929]

The fourth "legal unit" the Panel analysed was the term "respecting." To clarify this term, the Panel adopted a literal interpretation stating that it meant "show[ing] respect for […] refrain[ing] from injuring, harming, insulting, interfering with, or interrupting."[930] Therefore, the legal meaning of the commitment to respecting the freedom of association and the right to collective bargaining referred "to the negative obligation not to injure, harm, insult, interfere with or interrupt freedom of association."[931] To better determine the legal obligation, the Panel recalled the meaning of "respect" under the 1966 International Covenant on Economic, Social and Cultural Rights, where the term meant "to refrain from interfering with the enjoyment" of rights.[932]

The fifth "legal unit" the Panel analysed was the term "promoting." To interpret this term, the Panel considered the word's ordinary meaning. The Experts affirmed that

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[927] Ibid.
[928] Ibid., 37.
[929] Ibid.
[930] "[To] Respect," in *Shorter Oxford English Dictionary* (Oxford University Press, 2002).
[931] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 37.
[932] "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," *Human Rights Quarterly* 20, no. 3 (1998): 691-7040; Victor Dankwa, Cees Flinterman, and Scott Leckie, "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," *Human Rights Quarterly* 20, no. 3 (1998): 705-30; Report of the UN Special Rapporteur, "Rights to Freedom of Peaceful Assembly and of Association," *Report A/71/385*, 2016, para. 63; Office of the United Nations High Commissioner for Human Rights, "Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions," *Professional Training Series No.12* (New York, Geneva, 2005).

"promote" meant "further the development, progress, or establishment of (a thing), encourage, help forward, or support activity."[933] Accordingly, States were bound to enact human rights declarations on the content of freedom of association and the right to collective bargaining by preventing any action contrary to trade union rights and allowing workers and employers to organise and negotiate freely. These obligations appeared in the Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association to the 71st UN General Assembly: "International human rights law […] imposes upon States a duty to actively promote, encourage and facilitate the enjoyment of fundamental rights, including labour rights."[934]

The sixth "legal unit" the Panel analysed was the term "realising." To interpret this term, the Panel considered the ordinary meaning of the word. According to the Panel, the term "realising" was to be interpreted in its literal meaning as a commitment to concretise, or rather, to "make real"[935] the principles relating to the freedom of association and the right to collective bargaining.[936] In its submissions, the Republic of Korea argued that the EU Panel request was intended to force it to comply with Conventions No. 87 and No. 98.[937]

The Panel explained that under Article 13.4.3, the Parties undertook to realise the principles of fundamental rights, not to ratify Conventions 87 and 98. Therefore, the Republic of Korea's argument could not be accepted. Furthermore, the Panel noted that it was the Asian State itself that explained the Parties' commitment to realise the

[933] "[To] Promote," in *Shorter Oxford English Dictionary* (Oxford University Press, 2002).
[934] Report of the UN Special Rapporteur, "Rights to Freedom of Peaceful Assembly and of Association," 2016, para. 55; Report of the UN Special Rapporteur, "Rights to Freedom of Peaceful Assembly and of Association," *Report A/70/266*, 2015.
[935] "[To] Realise," in *Shorter Oxford English Dictionary* (Oxford University Press, 2002).
[936] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 38.
[937] Ibid.

fundamental rights principles in the Agreement. [938] In this sense, it was essential to distinguish between a binding requirement that implied a commitment to realise the principles relating to the freedom of association and the right to collective bargaining and a binding requirement that obliged a Party to comply with the terms of ILO Conventions No. 87 and No. 98. Chapter 13 of the FTA provided for the former and not the latter.[939]

The seventh "legal unit" the Panel analysed was the phrase "principles concerning the fundamental rights." This last unit was particularly debated between the Parties.

The Republic of Korea presented two arguments on the meaning of the term "principles concerning the fundamental rights." First, the Asian country argued that the "principles concerning the fundamental rights" were not binding because the Preamble to the ILO Constitution and the 1998 ILO Declaration were soft law acts.

Second, the Republic of Korea argued that the notion of "principles concerning fundamental rights" was not sufficiently clear and concrete and could not be applied. This second argument was based on an academic paper – *Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System* – written by ILO officials in an exclusively personal capacity.[940] The version of the paper cited by the Korean government argued that states required to implement fundamental labour principles lacked guidance because those principles were not sufficiently clear.

Concerning the non-binding nature of the ILO Constitution and the 1998 ILO Declaration, the Panel explained that the relationship between the ILO constitutional principles on freedom of association and the right to collective bargaining and the terms

[938] Ibid.
[939] Ibid.
[940] Agustí-Panareda, Ebert, and LeClerq, *Labour Provisions in Free Trade Agreements: Fostering Their Consistency with the ILO Standards System*, 5.

of the Conventions was based on two poles.[941] On the one hand, the Panel recognised the existence of fundamental obligations based on the principles of the Constitution that existed for the ILO Member States, independently of the specific obligations of the countries that had ratified the Conventions in question.[942] On the other hand, the Panel recognised the existence of fundamental rights whose specific scope and content were elaborated in the relevant Conventions but which existed for all workers even when they could not claim the benefit of specific provisions of the Conventions.[943]

Concerning the inapplicability of the labour principles for lack of clarity, the panel refuted the Republic of Korea's argument by citing the same paper published some time later as an article in a scientific journal. In that article, the authors stated that only the fundamental principle of freedom of association and the right to collective bargaining were easily enforceable by States, even when they did not ratify the relevant conventions, due to the ILO's case law.

Finally, the Panel rejected both the Republic of Korea's arguments, stating that the freedom of association and the right to collective bargaining was sufficiently clear to provide a basis for examining the provisions of the TULRAA.[944]

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[941] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 40; Francis Maupain, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights," *European Journal of International Law* 16, no. 3 (2005): 439-51.

[942] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 40; Maupain, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights."

[943] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 40; Maupain, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights."

[944] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 40.

3.3.2. Application of the Panel's Findings

Having clarified the meaning of the "legal units," the Panel considered the single norms of the TULRAA. It assessed their consistency with the obligation to "commit to respecting, promoting and realising the principles concerning the fundamental rights" under Article 13.4.3 of the EU-Republic of Korea FTA.

The first disputed provision of TULRAA was Article 2.1; on this issue, the EU complained:

> Article 2 paragraph 1 of the Korean Trade Union Act defining a 'worker' as a person who lives on wages, salary or equivalent form of income earned in pursuit of any type of job. This definition, as interpreted by Korean courts, excludes some categories of self-employed persons such as heavy goods vehicle drivers, as well as dismissed and unemployed persons from the scope of the freedom of association.[945]

The Panel began its examination of Article 2.1 of the TULRAA by establishing that the reference legal standards were the first sentence of Article 13.4.3 of the EU-Republic of Korea FTA and the ILO fundamental principles of freedom of association and the right to collective bargaining. Subsequently, the Panel identified the two main problems: the notion of "self-employed" and that of "dismissed or unemployed."[946]

The Parties' arguments on each issue ran parallel and revolved around the notion of "worker." According to the EU, Article 2.1 of the TULRAA excluded the self-employed from the legal definition of "worker."[947] In support, the EU cited Article 2.1 of the TULRAA in conjunction with Article 5 of the TULRAA and the interpretation given by the Supreme Court of Korea. Notably, Article 2.1 of the TULRAA defined "worker" as "a person who lives on wages, salary or other equivalent form of income earned in

[945] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 1.
[946] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 41.
[947] Ibid., 42–45.

pursuit of any kind of job." Article 5 of the TULRAA stated "[w]orkers are free to organise a trade union or to join it, except for public servants or teachers who are subject to other enactments."[948] The Supreme Court established that: "*'Worker' under the TULRAA refers to any person who provides labour to another Party based on a subordinate relationship and receives wage, etc in return* […]."[949] The EU noted that the Republic of Korea did not recognise trade unions of self-employed workers except in sporadic cases.[950]

To the EU's arguments, the Republic of Korea replied that no evidence was submitted that Article 2.1 of the TULRAA conflicted with the first sentence of Article 13.4.3 of the FTA. Moreover, the Korean submission pointed out that the text of Article 2.1 TULRAA did not exclude the self-employed in general, and this was proved by the inclusion of several categories of self-employed in the notion of "worker."[951]

Concerning Article 2.1 of the TULRAA, the Panel noted that the principles regarding the freedom of association and the right to collective bargaining extended the scope of the right to include all workers without distinctions. At the same time, the provisions of Article 2.1 of the TULRAA were manifestly more limited.[952] The reason was that the TULRAA definition envisaged a binary relationship between a worker and an employer.[953] According to the Panel, the Supreme Court's case law was restrictive of

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[948] Ibid., 42.
[949] Emphasis in the original text. "Supreme Court of Korea, Decision 2014Du12598, 12604, Decided 15 June 2018," n.d.; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 43; First Written Submission by the European Union, para. 42.
[950] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 44; "Oral Statement by the European Union," para. 88.
[951] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 43-45; First Written Submission by the Republic of Korea, paras. 79-119, 135-139.
[952] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 45.
[953] Ibid.

the notion of "worker" because it derived from this binary legislative framework.[954] This case law was an outcome of the principle of separation of powers, according to which the courts enforce laws and not create them. Thus, the criteria developed by the courts consolidated the restrictive legislative notion of "worker" excluding self-employed persons.[955] However, the restrictive notion of "worker" was contrary to the elaboration of the CFA and, more generally, to ILO standards.[956]

According to the EU, Article 2.1 of the TULRAA excluded dismissed and unemployed from the legal definition of "worker" in violation of Article 13.4.3 of the FTA.[957] The EU argued that, according to the CFA, the criterion for determining the persons covered by the right to organise had to be independent of the existence of an employment relationship and that a provision excluding dismissed and unemployed workers from participation in a trade union was contrary to the principle of freedom of association and the right to collective bargaining because it encouraged anti-union dismissals.[958] Furthermore, the EU argued that the creation of enterprise and non-enterprise trade unions illegitimately restricts the union rights as defined by the ILO.[959]

The Republic of Korea argued that the dismissed employees could challenge the dismissal before a court by showing that the dismissal violated freedom of association. Moreover, the Korean government emphasised the existence of criminal legislation against anti-union acts.[960] To show its commitment, the Asian State presented an amendment proposal to the TULRAA that should enlarge the union membership:

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[954] Ibid., 46.
[955] Ibid., 47.
[956] Ibid.
[957] Ibid., 42, 50.
[958] Ibid., 50.
[959] Ibid.; Oral Statement by the European Union, para. 96.
[960] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 52.

Current text	Amendment Proposal
Union membership eligibility is limited to workers of the enterprise. The unemployed and the dismissed may join a multi- enterprise union (by industry, region or occupation).	Regardless of the unemployed or the dismissed, the union membership will be set by the union by-laws.

Table 15: Amendment Proposal to the TULRAA of the Republic of Korea.[961]

The Panel rejected the Republic of Korea arguments recognising the right of association and collective bargaining even for dismissed or unemployed workers.[962] In support, the Panel stated that under CFA case law, all workers enjoyed trade union rights and that these rights did not legitimise the creation of distinct types of trade unions, as this was discriminatory.[963] Furthermore, the Panel found that the protection against anti-union dismissal was insufficient to guarantee the dismissed workers the right to organise because the burden of proof of discriminatory behaviour was too heavy for workers. Finally, the Amendment proposal did not provide sufficient guarantees to consider it suitable to overcome the problems of violation of the right of association.[964]

Regarding the two problems of self-employed, dismissed and unemployed, the Panel concluded that:

> [T]he TULRAA definition of 'worker' in Article 2(1) [was] not consistent with the principles concerning the fundamental right of freedom of association, which Korea [was] obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA.
> The Panel recommend[ed] that Korea brings the TULRAA provision into conformity with the principles concerning freedom of association, so that all workers, including the self-employed, dismissed and unemployed, are included in the TULRAA's definition of 'worker' in Article 2(1).[965]

The second disputed provision of TULRAA was Article 2.4(d); on this issue, the EU complained:

[961] Ibid., 51–52.
[962] Ibid., 52.
[963] Ibid.
[964] Ibid., 53.
[965] Ibid.

> Article 2 paragraph 4(d) of the TULRAA stating that an organisation shall not be considered as a trade union in cases where persons who do not fall under the definition of 'worker' are allowed to join the organisation. [966]

Article 2.4 of the TULRAA defined trade unions:

> The term 'trade union' means an organisation or associated organisation of workers which is formed in voluntary and collective manner upon the workers initiative for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers. In cases where an organisation falls into one of the following categories, however, the organisation shall not be regarded as a trade union. […]
>
> (d) Where those who are not workers are allowed to join the organisation, provided that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labour Relations Commission when he/she has made an application to the Labour Relations Commission for remedies for unfair labour practices […][967]

Concerning Article 2.4(d) of TULRAA, the EU argued that trade unions found it difficult to register if they granted registration to dismissed and unemployed workers. In support, the EU cited the 2013, 2018 and 2019 failed registration attempts by the Korean Teachers and Education Workers Union.[968]

The Korean government's submissions on Article 2.4 of the TULRAA pointed out that the State had also registered trade unions that included unemployed or dismissed workers, allowing them to freely join non-enterprise unions and participate in organised labour activities. This practice arose following the Supreme Court's decision finding that the definition of "worker" covered temporarily unemployed or job-seekers.[969]

In its analysis, the Panel considered the *amicus curiae submission* that provided the example of the Korean Teachers and Education Workers Union. This union was

[966] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 1.
[967] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 54.
[968] Ibid.; First Written Submission by the European Union, para. 45.
[969] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 54.

decertified in 2013 because nine out of its 60,000 members were dismissed workers.[970] Starting from this fact, the Group recalled that the CFA affirmed:

> A provision depriving dismissed workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organisation of their choice. Such a provision entails the risk of acts of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities with their organisation.[971]

The Panel rejected the Korean arguments by stating that Article 2.4(d) of the TULRAA did not only endanger the freedom of association and the right to collective bargaining of dismissed and unemployed workers, but that of all workers.[972] Indeed, the combined effect of the TULRAA provisions was to deprive any trade union comprising unemployed or dismissed workers of the right to organise, potentially undermining the industrial relations system.[973] Therefore, the Panel recommended that the Korean government bring Article 2.4(d) of the TULRAA in line with international labour standards.[974]

The third contested provision of TULRAA was Article 23.1; on this point, the EU complained that the Article provided that union officials could only be elected from among union members.[975]

In its First Written Submission, the EU argued that Article 23.1 of TULRAA conflicted with the right of trade unions to freely elect their representatives as expressed

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[970] Report of the UN Special Rapporteur, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association on His Mission to the Republic of Korea," *Report A/HRC/32/36/Add.2*, 2016, para. 58.
[971] *Freedom of Association. Compilation of Decisions of the Committee on Freedom of Association*, 6th ed. (Geneva: International Labour Office, 2018), para. 410.
[972] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 56.
[973] Ibid.
[974] Ibid.
[975] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 1.

in Article 3 of Convention No. 98.[976] Furthermore, the EU cited the CFA, which extensively emphasised that the election of trade union officers should be the exclusive prerogative of the trade union itself, and urged the Republic of Korea to repeal Article 23.1.[977]

The Republic of Korea replied that Article 23.1 was not an obstacle to trade union autonomy but rather strengthened the role of the enterprise union. This rule was justified by the Korean industrial relations system because it favoured enterprise-level bargaining. Moreover, the Republic of Korea stated that unemployed and dismissed workers were also eligible for union elections, but only in non-enterprise unions, so they were not denied the right to organise.[978]

In its analysis, the Panel stated that the CFA established the principle that "[f]reedom of association [implied] the right of workers and employers to elect their representatives in full freedom."[979] According to the CFA, this freedom was indispensable for trade unions to promote the interests of their members effectively and to establish fair industrial relations.[980] Therefore, the public authorities had to refrain from any intervention that could undermine the exercise of this right.[981]

The Panel agreed with CFA that the requirement in Korean law that union officials work in the undertakings where the enterprise union is established was contrary to the freedom of association and the right to collective bargaining and that the danger inherent

[976] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 57.
[977] Ibid., 58.
[978] Ibid., 58–59.
[979] *Freedom of Association. Compilation of Decisions of the Committee on Freedom of Association*, para. 585.
[980] Ibid.
[981] Ibid., para. 589.

in TULRAA was that the dismissal of union officials of an enterprise union also meant the end of their union role.[982]

The Panel concluded that Article 23.1 of the TULRAA was contrary to the obligations of Article 13.4.3 of the EU-Korea FTA and that the Asian State should amend the legislation to ensure an entirely free election of trade union representatives.[983]

The fourth contested provisions were Articles 12.1-12.3 of the TULRAA,[984] in connection with Article 2.4 and[985] Article 10.[986] The EU complained that the Republic of

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[982] Ibid., para. 609; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 61.

[983] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 61.

[984] Article 12.1-12.3,TULRAA: "1.The Minister of Employment and Labour, the Special City Mayor, Metropolitan City Mayors, Governors of Self-Governing Provinces or heads of Sis/Guns/Gus (hereinafter referred to as "administrative authorities) shall issue a certificate within three days after receiving the report on establishment under paragraph (1) of Article 10, except for cases prescribed in paragraphs (2) and (3).
2. In cases where a report or by-laws needs to be supplemented because of any omission or other reasons, the administrative authorities shall order a supplement thereof by designating a submission period up to twenty days in accordance with the Presidential Decree. Upon receiving the supplemented report or by-laws, a certificate shall be issued within three days.
3. The administrative authorities shall return a report filed in cases where a trade union which made the report falls under any of the following sub-paragraphs:
1) Where a trade union falls within the categories of each sub-paragraph 4 of Article 2;
2) Where supplements are not submitted within the designated period in spite of the order to supplement a report in accordance with the provisions of paragraph 2."

[985] Article 2.4, TULRAA: "The term "trade union" means an organisation or associated organisation of workers which is formed in voluntary and collective manner upon the workers' initiative for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers. In cases where an organisation falls into one of the following categories, however, the organisation shall not be regarded as a trade union.
A. Where an employer or other persons who always act in their employer's interests are allowed to join the organisation;
B. In cases where most of the expenditure is supported by the employer;
C. Where activities of an organisation are aimed at mutual benefits, moral culture and other welfare undertakings;
D. Where those who are not workers are allowed to join the organisation, Provided that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labour Relations Commission when he/she has made an application to the Labour Relations Commission for remedies for unfair labour practices.
E. Where the aims of the organisation are mainly directed at political movements."

[986] Article 10, TULRAA: "1. A person who intends to establish a trade union shall prepare a report containing the matters described in the following sub-paragraphs, attached by the by-laws under Article 11 and submit it to the Minister of Employment and Labour in cases of a trade union taking the form of an associated organisation or a unit trade union spanning not less than two areas among the Special City, Metropolitan Cities, Special Self-Governing Provinces; to the Special City Mayor, Metropolitan City Mayors and Provincial Governors in cases of a unit trade union spanning not less than two areas among Sis/Guns/Gus (referring to autonomous Gus); and to the Special Self-Governing City Mayors, Governors

Korea had a highly discretionary trade union certification system,[987] which severely restricted the creation of a trade union.[988] Moreover, for the EU, the vagueness of the grounds on which a trade union could be disqualified, combined with the wide margin of discretion left to the administrative authorities, threatened the freedom of association and the right to collective bargaining.[989] Moreover, the EU did not consider both administrative and judicial review of administrative decisions to certify a union to be sufficient to eliminate the discrepancy between the TULRAA and the principle of freedom of association.[990] The reason rested in the fact that the administration's decisions were based on the law and were consequently always justifiable before a judge.[991]

The Korean government responded that its system for certifying trade unions was in line with the principles of freedom of association. Indeed, the law limited the task of the administrative authorities to check whether the required documents had been submitted and whether there were grounds for exclusion.[992] Therefore, the activity of issuing certification was non-discretionary.[993] Moreover, the grounds for unions disqualification were prescribed by law and not determined by the authority on a

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of Special Self-Governing Provinces and heads of Sis/Guns/Gus (referring to heads of autonomous Gus; hereinafter the same shall apply in Article 12(1) in cases of any other trade union:
1. Name of the trade union;
2. Location of the main office/headquarters;
3. Number of union members;
4. Names and addresses of union officials;
5. Name of the associated organisation to which it belongs;
6. In cases of a trade union in the form of an associated organisation, the name of its constituent organisations, the number of union members, the address of its main office/headquarters, and the names and addresses of its officials.
(2) A trade union which is an associated organisation under paragraph (1) means an industrial level organisation comprised of unit trade unions in the same industry and a federation comprised of industry-level organisations or nationwide industry-level unit trade unions."

[987] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 1.
[988] First Written Submission by the European Union, paras. 57–61.
[989] Ibid., paras. 57–60; Consolidated Hearing Report Prepared by the Parties, 2020, 49.
[990] Oral Statement by the European Union, para. 103.
[991] Ibid., para. 108.
[992] First Written Submission by the Republic of Korea, paras. 146–147.
[993] Oral Statement by the Republic of Korea, 2020, para. 57.

discretionary basis. In support, the Asian State invoked the case law of the Korean Constitutional Court, confirming the non-discretionary nature of the procedure for granting certification to the applicant trade union.[994] Finally, Korea emphasised the independent judicial review of unsuccessful certification proceedings that ensured the legality of the proceedings.[995]

In its analysis, the Panel recalled the CFA's view that freedom of association and the right to collective bargaining suffered limits that may result from the requirement of certification or registration; "[h]owever, such requirements must not be such as to be equivalent in practice to previous authorisation, or as to constitute such an obstacle to the establishment of an organisation that they amount in practice to outright prohibition."[996]

Central to both Parties was the significance to be attached to the Korean Constitutional Court's decision upholding the TULRAA law and affirming its non-discretionary nature.[997] According to the Panel's interpretation, this decision determined the Korean position *de jure*, yet contrasted it with a *de facto* situation.[998] In practice, in the Panel's view, the administrative authorities exercised substantial and penetrating control over the workers' association that resembled a prior authorisation and not a certification. The Panel also agreed with the EU on the vague and imprecise nature of the grounds for disqualification.[999] Therefore, the Experts concluded that Articles 12.1.3, in

[994] "Korean Constitutional Court, Decision 2011Hunba53, Decided 29 March 2012," n.d.
[995] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 66-67.
[996] *Freedom of Association. Compilation of Decisions of the Committee on Freedom of Association*, para. 419.
[997] Consolidated Hearing Report Prepared by the Parties, 50, 51.
[998] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 69.
[999] Consolidated Hearing Report Prepared by the Parties,42; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 69.

connection with Article 2.4 and Article 10 of the TULRAA were contrary to Korea's obligations under Article 13.4.3 of the EU-Republic of Korea FTA.[1000]

3.4. Second Substantive Issue: The Last Sentence of Article 13.4.3 of the EU-Republic of Korea FTA

The second substantive issue dealt with by the Panel of Experts concerned the Republic of Korea's compliance with the obligations established in the last sentence of Article 13.4.3 of the EU-Republic of Korea FTA.[1001] As a matter of fact, the EU claimed that:

> The EU considers that Korea's efforts towards ratifying the following fundamental ILO Conventions are inadequate:
> - C87 Freedom of Association and Protection of the Right to Organise Convention, 1948;
> - C98 Right to Organise and Collective Bargaining Convention, 1949;
> - C29 Forced Labour Convention, 1930; and
> - C105 Abolition of Forced Labour Convention, 1957.
>
> Indeed, eight years after the entry into force of the EU-Korea FTA, Korea has still not ratified the aforementioned four fundamental ILO Conventions. Moreover, Korea has not been making efforts towards ratification of the above fundamental Conventions that could be qualified as sustained and continuous over this period. Thus, Korea appears to have acted inconsistently with Article 13.4 paragraph 3 last sentence of the EU-Korea FTA.[1002]

In dealing with the EU claim, the Panel started by recalling the last sentence of Article 13.4.3 EU-Republic of Korea FTA: "The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as "up-to-date" by the ILO."

[1000] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 70.
[1001] Ibid.
[1002] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 2.

At the time of the signing of the Agreement and the Panel decision, the ILO fundamental Conventions were eight: Convention No. 87; Convention No. 98; Convention No. 29; Convention No. 100; Convention No. 105; Convention No. 111; Convention No. 138; Convention No. 182.[1003]

In 2018, the ILO registered that the Republic of Korea ratified: Convention No. 100; Convention No. 111; Convention No. 138; Convention No. 182.[1004] The missing Conventions were: Convention No. 29, Convention No. 105, Convention No. 87 and Convention No. 98.

The Panel indicated two "legal units" to be analysed in the last sentence of Article 13.4.3: 1) "will" and 2) "will make continued and sustained efforts towards ratification." Therefore, following the Panel's reasoning, the next subsection analyses these two "legal units," while the one after deals with applying the Panel's findings.

3.4.1. Analysis of the Legal Units of the Last Sentence of the Article 13.4.3 EU-Republic of Korea FTA

The first "legal unit" the Panel analysed was "will." According to the EU, this term was legally binding, obliging the Parties to "make continued and sustained efforts towards ratifying the fundamental ILO Convention […]" because "these Conventions express[ed] and develop[ed] the core principles and rights that all ILO Members […] endorsed when they freely joined the ILO."[1005] Moreover, the EU argued that "will" did not affect the binding force of the commitment within the meaning of the last sentence of Article 13.4.3,

[1003] After the 2022 amendment to the 1998 Declaration, the number of core ILO conventions increased to ten. Today, the Occupational Safety and Health Convention, 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) are also part of the CLS. The Republic of Korea ratified these conventions in 2008.
[1004] ILO, "Ratifications for Republic of Korea."
[1005] First Written Submission by the European Union, para. 72.

because the Agreement was drafted in such a way as to equate "will" and "shall."[1006] While recognising the promotional nature of this provision, the EU argued that the Article established a specific legal obligation against which a Party's action or inaction could be evaluated over time under the trade treaty.[1007]

Following the EU's allegation, the Republic of Korea contended that "will" was not to be understood as a synonym for "shall" and "must" since it had a non-prescriptive meaning.[1008] According to the Asian State, the term was merely a declaration of intent and meant "desire, wish for, have a mind to, 'want' (something); sometimes implying 'intend, purpose' or 'to wish, desire; sometimes with implication of intention.'"[1009]

In its analysis, the Experts affirmed that the Korean interpretation of "will" was not supported by the ordinary meaning of the term within the context of Article 13.4.3 in light of the object and purpose of the Agreement.[1010] Conversely, the term indicated a future obligation to ratify the ILO Conventions and was to be understood as meaning "shall."[1011] Moreover, the Panel agreed with the EU affirmation that "will" and "shall" were interchangeable in the context of the EU-Republic of Korea FTA and were used to express legally binding provisions.[1012] Therefore, pursuant to Article 31 of the Vienna Convention, the Panel concluded that "the provision (even with the term 'will') set forth

[1006] Consolidated Hearing Report Prepared by the Parties,paras. 45, 62; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 71.
[1007] First Written Submission by the European Union, paras. 72–74; Consolidated Hearing Report Prepared by the Parties, para. 17.
[1008] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 71.
[1009] First Written Submission by the Republic of Korea, para. 167.
[1010] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 72.
[1011] Ibid.
[1012] Ibid., 71.

the Parties' commitment to undertake something specific and concrete; […] it establish[ed] a binding legal obligation[…]."[1013]

The second "legal unit" analysed by the Panel was the phrase "will make continued and sustained efforts towards ratifying."[1014] Regarding the contents of the obligation in the last sentence of Article 13.4.3, the EU claimed that the provision obliged the Parties to adopt higher standards, recalling the International Court of Justice decision on the case *Pulp Mills on the River Uruguay.*[1015]

In responding, the Republic of Korea argued that the provision contained an obligation on the Parties "to not to roll back their efforts or take actions that would impede the preparatory steps towards ratification" and "to refrain from taking measures that would defeat the purpose of moving towards ratifying the key ILO Conventions." [1016]

Both Parties agreed that "continued and sustained efforts" meant "persistent" efforts.[1017] To this understanding, the EU added that such persistent efforts should also be constant in time and uninterrupted.[1018]

In its analysis, the Panel noted that the Korean argument that Article 13.4.3 merely prohibited a downgrading of standards without implying an enhancement was contrary to a literal, systematic and teleological interpretation.[1019] Indeed, the Article required Parties not just to maintain the status quo, but to try to ratify the Conventions. However, the

[1013] Ibid., 72.
[1014] Ibid., 73.
[1015] International Court of Justice, Judgment Of 20 April 2010, Case Concerning Pulp Mills On The River Uruguay (Argentina V. Uruguay) (2010); Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 72; Consolidated Hearing Report Prepared by the Parties,para. 17.
[1016] Consolidated Hearing Report Prepared by the Parties,para. 29.
[1017] Oral Statement by the European Union, para. 119; Consolidated Hearing Report Prepared by the Parties,22; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 73.
[1018] First Written Submission by the European Union, para. 90; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 73.
[1019] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 73.

Experts rejected the EU's argument that the effort should be uninterrupted.[1020] This reading was inconsistent with the literal meaning of the obligation. Moreover, the Panel maintained that: "the appreciation of the nature of the obligation arising from a treaty [had to be] contextual and its satisfaction [depended] on the content of the obligation as contained in the treaty in question."[1021] Thus, the obligation raised in *Pulp Mills on the River Uruguay* was different from the obligation in the last sentence of Article 13.4.3. The latter did not establish specific forms or content of the required efforts but mentioned a general obligation and left discretion to the Parties regarding the timing of implementation.

Regarding the meaning of the two legal units, the Panel concluded that:

> […] the last sentence of Article 13.4.3 imposes a legally binding obligation on the Parties to make 'continued and sustained efforts towards ratification' of the core ILO Conventions. This is an obligation of 'best endeavours': the standard against which the Parties are to be measured is higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times.
> In the absence of explicit targets or at least any informal understanding on expected milestones towards ratification, the Panel regards the last sentence of Article 13.4.3 of the EU-Korea FTA as imposing an on-going obligation for the Parties, affording leeway for the Parties to select specific ways to make continued and sustained efforts. […][1022]

From this reasoning, the Panel derived that Korean failure to ratify four core ILO Conventions could not in itself constitute sufficient evidence of non-compliance with the EU-Republic of Korea FTA.[1023]

[1020] Ibid.
[1021] Ibid.
[1022] Ibid., 74.
[1023] Ibid., 75; Consolidated Hearing Report Prepared by the Parties,paras. 16, 18, 74; First Written Submission by the European Union, para. 91.

3.4.2. Application of the Panel's Findings

Once clarified the meaning of the two "legal units," the Panel examined the EU claim concerning the Republic of Korea's failure to fulfil its obligation to "make sustained and continuing efforts to ratify the ILO Core Convention [..]" pursuant to the last sentence of Article 13.4.3 of the EU-Republic of Korea FTA.

The EU argued that the Asian State violated the last sentence of Article 13.4.3 because eight years after the entry into force of the FTA, it had still not ratified the Convention No. 29, Convention No. 105, Convention No. 87 and Convention No. 98.[1024] Furthermore, the EU considered that the Republic of Korea had made minimal effort to ratify these four Conventions.[1025] Thus, the Asian Country failed to meet the "continued and sustained" standard by not using all appropriate measures that would have enabled it to fulfil its obligation.[1026]

In response to the allegations, the Republic of Korea listed its efforts to ratify the ILO Conventions since 2011, Reporting 30 amendment proposals, numerous consultations with social partners and relevant research undertaken.[1027] However, the Parties recognised that the bulk of Korea efforts had taken place after 2017, whereas there had been negligible efforts in the previous six years.[1028]

In its analysis, the Panel acknowledged Korean efforts since 2017; however, it emphasised that the beginning of a ratification procedure with the submission of a bill

[1024] European Union, "Request for the Establishment of a Panel of Experts by the European Union," 2.
[1025] First Written Submission by the European Union, para. 91.
[1026] Consolidated Hearing Report Prepared by the Parties,para. 16.
[1027] First Written Submission by the Republic of Korea, paras. 186-197; Consolidated Hearing Report Prepared by the Parties,para. 34; Oral Statement by the Republic of Korea, paras. 68-71; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 76.
[1028] Consolidated Hearing Report Prepared by the Parties,paras. 18, 47; First Written Submission by the European Union, para. 76; Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 76.

was in 2019. The Korean government presented the bill to ratify Convention No. 29, Convention No. 87, Convention No. 98 in October 2019.[1029] Although the proposal roughly coincided with the beginning of the Euro-Korean dispute, the Panel saw it as indicating "tangible, though slow, efforts by Korea concerning the ratification of the ILO Conventions at issue."[1030]

Regarding the obligation under the last sentence of Article 13.4.3, the Experts concluded that the Republic of Korea's efforts fulfilled the requirement. Additionally, the Panel was convinced that Article 13.4.3 did not impose an obligation of result but an effort that suggested an on-going obligation without a specific target, timeframe or threshold.[1031]

Regarding the Abolition of Forced Labour Convention of 1957 (No. 105), the Panel fully accepted the justifications of the Republic of Korea.[1032] Indeed, the Asian State claimed that the ratification of this Convention affected Korean criminal law. Therefore, the Country needed an in-depth domestic discussion and reform of its criminal law, which did not allow immediate standard ratification.[1033]

3.5. Preliminary Remarks on the EU v. Republic of Korea case

Unlike the US v. Guatemala case, the Report of the Panel of Experts of the EU v. Republic of Korea case is much more convincing. The three fundamental points around

[1029] First Written Submission by the Republic of Korea, paras. 192–193.
[1030] Panel Of Experts Proceeding Constituted Under Article 13.15 Of The Eu-Korea Free Trade Agreement, "Report of the Panel of Experts," 76.
[1031] Ibid.
[1032] Ibid., 77.
[1033] Consolidated Hearing Report Prepared by the Parties, para. 35; Oral Statement by the Republic of Korea, para. 72.

which the dispute revolves – jurisdiction, the first sentence of Article 13.4.3 and the last sentence of Article 13.4.3 – are solidly justified.

The jurisdiction is a crucial issue because it indicates the legal framework and the scope of the decision. The Panel rejects the Korean argument of limited jurisdiction, stating that the FTA creates a strong connection between promoting and achieving fundamental labour principles and rights and trade. This connection is confirmed by the reference to international declarations made in the treaty, which demonstrates that decent work is at the core of the Parties' aspirations for trade and sustainable development. Therefore, in the framework of the FTA, national measures implementing labour rights are intrinsically linked to trade.

Even more robust appears to be the Panel's interpretation of the first sentence of Article 13.4.3 of the EU-Republic of Korea FTA. Here the Panel analyses seven "legal units": 1) "in accordance with the obligations deriving from membership of the ILO;" 2) "the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up;" 3) "commit to;" 4) "respecting;" 5) "promoting;" 6) "realising;" 7) "the principles concerning the fundamental rights." The analysis adopts a literal, systematic and teleological interpretation that shows that Parties are obliged to ratify core ILO Conventions; thus, creating a minimum framework of protections within which national legislation sets the domestic standard. According to the Experts, this obligation is independent and does not derive from referencing the 1998 ILO Declaration. In other words, the Parties choose with the first sentence of Article 13.4.3 to create a self-standing obligation to protect labour rights, separate from the obligation they have undertaken as members of the ILO. This obligation is "secured" by the disciplines of the FTA itself.

Although more succinct, the Panel's argument regarding the last sentence of Article 13.4.3 of the EU-Republic of Korea FTA is also sound. Indeed, the Panel concludes that the last sentence of Article 13.4.3 imposes a legally binding obligation on the Parties to make "sustained and continued efforts towards ratification" of core ILO Conventions. This obligation is higher than merely taking minimal or non-regressive steps but lower than the obligation to explore and mobilise all available measures at all times. Hence, the Panel's position is compromising on both sides but correct.

The text of the Article 13.4.3 does not constitute an obligation of result, but rather an on-going obligation. A broader interpretation would have been inconsistent with the ordinary meaning of the words, lending itself to criticism of incoherence with the interpretative principles established by the Vienna Convention.

The weakness of the EU-Republic of Korea case does not lie in the Panel Report but in the enforcement mechanism of the Experts' findings. As explained in the previous Chapter, the EU social clause model (i.e. the TSD Chapters) is not enforced by sanctions. Instead, the EU model is cooperative or promotional. The lack of sanctions is a significant limitation that potentially reduces the legal deterrence of the provisions. The declaratory nature of the Panel Report is a blunt weapon in the hands of those who wish to protect workers' rights. Because the absence of the threat of a sanction reduces the deterrence of the legal provision, according to Garcia, the cost of violation is mainly reputational and it increases as the democratic nature of a government grows.[1034] The less democratic a country is, the less effective a Panel Report will be, because the reputational damage is limited in an authoritarian government. Instead, trade and economic sanctions, since they

[1034] García, "Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case," 65.

are tangible, act as a more significant deterrent. Evidence of this limited efficacy can be seen by observing the follow-up to the Panel Report by the Republic of Korea.

During the dispute, the Republic of Korea tried to ratify three of the four core Conventions it lacked (Conventions Nos. 87, 98 and 29). The final ratification followed about three months after the Report was issued. Regarding the fifth Convention (No. 105), the Republic of Korea cited the need to review its criminal law as justification for non-ratification.

However, after the conclusion of the dispute, the Asian State did not undertake any process of a comprehensive reform of either its Labour Law or its criminal law to bring it into conformity with the recommendations of the Panel of Experts; on the contrary:

> The briefing of the Ministry of Labour not only kept quiet about this recommendation but also maintained the attitude that there is no need to revise the law as several special employment unions are already receiving establishment registration certificates.[1035]

The Korean government's choice was to maintain the dual trade union model and the discretion to dissolve or diminish a trade union under the TULRAA because this allows for the restriction of trade union freedom, as happened in early 2023.[1036]

[1035] Original Korean text: "노동부의 브리핑은 이런 권고에 대해서 함구했을 뿐 아니라 이미 여러 특수고용직 노조가 설립신고증을 받고 있으니 법 개정이 필요 없다는 태도로 일관하고 있다." Author's translation with the support of machine translation software. Editorial Department, "The Meaning and Challenges of the Korea-EU FTA Expert Panel Report," *Labortoday - Online Edition*, January 29, 2021.

[1036] Tae-woo Park and Byung-chan Go, "National Intelligence Service, KCTU Office Seizure and Search. Accused of Violating the National Security Law," *Hankyoreh - Online Edition*, January 18, 2023; Hae-ram Jo and Gwang-yeon Park, "The NIS and the Police, Search and Seizure of the Offices of the Korean Confederation of Trade Unions... Also the Offices of the Health and Medical Unions," *Kyunghyang - Online Edition*, January 18, 2023; Chang-hoon Lee, "NIS, the Reason for the Search and Seizure of the Trade Union Confederation Office Is 'the Concealment of Orders from North Korea,'" *The JoongAng - Online Edition*, January 24, 2023; UNI Global Union, "Raid On S. Korean Unions Is An Attack On The Labour Movement And On Democracy, Says Uni," UNI Global Union - News, 2023; International Trade Union Confederation, "South Korea: Government Raids on Trade Unions an Attack on Democracy," Human & Trade Union Rights - News, 2023.

Notwithstanding the weakness resulting from the absence of sanctions, as García notes, the Panel's Report has a positive impact on EU trade law because it clarifies that the contents of the TSD Chapters are not mere commitments but binding legal obligations that should lead Parties to improve their labour protection legislation.

Conclusion

Summary: 1. Introduction; 2. The Social Clause; 3. The EU and US Model; 4. The US v. Guatemala and the EU v. Republic of Korea; 5. Final Remarks

1. Introduction

Having reached the end of this research path, it is worth recalling the general coordinates of departure in order to be able to carry out an overall reasoning on the results. The starting point of any research is a question that identifies an issue or phenomenon to be analysed. The research question is whether the social clauses of FTAs are an effective instrument to protect labour rights. Therefore, the phenomenon under study is the social clause, and the problematic aspect analysed is its legal efficacy as an instrument to protect labour rights with an evaluative objective. For the purpose of this study, efficacy means the ability of an international standard to influence national authorities to adapt national norms to international standards and the ability to prevent the violation of social obligations under social clauses through deterrence mechanisms.

The study begun with the legal-historical conceptualisation of social clauses. After framing the phenomenon, the focus narrows down through a comparative analysis of the two main existing models of social clauses: the US conditional model and the European cooperative model. This stage explained the historical form taken by the US and EU social clauses and defined how the two models react to labour rights violations. At this stage, the difference between theory and practice emerged, with the theoretical notion capturing much but not all of social clauses. Finally, the research compared the two main (and so

far only) international disputes on social clause violations settled by International Panels, namely the US v. Guatemala case and the EU v. Republic of Korea case.

The methodology is the objective-based legal research with four research objectives: explanatory, descriptive, comparative, and evaluative. The latter is the main objective, and the others are subordinate to it because their function is to enable value judgements on social clauses. These objectives are horizontally unified by the doctrinal approach concerning explanation, description and evaluation, and the non-doctrinal approach concerning comparison.

Based on the empirical analysis of the two disputes and the theoretical analysis of the models, these conclusions answer the question of efficacy and evaluate the two existing models on the basis of their adherence to this definition.

2. The Social Clause

Chapter I of this dissertation had both explanatory and descriptive objectives. Specifically, the Chapter described the historical evolution of social clauses, the link between trade and labour (Section 2) and conceptualised the social clause and its structural characteristics and elements (Section 3).

The Section 2 showed that historically, International Labour Law and social clauses were created with the same objective of reducing the negative social externalities of capitalism. Both were ancillary and complementary in nature to the market and international trade. International labour law originated at the end of the 19th century, developed before social clauses and was the reference point for the latter in terms of labour provisions. Indeed, social clauses are inextricably linked to Labour Law because they are the instrument that International Trade Law has conceived to commit States to

respect minimum labour standards. It is no coincidence that IFLRs are central to the theoretical notion of social clauses. In practice, since 1998, these IFLRs have consistently incorporated the 1998 ILO Declaration and CLS. The CLS create a minimum framework of protections within which national legislation sets the domestic standards.

The history of social clauses is a history of attempts and failures spanning the second half of the 20th century. The starting point was the Havana Charter for the creation of the ITO. This treaty, which never came into force, showed the first example of a universal social clause. Between the late 1950s and the late 1980s, developed countries periodically failed to introduce social clauses into the GATT. The establishment of the WTO opened the possibility for a universal social clause. However, the developing countries resistance to losing their competitive advantage led to another failure. Since the mid-1990s, the strategy changed and Western countries started introducing social clauses in their unilateral, bilateral or regional trade arrangements. This new approach led to a proliferation of social obligations in FTAs. Today, social clauses are an established and widely used instrument, with almost all ratified trade agreements containing them.

The Section 3 conceptualised the theoretical notion of the social clause from a doctrinal point of view. Like any theorisation, this notion grasps the essence of social clauses without being completely exhaustive of the forms assumed in reality by these legal constructs. For the purposes of this dissertation, the social clause has been understood as an institution of International Trade Law provided for in a trade arrangement that commits the Parties to protect IFLRs by providing for investigation and enforcement mechanisms.

The doctrinal notion of a social clause consists of at least three characteristic and structural elements: the commercial element, the labour protection element (IFLRs) and

the monitoring and enforcement element (IEMs). Indeed, the first characteristic and structural element of the social clause is its provision within a unilateral, bilateral, multilateral and (at least in theory) universal trade arrangement. The second characteristic and structural element of the social clause is the protection of IFLRs, which in most cases coincide with CLS, although additional international standards may be envisaged. The third characteristic and structural element of the social clause is the presence of IEMs aimed at preventing violations of IFLRs, which may also provide for trade sanctions.

In the field, these characteristics are declined in different ways, they may be enriched by cooperation mechanisms, fora for discussion between parties or mechanisms for civil society involvement. In most cases, the characteristics and structural elements are all present, in some cases only partially.

3. The EU and US Model

The second step of the research was to narrow the field of investigation by moving from a predominantly theoretical and doctrinal study to a comparative theoretical-practical one. In fact, Chapter II focuses on the two main models of social clauses, the conditional model of the US and the cooperative model of the EU. The choice to compare these two models is based on three common factors shared by the two models: a) political, b) economic, and c) legal.

Politically, both the US and EU have unsuccessfully advocated for the inclusion of social provisions in Free Trade Agreements (FTAs) since the Havana Charter.[1037] The failure to create the International Trade Organization (ITO), the opposition to social commitments during the post-World War II period, and the failure to include a universal

[1037] ILO, *Social Dimensions of Free Trade Agreements*, 18.

social clause in the WTO hindered the development of a link between labour and trade.[1038] Hence, the US and the EU have overcome the impasse by introducing social clauses in their unilateral, bilateral or multilateral (not universal) trade arrangements.[1039] Economically, the US and the EU have important markets; according to the IMF, the WB and the EU Commission, together the US and the EU account for about 40% of the world's GDP and more than 40% of world trade.[1040] Legally, the US and the EU have adopted comparable social clauses that bring out issues and strengths and make it possible to assess the efficacy of these instruments.

The starting point of the analysis was an historical description of the two models. The first Sate establishing a labour obligations were the US in the 1994 NAFTA side agreement NAALC. This model quickly evolved to include a 'Labour Chapter' and an 'Environment Chapter' within all trade agreement. The turning point in US social clause policy was the May 10th Compromise. Under this compromise, the US shifted from a social clause template that included an obligation to implement national labour standards to one that included an obligation to comply with and implement ILO CLS. However, the reference to CLS was not followed by a solid legal framework. Furthermore, in negotiating the mega-regional agreements with the Pacific and Atlantic countries (TPP and TTIP), the Obama Administration based its social clause template on the May 10th Compromise. However, the TPP and TTIP never entered into force because the Trump Administration withdrew for them. Nevertheless, the Trump Administration managed to

[1038] Perulli, "The Perspective of Social Clauses in International Trade," 4; ILO, *Social Dimensions of Free Trade Agreements*, 18–19; De Wet, "Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization," 445.
[1039] ILO, *Social Dimensions of Free Trade Agreements*, 19–21.
[1040] European Commission, "EU Trade Relations with United States," EU trade relationships by country/region, February 4, 2022; World Bank, "GDP (Current US$) - European Union, United States - Data," World Bank Open Data, 2022, "Report for Selected Countries and Subjects - European Union,"; IMF, "Report for Selected Countries and Subjects - United States," World Economic Outlook Database, 2022.

conclude the only trade agreement that came into force after those of the time of G.W. Bush, the USMCA. This FTA has a strong social clause that mainly aims to protect the trade union rights of Mexican workers.

Over time, the US social clauses have evolved. Each US Administration has modified the content of the clauses according to its own legal model. This evolution is the result of Parliamentary and institutional political compromise.

Like the US, the EU introduced social clauses first in the GSP and then in its FTAs. The first social clause was introduced in the 1999 EU-South Africa FTA, followed by the 2000 Cotonou Agreement, which further detailed the obligations to protect workers. Based on the Cotonou Agreement, the EU negotiated EPAs with the ACP countries that included social obligations. However, the EU social clause template was finally settled in the 2015 EU-Republic of Korea FTA, establishing the TSD Chapters. These Chapters bind the Parties to respect and implement international and environmental Conventions and to promote economic, social and environmental sustainability. Since TSD Chapters have a very specific legal framework, they became the dominant model in all EU FTAs.

Over time, the EU clauses have developed. However, unlike the US ones, the EU social clauses result from a dual compromise: political-institutional in the Council and Parliament (Articles 207 and 218 TFEU) and between the general interests of the EU and the interests of the Member States. The need to compromise results from the principle of conferral that governs the EU, according to which the EU has exclusive competence in trade policy but not in social matters. Therefore, the EU concludes mixed agreements – to promote social and economic development – that have to be ratified by the EU and all its Member States, meaning that national (and, in one case, regional) Parliaments have

veto power over FTAs. Hence the need to mediate between all the interests within the framework of the institutional dialogue.

The parallel analysis revealed the characteristics and structural elements of the EU and US models, highlighting similarities and differences as well as strengths and weaknesses (Table 13 in Chapter II, reproduced below for clarity).

Element	USA - Labour Chapter	EU - Trade and Sustainable Development Chapter

Social obligations	• Conform national labour legislation to CLS
	• National labour standards (acceptable condition of work, minimum wage, hours of work, and occupational safety and health)
	• Prohibition of worsening national labour standards to attract trade and investment.
	• Legal framework:
	  o 1998 ILO Declaration;
		• Conform national labour legislation to CLS by ratifying and implementing CLS Conventions, Decent Work Agenda.
		• Prohibition of worsening national labour standards to attract trade and investment.
		• Legal framework:
		  o 1998 ILO Declaration;
		  o ILO CLS Conventions;
		  o 2006 UN ECOSOC Ministerial Declaration on Employment and Decent Work for All;
		  o UN and OECD Corporate Social Responsibility recommendations;
		  o 2008 ILO Declaration on Social Justice for a Fair Globalization.

Procedural commitments	• Dialogue • Cooperation	• Transparency • Dialogue • Cooperation • Impact assessment
Implementation mechanisms	• Labour Affair Council; • Domestic Labour Advisory Committee (optional); • Open meeting civil society with Labour Affairs Council.	• Committee on Trade and Sustainable Development (mandatory); • Domestic Advisory Group(s) on Sustainable Development (mandatory); • Meetings between the Civil Society Forum and the National Advisory Group on Sustainable Development (mandatory).
Dispute Settlement	• Cooperative labour consultation; • Commercial dispute settlement system with financial or trade sanctions (with procedural and subject matter limitations).	• Cooperative labour consultation; • A Panel of experts without sanction possibility.

Table 13: Labour obligations in US and EU social clauses[1041]

[1041] De Ville, Orbie, and Van Den Putte, "TTIP and Labour Standards," 34–35.

The first difference between the US and European models is value-based. While the EU chooses sustainable development as its goal, the US merely refers to Labour Law. The terminology underlies the ideological framework: the EU aims at general progress, whereas the US corrects negative market externalities. Furthermore, the ideological approach is reflected in the organisation of legal obligations: the EU brings environment and labour together in one Chapter, while the US treats them separately without highlighting their interconnection.

Both models refer to the principles of the 1998 ILO Declaration and the CLS. However, the EU specifically defines the legal framework by requiring Parties to ratify ILO CLS Conventions and apply ILO Decent Work Agenda principles. Conversely, the US legal framework lacks a similar level of development, but it requires Parties to conform their legislation to international standards and effectively enforce it.

Both the US and the EU prohibit worsening national labour standards to attract trade and investment and rely on cooperation to promote labour progress. Therefore, the US and the EU templates provide for cooperative implementation mechanisms on three levels: bilateral (Labour Affair Council; Committee on Trade and Sustainable Development), national (Domestic Labour Advisory Committee; Domestic Advisory Committee on Sustainable Development), and civil society (Open meeting civil society with Labour Affairs Council; Meetings between the Civil Society Forum and the National Advisory Group on Sustainable Development). However, the TSD Chapters strengthen cooperation by making all three levels mandatory.

The US and EU templates differ the most in their dispute resolution mechanisms. Although both provide for a pre-litigation phase of conciliation and a litigation phase before an International Panel, the US clauses include sanctions and the EU ones do not.

The US economic and trade sanctions are optional and presuppose an arbitral finding of violation of social commitments, which makes the model conditional. Conversely, the EU favours a cooperative and promotional approach, aimed at improving workers' conditions by convincing its partners without punitive mechanisms.

Both models are, in their own way, incomplete and leave room for criticism. Despite emphasising labour protection, the US model fails to establish precise and verifiable obligations as it lacks a binding legal framework. However, it does provide, at least in theory, an enforcement apparatus. Conversely, the EU is extremely precise regarding the legal framework, but largely lacks enforcement.

In both cases, the social clauses pursue their objectives inadequately because they leave extensive margins of discretion. The EU relies on cooperation but does not provide for coercive instruments, whereas the US provides for them, in theory, but has ineffective obligations. The causes of the inadequacy of the US clauses are eminently political. They stem from the parliamentary and governmental clash between an approach to the trade of pure liberalism and one more concerned with correcting negative social externalities. Conversely, the causes of the inadequacy of EU clauses are both technical and political. The technical causes are related to the negotiating mechanism and the mixed nature of the agreements. The political causes are related to the conflicting interests of the parties, the main objective of the FTAs (i.e. trade liberalisation) and the balance of power between the EU and its Member States.[1042]

To assess the efficacy of the US and EU social clauses, the last Chapter of the dissertation empirically examined the limits of these clauses studying the Final Report of

[1042] Harrison, "The Labour Rights Agenda in Free Trade Agreements," 713–15.

the Arbitral Panel in the US v. Guatemala case and the Report of the Panel of Experts in the EU v. Republic of Korea case.

4. US v. Guatemala and EU v. Republic of Korea

In the social clause history, only the US v. Guatemala and the EU v. Republic of Korea cases were settled by an International Panel. Therefore, these cases are the two (and, so far, only) milestones for understanding the efficacy of social clauses.

The Final Report of the Arbitral Panel in the US v. Guatemala case deals with Guatemala's alleged violation of its obligations under Article 16.2.1(a) of the CAFTA-DR. This provision stipulates: "A Party shall not fail to effectively enforce its Labour Laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."[1043]

The Arbitral Panel's analysis focuses on the interpretation of the phrase "affecting trade." The Arbitral Panel concludes that non-enforcement of Labour Law affects trade when it confers a competitive advantage on one or more employers engaged in trade between the Parties, regardless of the weight or importance of that employer within its particular economic sector. However, an impact on trade cannot be presumed as a result of every failure to enforce Labour Law since the specific effects caused by the competitive advantage have to be demonstrated.

This interpretation of the relationship between trade and labour is markedly favourable to the former. From this interpretation, the Arbitral Panel derives a heavy burden of proof holding that the Complaining Party must: "(1) demonstrate that the enterprise or enterprises in question export(s) to CAFTA-DR Parties in competitive

[1043] Article 16.2.1(a), CAFTA-DR.

markets or compete with imports from CAFTA-DR Parties; (2) identify the effects of a failure to enforce; and (3) demonstrate that these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises."[1044]

Due to the failure to fulfil the burden of proof, the US lost the dispute. However, the Arbitral Panel recognised that the Central American State violated workers' rights without integrating the "affecting trade" clause. Therefore, no sanctions were imposable on Guatemala.

According to Ortino, the Arbitral Panel Report has three weaknesses: (a) the interpretation of the clause "in a manner affecting the trade between the Parties" does not support the imposition of a condition of actual trade effect, (b) the object and purpose of the CAFTA-DR do not support the imposition of a condition of "actual" trade effect, and (c) the application of the "trade link" requirement remains ambivalent.[1045] These three weaknesses call into question the legal soundness of the decision. They are the consequence of an ambiguity in terminology in the CAFTA-DR (not surprisingly, the USMCA has clarified the content of the obligation).

The Report of the Panel of Experts in the EU v. Republic of Korea case deals with Korea's alleged violation of its obligations under Article 13.4.3 of the EU-Republic of Korea FTA. This provision stipulates:

> 3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to

[1044] Namgoong, "Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," 493-94; CAFTA-DR Arbitral Panel Established Pursuant to Chapter Twenty, "Final Report of the Panel in the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR," 63; Ortino, "Trade and Labour Linkages and the US-Guatemala Panel Report. Critical Assessment and Future Impact," 14-17.
[1045] Ortino, "Trade and Labour Linkages and the US–Guatemala Panel Report. Critical Assessment and Future Impact."

> respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.
>
> The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified, respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO.[1046]

The three key questions around which the dispute revolves are jurisdiction, the first sentence of Article 13.4.3 and the last sentence of Article 13.4.3. The Panel affirms its jurisdiction by confirming that in stipulating Chapter 13 of the FTA the Parties created a different and separate obligation – from that arising from ILO membership – to ratify the ILO fundamental Conventions. Further, the Experts conclude that the Republic of Korea has violated its obligations under the first sentence of Article 13.4.3 because it has introduced provisions restricting the freedom of association and the right to collective bargaining. However, the Panel finds that Korea has not violated the last sentence of Article 13.4.3 because it has made sufficient efforts to ratify the ILO fundamental Conventions since 2017.

From a legal viewpoint, the Experts' reasoning is robust. Moreover, the Report is key because it establishes the principle that "the TSD Chapter has implications and commitments that bond beyond the narrow interpretation of labour matters that impact trade."[1047] Indeed, Parties are obliged to ratify core ILO Conventions by creating a minimum framework of protections within which national legislation sets the domestic

[1046] Article 13.4.3, EU-Republic of Korea FTA.
[1047] García, "Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case," 64.

standard. Experts say this obligation is self-standing and derives from the FTA. Indeed, the first sentence of Article 13.4.3 creates an independent obligation to protect labour rights, distinct from the obligation assumed by the Parties as members of the ILO. This obligation is "secured" by the provisions of the FTA itself.

The weakness of the EU v. Republic of Korea case lies in the structure of the social clause, which does not provide for sanctions. The absence of penalties reduces the deterrence of social clauses because it links them to reputational damage. However, this damage is not immediate and tangible in contrast to economic penalties that have an afflictive effect. The Korean example is emblematic; pending litigation, the Asian state ratified three of the four core ILO conventions it lacked because it suffered reputational damage. However, the Korean government did not reform its legislation at all to conform to the Panel's findings and the ILO's standards, and after the conclusion of the dispute the Ministry of Labour stated that the legislation would not be changed.

From a comparative point of view, the study of these two cases reveals some essential aspects. The first aspect is the confirmation of the existence of two different approaches to social clauses: the US conditional model and the EU promotional model.

The second aspect concern the (negative) influence that the US-Guatemala dispute had on the EU-Republic of Korea dispute. The Panel of Experts rejected the findings of the Arbitration Panel through a formal and substantive argument. The formal argument revolved around the fact that the legal basis of the disputes were different. The EU-Republic of Korea FTA provides in Article 13.7.1 a text identical to Article 16.2.1(a) of CAFTA-DR. Therefore, the fact that the EU had not resorted to Article 13.7.1 led the Panel to conclude that the US v. Guatemala dispute was irrelevant.

Article 13.7.1 of EU-Republic of Korea FTA	Article 16.2.1(a) CAFTA-DR
1. A Party shall not fail to effectively enforce its environmental and Labour Laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties	A Party shall not fail to effectively enforce its Labour Laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

Table 16: Comparison between Article 13.7.1 of the EU-Republic of Korea FTA and Article 16.2.1(a) of the CAFTA-DR.[1048]

The substantive argument used by the panel concerns the fact that the TSD chapters have a scope that goes beyond the narrow field of labour issues impacting on trade, encompassing the objective of sustainable development from an economic and social perspective. [1049]

In light of the formal argument alone, one might assume that the EU had not invoked Article 13.7.1 to avoid incurring the same burden of proof as the US, thus losing the dispute. However, this assumption can be overcome by examining the substantive argument. Since the TSD Chapters aim to promote sustainable development, the Republic of Korea's violation of social norms breached Chapter 13 from the perspective of consistency between domestic law and the CLS. Therefore, the legal basis had to be the one that constituted the obligation of consistency between domestic law and the CLS, i.e. Article 13.4.3, Article 13.7.1 being residual.

The third and last aspect concerns the legal effects of disputes. The two cases clarify the nature of obligations arising from social clauses. Both Reports agree that social clauses are not merely formal commitments but legally binding obligations the Parties are bound to respect. This clarification marked a turning point by opening up the possibility of new disputes to improve working conditions. The downside of these decisions is the

[1048] "Free Trade Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part;" SICE - Foreign Trade Information System, "Central America - Dominican Republic - United States (DR-CAFTA)."
[1049] García, "Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case," 64.

risk that countries will become more reluctant to sign FTAs with social clauses and will aim to blur labour provisions.

A further consequence concerns the definition of the burden of proof. On this point, the two decisions differ significantly. The US v. Guatemala case establishes a burden of proof that makes the demonstration of the violation of labour rights conditional on the impact on trade. In contrast, EU v. Republic of Korea establishes a burden of proof where it is sufficient to demonstrate the violation of labour rights as the impact on trade is presumed. Underlying the burden of proof in EU v. Republic of Korea is the fact that decent work and trade are legally considered to be on the same level by the FTA. However, the legal equivalence of labour and trade in EU v. Republic of Korea does not imply political equalisation.

The last legal consequence concerns the efficacy of social clauses. The fact that the two control mechanisms (for the US the Arbitration and for the EU the Panel of Experts) have been activated shows that social clauses are a valuable tool for declaring the violation of workers' rights. However, this procedure has different costs and roles depending on whether it can include economic and trade sanctions.

In the US v. Guatemala case, the Report of the Arbitral Panel is both declaratory and condemnatory. If the US had fulfilled its burden of proof, the Panel could have condemned the Central American country for economic damages. A sanction increases the deterrent effect of a rule and strengthens the Arbitral Panel decision.

In the EU v. Republic of Korea case, the Report of the Panel of Experts is only declaratory. The deterrence, in this case, does not come from the threat of a sanction. As Garcia explains, the violation cost is mainly reputational and increases as the democratic

nature of a government grows.[1050] Therefore, the less democratic a country is, the less effective a Panel decision will be. In contrast, trade and economic sanctions, being tangible, act as a more significant deterrent. The role of sanctions is demonstrated by the dual attitude of the Republic of Korea, which has ratified some of the ILO Conventions but has no intention of undertaking any systematic reform of its legislation to bring it into conformity with the same Conventions.

In conclusion, this analysis shows that the EU's construction of social clauses undoubtedly has the merit of being more in line with socially and economically sustainable development. However, the US conditional model has the advantage of having social clauses whose deterrence is greater.

5. Final Remarks

Having gone through all the stages of this research, this study concludes that social clauses are a useful, but feeble instrument with limited efficacy. The notion of efficacy used to assess these legal provisions concerns the ability of an international norm to influence national authorities to adapt national norms to international standards and the ability to prevent the violation of social obligations under social clauses through deterrence mechanisms.

It has been said that social clauses can influence national law because they link trade with social obligations by providing the respect of IFLRs and, often, including the ratification of ILO Conventions. Therefore social clauses are useful, but are weak because of their enforcement mechanisms.

[1050] Ibid., 64–65.

The US and EU models provide for a long pre-litigation phase and absolute discretion in initiating disputes. This gradualism has a political root and serves to prevent conflicts. However, this approach undermines the deterrence of social provisions, which is linked to the threat of the sanction and the timeliness of the reaction to the violation. Moreover, the two cases show that – even in the event of litigation – the afflictive capacity is extremely limited, as in the case of US v. Guatemala, or non-existent, as in the case of EU v. Republic of Korea.

Above all, the comparative analysis of the two litigations showed the limits of the efficacy of social clauses. The US model has a higher degree of virtual deterrence than the EU model because it provides for sanctions. However, this virtual deterrence is neutralised by the excessive burden of proof in litigation. This burden may be due to the political choice to align the US and EU models substantively. In other words, in US v. Guatemala, a heavy burden of proof would have been adopted, knowing that this would have avoided the need to impose economic sanctions on Guatemala while still allowing for the establishment of violations. Conversely, in EU v. Republic of Korea, the burden of proof would have been lighter – and more in line with the FTA's legal dictate and general principles – because the decision was only declaratory and not condemnatory.

This hypothesis would explain the argumentative weaknesses of the Arbitral Panel's Report and would find confirmation in the two formal and substantive arguments used to deny the relevance of the US v. Guatemala case in EU v. Republic of Korea by the Panel of Experts. The difference in legal basis chosen is inconclusive because the reasoning of the EU's First Written Comment mirrors that of the US in many elements, foremost, the burden of proof. At the same time, the reference to the difference between the principles governing the two treaties needs to be better justified. Although this

difference exists because the CAFTA-DR is more market-oriented, whereas the EU-Republic of Korea FTA aims more at sustainable development, they are still trade liberalisation treaties within the framework of a capitalist economic system. Therefore, they are ideologically very similar. The reason that prompted the Experts to adopt a lighter burden of proof would, thus, lie in the merely declaratory and not condemnatory nature of its decision.

In US v. Guatemala case it would have been possible to choose a markedly teleological interpretation by espousing the arguments of the US and adopting a less onerous burden of proof. If this path was not taken, the reason was to avoid economic sanctions. The profound reason for this choice would be to prevent the risk that third States would no longer adhere to social clauses, thus nullifying decades of efforts to link trade and labour, as well as to protect the economic advantage for Euro-American companies that can access a labour market with lower costs.

Social clauses lack of efficacy and deterrence derives from how they are interpreted or legally constructed. This effect results from a (more or less conscious) gradualist political choice to protect the economic interest. Therefore, social clauses' concrete efficacy and deterrence are yet to come. However, clauses are not inherently useless. On the contrary, their utility is twofold: ethical and practical.

First, social clauses respond to an ethical need in advanced economies to promote sustainable development models and refute exploitation and abuse. This need can only be satisfied through a gradualist approach. Unfortunately, the gradualist choice has a heavy price in the loss of efficacy and the depowering of both virtual and practical deterrence, as demonstrated in this research.

Second, social clauses have the practical effect of creating autonomous and binding obligations for the implementation of the IFLR and, more specifically, for the adaptation of domestic law to the ILO Convention. Both the Reports declare that the social commitment undertaken by the Parties is not a mere declaration of intent but a substantive legal obligation that must be fulfilled. The absence of a sanction does not deprive the social clauses of their binding nature; it simply shifts the issue of deterrence to the level of political persuasion. The mechanisms of "naming, blaming and shaming,"[1051] typical of international relations, then come into play. These mechanisms focus on reputational damage and are all the more influential the more democratic the affected country is and the more critical the trading partner that applies them is.

In conclusion, this research recognises the ethical and substantive utility of social clauses and their lack of legal efficacy and deterrence.

[1051] Regarding "naming, blaming and shaming" see: James C. Franklin, "Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America," *International Studies Quarterly* 52, no. 1 (2008): 187-211; Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887-917; Helen Fein, "More Murder in the Middle: Life-Integrity Violations and Democracy in the World, 1987," *Human Rights Quarterly* 17, no. 1 (1995): 170-91; Christian Davenport and David A. Armstrong, "Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996," *American Journal of Political Science* 48, no. 3 (2004): 538-54; Sonia Cardenas, *Conflict and Compliance: Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007); Amanda M. Murdie and David R. Davis, "Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs," *International Studies Quarterly* 56, no. 1 (2012): 1-16; Bob Clifford, *The Marketing of Rebellion: Insurgents, Media, and International Activism* (Cambridge: Cambridge University Press, 2005); Elise Rousseau, "Power, Mechanisms, and Denunciations: Understanding Compliance with Human Rights in International Relations," *Political Studies Review* 16, no. 4 (2018): 318-30; Emilie M. Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization* 62, no. 4 (2008): 689-716; Jacqueline H.R. DeMeritt, "International Organizations and Government Killing: Does Naming and Shaming Save Lives?," *International Interactions* 38, no. 5 (2012): 597-621; Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem."

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