

**To What Extent Does the EU Usefully Promote Economic and Social
Rights Through Human Rights Clauses in its Trade Agreements?**

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Abstract

This thesis evaluates the extent to which the EU usefully promotes economic and social rights (ESR) through human rights clauses (HRC) in its trade agreements. HRC establish respect for human rights as an essential element of the parties' agreements and enable the parties to take appropriate measures in response to breaches of their obligations under HRC. HRC further provide a legal reference point for the parties' positive measures which promote ESR within the framework of trade agreements. Given that ESR tend to be given less priority than civil and political rights (CPR) in the international community, and given that EU trade agreements have developed in a manner which has strengthened the link between trade and ESR, it is necessary to examine whether the EU is making use of the opportunities provided by HRC in its trade agreements to usefully promote ESR. Two case studies have been undertaken for this purpose, in order to analyse the measures taken by the EU to promote ESR through HRC in practice. The first case study focuses on the EU's trade agreement with Korea, and the second case study focuses on the EU's trade agreement with Colombia and Peru.

List of Abbreviations

ASEAN = Association of Southeast Asian Nations

ASEM = Asia-Europe Meeting

CEDAW = Convention on the Elimination of All Forms of Discrimination
against Women

CERD = Convention on the Elimination of All Forms of Racial Discrimination

CoE = Council of Europe

CPR = civil and political rights

CRC = Convention on the Rights of the Child

CRPD = Convention on the Rights of Persons with Disabilities

CSO = civil society organisations

ECHR = European Convention on Human Rights

ECSR = European Committee of Social Rights

EEC = European Economic Communities

EIDHR = European Instrument for Democracy and Human Rights

ESC = European Social Charter

ESR = economic and social rights

EU = European Union

FTA = free trade agreement

GSP = General Scheme of Preferences

HRC = human rights clauses

ICCPR = International Covenant on Civil and Political Rights

ICESCR = International Covenant on Economic, Social and Cultural Rights

ILO = International Labour Organisation

MEP = Member of European Parliament

MPE = Market Power Europe

NPE = Normative Power Europe

OECD = Organisation for Economic Co-operation and Development

OAS = Organisation of American States

PCA = partnership and cooperation agreement

PEP = Platforma Europa Peru

RESC = Revised European Social Charter

SAP = Social Action Programme

SEA = Single European Act

SPA = strategic partnership agreement

TEU = Treaty on European Union

TFEU = Treaty on the Functioning of the European Union

TSD = Trade and Sustainable Development

UDHR = Universal Declaration of Human Rights

UN = United Nations

VCLT = Vienna Convention on the Law of Treaties

WMD = weapons of mass destruction

WTO = World Trade Organisation

Chapter One: Introduction

Within the framework of its Treaties, the EU has an obligation to promote human rights in all areas of its external action, including in the area of trade.¹ The EU has developed various tools for that purpose, one of them being human rights clauses (HRC). First emerged as programmatic principles in the Lomé IV Agreement,² HRC have evolved into legally binding provisions which have been systematically included in EU trade agreements since 1995.³ They establish respect for human rights and democratic principles as an essential element of parties' agreements, while allowing either party to take appropriate measures if the other party breaches their obligations under HRC. HRC provide the basis upon which the parties can take different measures to promote human rights, such as political dialogue, sharing of good practices, technical and financial assistance, human rights analysis, and other joint programmes.⁴ These

¹ Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU), arts 3(5), 21(1).

² Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 [1991] OJ L 229/3 (Lomé IV Agreement).

³ See Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (Communication) COM(95) 216 final, 10; E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 380-382.

⁴ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 3) 7; Commission, 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners: Strategic guidelines' (Communication) COM(2003) 294 final 11; L Bartels, 'A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements' (2004) 9 *Mediterranean Politics* 368; 370; N Ghazaryan, 'A new generation of human rights clauses? The case of Association Agreements in the Eastern neighbourhood' (2015) 40(3) *ELR* 1, 25-29; F Martines, 'Human Rights Clauses in EU Agreements' in S Poli (ed), *Protecting Human Rights in the European Union's External Relations* (ASSER Institute 2016) 38.

measures are what are considered as the positive function of HRC, in contrast with the negative function of HRC, which refers to suspension of agreements in response to a party's breach of their obligations.⁵

Against this back ground, this thesis seeks evaluate the extent to which the EU usefully promotes economic and social rights (ESR) through HRC in its trade agreements. ESR can be defined as a group of rights which create conditions for an individual's adequate standard of living and their economic and social well-being. Examples of ESR found in international human rights instruments include the right to work, the right to just and favourable conditions of work, the right to freedom of association and collective bargaining, the right to social security, the right to education, and the right to health.⁶

There are two main reasons why this thesis specifically focuses on ESR. First, although international law endorses the principles of universality, indivisibility and interdependence of all human rights,⁷ in practice ESR tend to be given

⁵ See Ghazaryan, 'A new generation of human rights clauses?' (n 4) 17-29; L Bartels, 'In-depth analysis: Assessment of the implementation of the human rights clause in international and sectoral agreements' (2023) <[https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2023\)702586](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2023)702586) > accessed 31 July 2023, 21.

⁶ For example, see International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1978) 993 UNTS 3 (ICESCR), part iii; European Social Charter (signed 18 October 1961, entered into force 26 February 1965) ETS 035 (ESC), part ii.

⁷ The principles of universality, indivisibility and interdependence were first espoused by the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR). They were reaffirmed in the World Conferences held in Teheran (22 April – 13 May 1966) and in Vienna (14 – 26 June 1993). See International Conference on Human Rights, 'Proclamation of Teheran' (adopted 13 May 1968) UN Doc A/Conf.32/41, para 13; World

subordinate status to civil and political rights (CPR), as will be discussed in Chapter Two. As second generation rights, international law distinguishes ESR from CPR, because of their different nature and processes of implementation. Recognising this disparity between CPR and ESR, EU law has sought to elevate the status of ESR through the adoption of the EU Charter of Fundamental Rights (EU Charter).⁸ The EU Charter brings CPR and ESR into one legally binding document that has the same legal status as the Treaties.⁹ Article 21(1) TEU also makes clear that it is the ‘universality and indivisibility’ of human rights, which the EU seeks to promote externally. This means that, when seeking to promote human rights using tools such as HRC, the EU should ensure that ESR are promoted as much as CPR. It is thus necessary to examine whether this is realised in practice. However, while there is significant literature on the EU’s promotion of human rights through HRC in general, there is a lack of focus on the EU’s promotion of ESR through HRC more specifically. Therefore, this thesis seeks to fill this gap in literature.

Secondly, there is an intrinsic link between the objectives of ESR and the objectives of international trade. Economic prosperity yielded by trade can contribute to improvement in standards of living, which in turn contributes to progressive realisation of ESR, as will be discussed in Chapter Four. In light of this link, trade provides a useful forum for the EU to promote ESR, particularly

Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ (adopted 25 June 1993) UN Doc A/Conf.157/23 (Vienna Declaration), point 5.

⁸ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EU Charter).

⁹ TEU, art 6(1).

by using the leverage that it derives from its market power.¹⁰ In practice, EU trade agreements have evolved in a manner that strengthens this link between trade and ESR. For example, the EU's new generation trade agreements have introduced Trade and Sustainable Development (TSD) Chapters, which seeks to ensure that the objectives of sustainable development are reflected in the parties' trade relations.¹¹ Given that there is a significant overlap between sustainable development and ESR, the TSD Chapters essentially contribute to the EU's promotion of ESR in its trade agreements.¹² This is even more the case as HRC underlie the whole agreements, meaning that provisions such as the TSD Chapters must be read in light of HRC, as will be discussed in Chapter Four. Therefore, it is necessary to examine whether the EU makes use of the opportunity provided by HRC in its trade agreements to usefully promote ESR in its relations with third countries. Again, while there is significant literature which focuses on specific provisions of EU trade agreements, such as the TSD Chapters, there is a lack of literature which focuses on the way in which those provisions and HRC complement one another to strengthen the EU's promotion of ESR. The originality of this thesis is therefore vested in analysing the link between HRC and the framework of EU trade agreements, and the extent to which the EU promotes ESR therein.

¹⁰ See C Damro, 'Market Power Europe' (2012) 19 JEPP 682, 686-687.

¹¹ See Commission, 'Global Europe: Competing in the World' (Communication) COM(2006) 567 final, 2, 8-9.

¹² For example, fundamental labour rights, which the parties must respect under the TSD Chapters, fall within the scope of ESR. See the discussion in Chapter Six, Section 3.

1. Terminology

The definition of ESR has already been provided above: they are rights which pertain to creating the conditions for an individual's adequate standard of living and economic and social well-being. For the purpose of this research, 'promotion' of ESR refers to the way in which the EU and its trade partners take positive and conscious steps to improve ESR within the framework of their trade agreements. Those steps may include political dialogue, ex-post evaluation of the agreements which include human rights assessments, funding, and other joint activities. As mentioned in the beginning of this chapter, those are the measures which fall within the positive function of HRC. 'Useful' promotion of ESR refers to the EU's promotion of ESR in a way that contributes to progressive realisation of ESR in its partner countries.

A 'trade agreement' means an agreement which the EU has entered into based either solely or partly on Article 207 TFEU.¹³ Article 207 confers on the EU exclusive competence to negotiate and conclude trade agreements with third countries. However, it must be noted that, in order to be categorised as a 'trade agreement', it is not necessary for Article 207 to be the sole legal basis. In fact, many of EU trade agreements are negotiated and concluded based on several legal bases in addition Article 207. These so-called 'mixed' agreements allow both the EU and its Member States to jointly participate in the negotiation, conclusion and implementation of the agreements. Examples of such

¹³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 207.

agreements include the EU-Korea Trade Agreement ¹⁴ and the EU-Colombia/Peru Trade Agreement,¹⁵ which constitute the focus of the case studies in Chapters Six and Seven.

2. Methodology

The research is largely based on doctrinal analysis, which helps to understand the normative framework in which the EU seeks to promote ESR through HRC in its trade agreements. The doctrinal analysis helps to evaluate the relationship between different legal concepts, norms and principles, while establishing a link between disparate segments of law by bringing them together ‘as part of a larger system of law’.¹⁶ This method is therefore useful in evaluating the relationship between ESR, HRC and EU trade agreements. Primary legal sources, including the EU Treaties, the EU Charter and international human rights instruments will be reviewed for the analysis of the concept of ESR under international and EU law, and to analyse the EU’s obligation to promote ESR in its trade relations. This will be complemented by the review of EU case law and secondary sources, including EU policy documents, which are also useful in analysing the scope of HRC in EU trade agreements.

¹⁴ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6 (EU-Korea Trade Agreement).

¹⁵ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3 (EU-Colombia/Peru Trade Agreement).

¹⁶ T Hutchinson and N Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 DLR 83, 84.

This will be followed by undertaking two case studies, which seek to examine whether the EU is in practice realising the opportunities provided by HRC in its trade agreements to usefully promote ESR. The first case study is focused on the EU-Korea Trade Agreement, signed in 2010, and the second case study is focused on the EU-Colombia/Peru Trade Agreement, signed in 2012. There are several reasons why Korea, Colombia and Peru have been chosen for the case studies. First, these countries are the first countries to sign new generation trade agreements with the EU in their respective regions. As mentioned in the beginning of this chapter, new generation trade agreements have introduced TSD Chapters which, when complemented by HRC, strengthen the link between trade and ESR. TSD Chapters thus serve to broaden the scope of the measures which the EU can take to promote ESR within the positive function of HRC.

Secondly, the countries chosen are important regional players, and the EU's implementation of trade agreements with these countries can serve as a precedent for its future trade relations with other countries in their regions. Korea maintains close trade links with its neighbours in Asia, including the regional organisation, the Association of Southeast Asian Nations (ASEAN).¹⁷ It also participates in the Asia-Europe Meeting (ASEM), where the EU seeks to cooperate with Asian countries.¹⁸ In the past, the EU sought to conclude an

¹⁷ See J Lee, '30 years of ASEAN-Korea partnership: From prosperity to peace with people' (2019) <<https://en.asaninst.org/contents/30-years-of-asean-korea-partnership-from-prosperity-to-peace-with-people/>> accessed 20 August 2023; Y Andrew, 'South Korea's New Southern Policy and ASEAN-ROK Relations' (2020) <<https://thediplomat.com/2020/07/south-koreas-new-southern-policy-and-asean-rok-relations/>> accessed 20 August 2023.

¹⁸ ASEM, 'Fostering Dialogue and Cooperation between Asia and Europe' (2023)

interregional new generation trade agreement with the ASEAN, but this goal was not realised because of the heterogeneity of the ASEAN countries, resulting in bilateral negotiations with these countries instead.¹⁹ In that regard, the EU's implementation of the new generation trade agreement with Korea can signal to the ASEAN countries and other countries of the region that the EU is committed to ambitious trade liberalisation with Asian countries.²⁰ The EU's implementation of HRC in this context can further demonstrate to the region that the EU is committed to promoting ESR in its trade relations.

Similarly, Peru and Colombia are important regional players, as they are members of the Andean Community,²¹ with which the EU sought to conclude a bi-regional association agreement in the past.²² As will be seen in Chapter Seven, the negotiations for the association agreement failed due to the difficulty reaching a common position among the members of the Andean Community.²³

<<https://aseminfoboard.org/overview/>> accessed 20 August 2023. See also A Forster, 'Evaluation the EU-ASEM relationship: a negotiated order approach' (2000) 7 JEPP 787; M Manea, 'Human rights and the interregional dialogue between Asia and Europe: ASEAN-EU relations and ASEM' (2008) 21 *The Pacific Review* 369.

¹⁹ KL Meissner, 'A case of failed interregionalism? Analyzing the EU-ASEAN free trade agreement negotiations' (2016) 14 *AEJ* 319, 324-331.

²⁰ A Marx et al, 'Introduction' in A Marx et al (eds), *EU-Republic of Korea Relations in a Changing World* (2013) <<https://ghum.kuleuven.be/ggs/publications/books/rapport-ggs-eu-korea-relations-in-a-changing-world.pdf>> accessed 6 July 2023, 6.

²¹ The current members of the Andean Community are: Colombia, Peru, Ecuador and Bolivia.

²² See Proposal for a Council Decision on the conclusion of a Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its member countries, the Republics of Bolivia, Colombia, Ecuador, Peru and the Bolivarian Republic of Venezuela, of the other part (Proposal) COM(2003) 695 final.

²³ I Szegegy-Maszak, 'Association / Free Trade Agreement – Bi-regional Partnership between European Union and Andean Community' (2009) 32 *Revista de Derecho* 218, 237-238; R

This resulted in trilateral negotiations with Colombia and Peru instead, and the EU-Colombia/Peru Trade Agreement thus serves as a starting point for the EU to liberalise its trade in the region. Therefore, as in the case of Korea, the EU's implementation of HRC in the EU-Colombia/Peru Trade Agreement serves as a trial for the EU to demonstrate its commitment to promote ESR in the region.

Thirdly, there are significant differences between Korea on the one hand, and Colombia and Peru on the other. Korea is a high income country²⁴ and was identified by the Commission in 2006 as a priority candidate for concluding a new generation trade agreement, because of its large market potential and high level of protection against EU competitors.²⁵ In 2010, the EU and Korea upgraded their relations to 'strategic partnership',²⁶ a concept which will be analysed in Chapter Six. Korea's fast economic growth and close trade links with large trading partners place it in a strategically and economically important position for the EU, particularly for 'securing a foothold' in the Asian market.²⁷

Dominguez, *EU Foreign Policy Towards Latin America* (2015 Palgrave Macmillan) 138-139.

²⁴ World Bank, 'World Bank Country and Lending Groups' (2023) <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>> accessed 6 July 2023.

²⁵ Commission, 'Global Europe' (n 11) 9.

²⁶ Commission, 'EU-Republic of Korea Summit, Joint Press Statement: Brussels, 6 October 2010' (2010) <https://ec.europa.eu/commission/presscorner/detail/en/PRES_10_266> accessed 7 July 2023; Commission, 'Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea – Final Report: Main Report' (2018) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/5be99665-6477-49a1-b6cc-30c6370c28fa/details>> accessed 7 July 2023, 40.

²⁷ Marx et al, 'Introduction' (n 20) 6. See also GI Neszmelyi, 'An Overview of the Trade Relations between the Republic of Korea and the European Union in the light of the KOREU Free Trade Agreement' in C Moldicz (ed), *Economic Development Strategies of Changing*

In contrast, Colombia and Peru are upper-middle income countries²⁸ and demonstrate relatively modest economic development, as will be seen in Chapter Seven. Whereas the EU's cooperation with Korea has always been tailored towards their bilateral relations, the EU's cooperation with Colombia and Peru have been mainly characterised by a regional approach, before the signing of the EU-Colombia/Peru Trade Agreement. The EU remains the largest donor of development aid in Colombia and Peru,²⁹ while being actively involving itself in the peace-building project in Colombia.³⁰ These suggest that there exists greater power asymmetry in the EU-Colombia/Peru relations. Furthermore, unlike the EU-Korea Trade Agreement, the ratification of EU-Colombia/Peru Trade Agreement was much controversial within the EU institutions, notably in the European Parliament, due to concerns of human rights violations in the countries.³¹ These differences therefore make Colombia and Peru ideal subjects to be examined in comparison with Korea, in the context of the EU's promotion of ESR through HRC. The comparative analysis of the two case studies will help reveal any significant differences in the EU's

East-Asian Countries After 2009 (Budapest Business School 2018) 182.

²⁸ World Bank, 'World Bank Country and Lending Groups' (n 24).

²⁹ Szegedy-Maszak, 'Association / Free Trade Agreement' (n 23) 233; Dominguez, *EU Foreign Policy Towards Latin America* (n 23) 22-24.

³⁰ See N Beaumont et al, 'The Challenges of Cooperation: The European Union's Engagement in Human Rights in Colombia: 2012 to 2019' (2019)
<<https://www.ucl.ac.uk/americas/file/2687>> accessed 31 July 2023, 18-31.

³¹ See European Parliament, 'EU trade agreement with Colombia and Peru (debate)' (2012)
<https://www.europarl.europa.eu/doceo/document/CRE-7-2012-05-22-ITM-014_EN.html> accessed 31 July 2023.

promotion of ESR through HRC in its relations with different countries, and what factors may affect the extent to which the EU promotes ESR in practice.

One final point to note is that Ecuador acceded to the EU-Colombia/Peru Trade Agreement in 2016,³² and therefore is now a party to the agreement. However, the EU's promotion of ESR through HRC in relation to Ecuador will not be examined in the second case study. This is because the case study seeks to examine the positive measures which the EU has taken since the start of the provisional application of the Trade Agreement in 2013. Furthermore, the analysis of the case study will make reference to the European Parliament's concerns in relation to Colombia and Peru from the beginning of the signing of the Trade Agreement. Therefore, only the original parties to the Trade Agreement will be examined in the case study for the purpose of the scope of this research.

3. Structure

This thesis contains six substantive chapters (Chapters Two – Seven), followed by a concluding chapter (Chapter Eight). Chapter Two will discuss the concept of ESR under international law. Understanding this concept is necessary for analysing the EU's promotion of ESR through HRC in the latter chapters. It will first give an overview of the development of ESR under international law and

³² Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession to Ecuador [2016] OJ L 356/3.

discuss why the concept of ESR has been more controversial than that of CPR in the international community. It will demonstrate how ESR have been given secondary status to CPR in practice, despite the principles of universality, indivisibility and interdependence of all human rights. It will also identify sources of ESR in international law, particularly within the legal framework of United Nations (UN), the International Labour Organisation (ILO) and the Council of Europe (CoE), since these sources have inspired the EU's own conceptualisation of ESR, which it seeks to promote externally.

Chapter Three will introduce the EU's own conceptualisation of ESR within its legal framework. It will particularly discuss the role of the EU Charter in elevating the status of ESR in the EU's promotion of human rights both internally and externally. It will also analyse the EU's obligation to promote ESR in its external relations, including in its trade relations. The analysis will help understand why the EU seeks to promote ESR through tools such as HRC in its trade agreements and how the EU's conceptualisation of ESR contributes to its promotion of human rights through HRC.

Chapter Four will discuss why it is particularly necessary for the EU to promote ESR in its trade agreements. It will analyse the relationship between trade and ESR, and discuss why trade agreements are useful instruments for promoting ESR in the EU's trade relations. It will further discuss the way in which EU trade agreements have developed to strengthen the link between trade and ESR,

and particular focus will be given to the role of TSD Chapters in complementing HRC in the context of EU's promotion of ESR.

Chapter Five will introduce what HRC are. It will provide an overview of the evolution of HRC in EU trade agreements and the rationale underlying the use of HRC. Particular focus will be given to the standard HRC modelled on the 1995 Commission Communication.³³ It will analyse the scope of the standard HRC and the extent to which ESR are included therein. It will further analyse the way in which HRC apply horizontally across the agreements to inform all the other provisions of the agreements. This will help understand the measures which the EU is able to take within the positive function of HRC, which provide the foundation for the following case studies.

Chapters Six and Seven contain case studies which evaluate the extent to which the EU usefully promotes ESR through HRC in the EU-Korea Trade Agreement, and in the EU-Colombia/Peru Trade Agreement, respectively. The case studies will give an overview of the relations between the EU and its partner countries concerned, and identify various issues of ESR in those countries, by consulting the reports of international organisations. In light of those issues, it will analyse whether the EU has taken any measures within the scope of HRC and, if so, whether those measures usefully promote ESR in practice. The findings of the case studies will be compared and further analysed in the concluding chapter

³³ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 3) 12-13.

(Chapter Eight), which will directly answer the research question on the extent to which the EU usefully promotes ESR through HRC in its trade agreements.

Chapter Two: Economic and Social Rights in International Law

1. Introduction

In the aftermath of World War II, there was an intense level of effort by the international community to ensure that history would not repeat itself again.¹ At international level, the United Nations (UN) was set up to promote international peace and security, while at European level, the Council of Europe (CoE) was established, seeking to unite the European states on the basis of human rights, democracy and the rule of law. It was in this context that civil and political rights (CPR) and economic and social rights (ESR) were brought together under international law, as fundamental rights deriving from inherent human dignity. Protection of these rights was considered as essential for the purpose of securing international peace and preventing the atrocities of World War II from occurring again in the future.²

Against this background, this chapter will evaluate the concept and the sources of ESR under international law. As will be seen in the Chapter Three, these

¹ J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 2010) 2; C Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, OUP 2014) 4-5; E Riedel, G Giacca and C Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in E Riedel, G Giacca and C Golay (eds), *Economic, Social and Cultural Rights in International Law* (OUP 2014) 5.

² See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), preamble; Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR), preamble.

sources and the concept of ESR have influenced the development of ESR in EU legal framework and the way in which ESR are encapsulated by human rights clauses (HRC) in EU trade agreements.

Section 2 will first introduce the concept of ESR under international law. It will demonstrate how ESR are distinguished from CPR, due to their different nature and processes of implementation. The discussion will help understand why the concept ESR has been more controversial than that of CPR within the international community, and why ESR tend to be treated as rather subordinate to CPR in practice. This will contribute to understanding the potential challenges that the EU may face when seeking to promote ESR in its external relations, and therefore why it is necessary to examine whether the EU usefully promotes ESR in practice through HRC in its trade agreements.

Section 3 will identify sources of ESR under international law. It will specifically focus on the legal framework of the UN and of the Council of Europe (CoE), as well as the standards developed by the International Labour Organisation (ILO). These sources have influenced the development of ESR in EU legal framework, and therefore the discussion in this section will lay the foundation for interpreting the concept of ESR which the EU seeks to promote externally, through tools such as HRC in its trade agreements.

2. Concept of ESR

As defined in Chapter One, ESR are rights which pertain to the conditions for an adequate standard of living and individuals' economic and social well-being. As such, these rights require imposition of positive obligations on States to make public choice and administrative decisions, such as distribution of resources, establishment of necessary infrastructure, and the balancing of different economic and social interests.³ Some critics therefore argue that ESR are not human rights *per se*, because they believe that the concept of 'human rights' entails negative obligations – precluding States from interfering with individuals' freedom.⁴ From their perspective, ESR are concerned with creating conditions for realising individuals' economic and social entitlements, which are desirable for better standards of living, but which are not necessarily fundamental human rights in themselves.⁵

Other less extreme critics believe that, while ESR may be given the status of human rights, they are inherently different from CPR in nature, which in effect places them secondary to CPR.⁶ This is because the realisation of ESR is

³ DM Hill, 'Right and their Realisation' in R Beddard and DM Hill (eds), *Economic, Social and Cultural Rights* (Macmillan 1992) 2-4; J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in TK Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003) 3.

⁴ Hill (n 3) 1-3, 9-10; Kenner (n 3) 2-3.

⁵ J Hunt, 'Fair and Just Working Conditions' TK Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003) 47.

⁶ See Hill (n 3) 9; S Deakin and J Browne, 'Social Rights and Market Order: Adapting the Capability Approach' in TK Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003) 30; Australian Human Rights Consultation Committee, 'National Human Rights Consultation: Report' (2009) <<https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>> accessed 31 July 2023, 366.

considered to be a much more complex process. The positive obligations of ESR mean that their realisation is more costly. For example, the right to health requires States to ensure quality healthcare services which are accessible and affordable, to establish necessary facilities, and to invest in medical research and training of the medical staff.⁷ States need to have adequate legislation and policy in place regarding various factors which affect the right to health, such as individuals' access to food and clean water, and protection of their right to housing.⁸ The right to housing would then entails more resources to be spent on providing social housing or subsidies for those who cannot afford their own housing, as well as establishing mechanisms to monitor the living conditions of vulnerable groups, while developing policies which can help people meet their own housing needs.⁹ The precise scope of these positive obligations is much more complex, because they are largely dependent on the economic and social models of each State.

Furthermore, the economic and social circumstances of each State may be volatile, in which case having a consistent approach to improve the level of protection for ESR may become difficult. This was evident during the global financial crisis of 2008, which negatively affected protection of ESR in many different countries. Among the 51 countries studied by the ILO in 2009, more

⁷ Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (2000) UN Doc E/C.12/2000/4, paras 11, 36-37, 43.

⁸ *ibid* paras 3-4, 11-12.

⁹ Committee on Economic, Social and Cultural Rights, 'General Comment No. 4: The Right to Adequate Housing (Art.11 (1) of the Covenant)' (1991) E/1992/23, paras 8, 11.

than 20 million jobs were lost since the crisis.¹⁰ There was an increase in the rate of evictions from rental housing in many countries because of the crisis, including in EU Member States such as Italy, Portugal, France, Greece and Spain.¹¹ States tended to respond to the crisis by resorting to austerity measures and making cuts in public expenditure, which negatively affected both CPR and ESR.¹² However, they had more damaging effects on the enjoyment of ESR, such as the right to health, the right to social security, and the right to food and housing, particularly for those who were already living in poverty.¹³ However, those austerity measures and cuts in public expenditure may have been necessary to maintain the structures of economy and to prevent deterioration of the cost of living crisis in the long term.

As the above example illustrates, the realisation of ESR is largely contingent on States' relative affordability in the background of scarcity of resources.¹⁴ In particular, '[n]o matter what the level of public deliberation in allocating scarce resources for securing these rights, there will always be some people who miss

¹⁰ ILO, *World of Work Report 2009: The Global Jobs Crisis and Beyond* (ILO 2009) 1, 3.

¹¹ FEANSTA, 'On the Way Home? FEANSTA Monitoring Report on Homelessness and Homelessness Policies in Europe' <<https://www.feantsa.org/en/report/2012/09/29/on-the-way-home-feantsa-monitoring-report-on-homelessness-and-homelessness-policies-in-europe?bcParent=27>> accessed 31 July 2023, 33; MA Nolan, 'Not fit for purpose? Human rights in times of financial and economic crisis' (2015) 4 EHRLR 360, 361-362.

¹² Nolan (n 11) 362.

¹³ MS Carmona, 'Alternatives to austerity: a human rights framework for economic recovery' in A Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 32; Nolan (n 11) 362-363.

¹⁴ Hill (n 3) 2-3.

out’,¹⁵ or certain ESR may receive less priority than other ESR depending on the available resources and policy priorities. This is why realisation of ESR tends to be more ‘progressive’ in nature, compared to CPR.¹⁶ This is also why Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) refers to State Parties’ obligations to take steps ‘to the maximum of its *available resources*, with a view to achieving *progressively* the full realization of the rights...’,¹⁷ as will be seen in Section 3. Progressive realisation of ESR means that assessing whether ESR are being realised is not a straightforward exercise, and it requires a case-by-case basis analysis of a matrix of factors, such as budgetary and infrastructural limitations, policy priorities, and the economic and social conditions prevailing in the States.

This then leads to an issue of justiciability. As the National Human Rights Consultation Committee of Australia noted, ‘[i]f it came to a choice between the maintenance of the clinic or the primary school, there would be no suitable criteria a judge could apply to make such a determination’.¹⁸ It is easier for courts to ‘protect the individual from interference by the state’, in which case the legal criteria tend to be more precise and clear.¹⁹ It is more difficult for courts

¹⁵ Australian Human Rights Consultation Committee (n 6) 365.

¹⁶ Kenner (n 3) 2-3; RR Churchill and U Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 EJIL 417, 419.

¹⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1978) 993 UNTS 3 (ICESCR), art 2(1) (emphasis added).

¹⁸ Australian Human Rights Consultation Committee (n 6) 366.

¹⁹ Australian Human Rights Consultation Committee (n 6) 366.

to assess States' policy decisions, particularly regarding resource allocation, and whether States are making the best use of available resources. Positivists therefore argue that ESR 'cannot claim the status of rights',²⁰ precisely because formal justiciability is 'an indispensable attribute of a right',²¹ while ESR lack 'clear juridical status'.²² The inherent complexity thus involved in realisation of ESR suggests that, at international level, enforcing States' ESR obligations through legal mechanisms may be more contestable than in the context of CPR, as will be further observed in Section 3.

However, it is submitted that ESR must be treated as equally important as CPR in terms of their value and status, in line with the principles of universality, indivisibility and interdependence of human rights.²³ The distinction based on negative and positive obligations is somewhat artificial, because, in the context of protection of human rights, negative and positive obligations are two sides of the same coin. ESR are not the only rights which trigger positive obligations – CPR entail both negative and positive obligations, too. For example, the right to life and the right to be free from torture, degrading or inhuman treatment,

²⁰ Hill (n 3) 9. See also A Eide, 'Economic, Social and Cultural as Human Rights' in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Nijohf 2001) 9.

²¹ *ibid.*

²² See Deakin (n 6) 30.

²³ These principles were first espoused by the UDHR and were reaffirmed in the World Conferences held in Teheran (22 April – 13 May 1966) and in Vienna (14 – 26 June 1993). See International Conference on Human Rights, 'Proclamation of Teheran' (adopted 13 May 1968) UN Doc A/Conf.32/41, para 13; World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (adopted 25 June 1993) UN Doc A/Conf.157/23 (Vienna Declaration), point 5.

require States to refrain from killing or ill-treatment of individuals, but they also entail positive obligations, such as having effective legislation in place to protect those rights and to afford necessary care for those in custody. They are also intrinsically linked to positive obligations of ESR, such as ensuring individuals' access to food and to effective medical treatment.

Although CRP and ESR are different in nature and have different processes of implementation, it cannot be maintained that there should exist a hierarchy among these rights. As Rehof once put it, 'why is it apparently more acceptable to die of hunger than be shot?'²⁴ Riedel and others argued that "freedom of opinion alone makes no sense to a starving person", suggesting that, without protection of ESR, 'the overall picture of human rights would be incomplete, missing out crucial dimensions of the most needy.'²⁵ Furthermore, there is a significant overlap between CPR and ESR. For example, the right to freedom of association includes the right to form and join trade unions.²⁶ The right not to be subjected to unlawful interference with one's home entails the right not to be subjected to forced eviction, which then falls within the scope of the right to housing.²⁷ Given that both ESR and CPR derive from individuals' dignity, it is not sound in principle that there should be a hierarchy of rights.

²⁴ LA Rehof, 'Development Assistance from the Point of View of Human Rights' in LA Rehof and C Gulmann (eds), *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries*(Kluwer 1989) 12.

²⁵ Riedel (n 1) 6.

²⁶ UN Human Rights Council, 'Resolution adopted by the Human Rights Council: 15/21 The right to freedom of peaceful assembly and of association' (2010) UN Doc A/HRC/RES/15/21, recital 7.

²⁷ Committee on Economic, Social and Cultural Rights, 'General comment No. 7: The right to

In terms of justiciability, it is true that many ESR are not immediately realisable, but this should not render them secondary to CPR. Justiciability is not limited to judicial processes, nor does it require a decision to be taken with immediate effect.²⁸ As Hill pointed out, the notion of justiciability ‘essentially inheres in the idea of review’, which does not necessarily have to be judicial.²⁹ Hill identified two elements of justiciability: ‘adversarial’ and ‘inquisitorial’.³⁰ Adversarial justiciability refers to court procedures, whilst inquisitorial justiciability refers to ‘processes of review which examine the facts of a case, requiring reports and commenting on them’.³¹ The latter is the approach preferred by international bodies, such as the UN Economic and Social Council (ECOSOC), the ILO, and the UN Human Rights Committee. As will be seen in Chapters Five – Seven, the positive function of HRC in EU trade agreements serves to contribute to inquisitorial justiciability of ESR.

Justiciability of ESR under international law can thus be achieved through review mechanisms, and it is for the national governments to enforce these decisions in ways that are appropriate to their domestic contexts.³² This element

adequate housing (art.11(1) of the Covenant): Forced evictions’ (1997) E/1998/22, paras 4, 8.

²⁸ Churchill (n 16) 420-422; Riedel (n 1) 6.

²⁹ Hill (n 3) 17-18. See also Churchill (n 16) 420-422.

³⁰ Hill (n 3) 17.

³¹ Hill (n 3) 17. See also Churchill (n 16) 420-422.

³² Hill (n 3) 17; Churchill (n 16) 420-422.

of flexibility in enforcement does not render ESR subordinate to CPR but provides a realistic means to realise ESR progressively. As will be seen in Chapter Five, HRC in EU trade agreements provide such flexibility for the EU to promote ESR, recognising that it is the partner countries which must be in charge of implementing the recommendations made by the EU and international organisations. While such an approach may be criticised for lacking enough strength to bring positive changes for ESR, the case studies in Chapters Six and Seven suggest that that is not necessarily the case, particularly with the introduction of Trade and Sustainable Development (TSD) chapters which complement HRC to strengthen the link between protection of ESR and trade.

3. Sources of ESR under International Law

3.1. From ILO to the UN

The historical origins of ESR prior to their evolution under international law have been scattered across different sources, including various religious and cultural traditions which value ‘[caring] for those who cannot look after themselves’, and the national constitutions of some countries, such as the Soviet Union and Weimar Republic.³³ At international level, the ILO was established in 1919 at the Paris Peace Conference, in order to advance social justice, following the end of the World War I.³⁴

³³ P Alston and R Goodman, *International Human Rights* (OUP 2013) 278-279.

³⁴ D Maul, *The International Labour Organization: 100 Years of Global Social Policy* (2019 De Gruyter) 33. See also Constitution of the International Labour Organization (signed 1 April 1919, entered into force 28 June 1919) (ILO Constitution), preamble.

The Preamble of the ILO Constitution, annexed to the Treaty of Versailles, reflects the belief that promoting social justice is a key to ensuring ‘universal and lasting peace’.³⁵ During the interwar years, the ILO therefore became the main trend-setter of international standards in the areas of employment and working conditions. Some examples of the Conventions adopted during the interwar years include Hours of Work (Industry) Convention (No. 1),³⁶ Unemployment Convention (No. 2),³⁷ Maternity Protection Convention (No. 3),³⁸ Night Work of Young Persons (Industry) Convention (No. 6),³⁹ Right of Association (Agriculture) Convention (No. 11),⁴⁰ Forced Labour Convention (No. 29),⁴¹ and Holidays with Pay Convention (No. 52).⁴² These Conventions became an important foundation adjust and favourable conditions, the right to organise and freedom of association, and special protection for mothers and children.

³⁵ ILO Constitution, preamble.

³⁶ Hours of Work (Industry) Convention, C001 (signed 28 November 1919, entered into force 13 June 1921).

³⁷ Unemployment Convention, C002 (signed 28 November 1919, entered into force 14 July 1921).

³⁸ Maternity Protection Convention, C003 (signed 29 November 1919, entered into force 13 June 1921).

³⁹ Night Work of Young Persons (Industry) Convention, C006 (signed 28 November 1919, entered into force 13 June 1921).

⁴⁰ Right of Association (Agriculture) Convention, C11 (signed 25 October 1921, 11 May 1923).

⁴¹ Forced Labour Convention, C29 (adopted 28 June 1930, entered into force 1 May 1932).

⁴² Holidays with Pay Convention, C52 (adopted 24 June 1936, entered into force 22 September 1939).

In 1944, the ILO adopted the Declaration of Philadelphia which reoriented the ILO's objectives, after having experienced the Great Depression, the emergence of Nazism, and the outbreak of World War II.⁴³ The main development brought by the Declaration was that it placed human rights as a new 'ideological foundation' for the ILO's work.⁴⁴ Therefore, paragraph (a) of Section II states that: 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'. This phrase, which serves as a basis for the concept of international human rights, was later reflected in the UN Charter⁴⁵ and in the Universal Declaration of Human Rights (UDHR),⁴⁶ both of which will be analysed in Section 3.1. Furthermore, paragraph (c) of Section II explicitly links 'all national and international policies' to the aim of achieving the conditions in which human rights can be realised. Therefore, the Declaration in effect establishes human rights as a universal and cross-cutting objective. Section III mandates the ILO with activities in a broader range of areas, such as 'full employment and the raising of standards of living', vocational training, conditions of work, the right to collective bargaining, social security, health, and housing, all of which have

⁴³ Maul (n 34) 111.

⁴⁴ *ibid* 133.

⁴⁵ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), art 1(3).

⁴⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 2.

direct implications for ESR. The ILO became a specialised agency of the UN in 1946, contributing to development of ESR in the UN's wider framework of international human rights law. As will be seen in Chapters Four – Seven, ILO Conventions also serve as a reference point for the parties' obligations regarding ESR, within the framework of HRC and TSD Chapters in EU trade agreements.

3.2. UN human rights framework

Established in 1945, the UN serves as the main international organisation which drafts standards for international human rights law. The UN Charter was adopted in the context where the Great Depression of the 1930s called for social protection for the unemployed,⁴⁷ and where international labour standards were thus being set by the ILO. Against this background, there had been proposals to include provisions in the UN Charter which would commit UN members to ensure 'improved labour standards, economic advancement, social security, and employment for all who seek it.'⁴⁸ However, the US viewed such commitment as 'interference in the domestic, economic and political affairs of states'.⁴⁹ The compromised version of the proposal is now found in Article 55, paragraph (a) of the UN Charter, which commits the UN to promote 'higher standards of living, full employment, and conditions of economic and social progress of development.' As these are conditions in which ESR can be progressively

⁴⁷ Alston (n 33) 279.

⁴⁸ R Russell and J Muther, *A History of the United Nations Charter: The Role of the United States 1940-1945* (Brookings Institution 1958) 786.

⁴⁹ Alston (n 33) 279.

realised, the UN Charter can be seen as envisaging promotion of ESR by UN members. Furthermore, as will be seen in Chapters Six – Seven, respect for the principles in the UN Charter is often referred to in EU trade agreements, meaning that, when read in light of HRC, these principles regarding ESR must constitute legally binding obligations of the parties within the framework of their trade agreements.

As envisaged by the UN Charter, the promotion of ESR by UN member states is realised through the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. It was difficult to reach agreement on the precise content of the rights which should be included in a legally binding human rights treaty, and, therefore, it was decided that the UN would first adopt ‘a legally non-binding, but standard-setting UDHR’, which would be later complemented by a legally binding treaty ‘that would translate the UDHR standards into legally binding obligations’.⁵⁰ In line with the vision of the UN Charter, there was general support for the inclusion of ESR in the UDHR, although the precise content and scope of ESR were debatable. For example, the US and Belgium were of the view that the UDHR should go beyond ‘the traditional categories of rights’ from the eighteenth century,⁵¹ and Cuba argued that ESR should ‘appear in the first articles of that document’.⁵² While recognising the need to include ESR,

⁵⁰ Riedel (n 1) 6.

⁵¹ UNGA, ‘Summary Record of the Sixty-Ninth Meeting [of the Economic and Social Council]’ (1947) UN Doc E/422, 6; UNGA, ‘Summary Record of the Hundred and Thirty-Ninth Meeting [of the Third Committee]’ (1948) UN Doc A/C.3/SR.139, 522.

⁵² UNGA, ‘Summary Record of the Hundred and Fourth Meeting [of the Third Committee]’ (1948) UN Doc A/C.3/SR.104, 165.

Australia and the UK argued that that, because of the difficulty in spelling out the precise scope of ESR, ‘two or three Articles in the final draft should be sufficient to cover the broad principles [of ESR]’.⁵³ In contrast, Chile believed that limiting ESR into two or three Articles would be insufficient, and highlighted the importance of recognising ESR to prevent ‘the return of Fascism’.⁵⁴

After a long debate, both CPR and ESR were included in the final draft of the UDHR, taking a ‘holistic approach’ to purport indivisibility and interdependence of all human rights.⁵⁵ Examples of ESR contained in the UDHR include the right to social security,⁵⁶ the right to work under just and favourable conditions,⁵⁷ the right to equal pay for equal work without any discrimination,⁵⁸ the right to form and to join trade unions,⁵⁹ and the right to an adequate standard of living, including food, clothing, housing and medical care.⁶⁰ As will be seen in Chapters Five – Seven, the UDHR provides one of the

⁵³ UNGA, ‘Summary Record of the Ninth Meeting [of the Drafting Committee of the Commission on Human Rights]’ (1947) UN Doc E/CN.4/AC.1/SR.9, 10.

⁵⁴ UNGA, ‘Summary Record of the Seventh Meeting [of the Drafting Committee of the Commission on Human Rights]’ (1947) UN Doc E/CN.4/AC.1/SR.7, 3.

⁵⁵ AAC Trindade, *The Interdependence of All Human Rights – Obstacles and Challenges to their Implementation* (Blackwell 1998) 513; Hill (n 3) 5.

⁵⁶ UDHR art 22.

⁵⁷ *ibid* art 23(1).

⁵⁸ *ibid* art 23(2).

⁵⁹ *ibid* art 23(4).

⁶⁰ *ibid* art 25(1).

main reference points for the parties' obligations under HRC in EU trade agreements, thereby suggesting that ESR fall within the scope of HRC.

However, as opposed to Cuba's recommendation above, the UDHR lists an extensive number of provisions for CPR in Articles 1 – 21 first, followed by a smaller number of provisions for ESR in Articles 22 – 27. The order in which these rights are listed, and the notable difference between the number of provisions for CPR and ESR, reflect the fact that determining the precise scope of ESR remained controversial within the international community. This difficulty with determining the scope of ESR became more apparent when transposing the UDHR standards into legally binding documents. This was evidenced by the long gap (from 1949 to 1966) between the adoption of the UDHR and the final adoption of the two covenants – the International Covenant on Civil and Political Rights (ICCPR)⁶¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶²

Initially, it was intended that the UN would adopt a single covenant on human rights, but this became infeasible due to the diverging views among the member states on the scope of ESR which should be included as human rights. As a result, it was finally agreed that ESR should be included, but in a separate covenant

⁶¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁶² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1978) 993 UNTS 3 (ICESCR).

from CPR. Although there were some states which believed that separating the covenant into two will undermine the indivisibility of human rights conceived by the UDHR,⁶³ other states believed that separating them would be necessary, as they require different processes of implementation.⁶⁴ Therefore, the ICCPR and ICESCR were adopted as separate covenants in 1966 as the main sources of CPR and ESR, respectively, under international human rights law.

In terms of States' general obligations under the ICESCR, Article 2(1) states:

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...

The wording clearly reflects the difference between the process of realisation of CPR and ESR: the phrases such as 'to the maximum of its available resources' and 'achieving *progressively* the full realization of the rights' (emphasis added), which are missing in the ICCPR, recognise that the realisation of ESR involves significant material assistance from the States,⁶⁵ and that the extent of

⁶³ See UNGA, 'Draft first international covenant on human rights and measures of implementation' (1950) UN Doc A/C.3/SR.298, paras 16 -17; C Chapdelaine-Feliciati, 'The sense, meaning, and significance of the Twin International Covenants on Political and Economic Rights' (2013) 196 *Semiotica* 325, 332.

⁶⁴ For example, see UNGA, 'Annotations on the Text of the Draft International Covenants on Human Rights' (1955) UN Doc A/2929, 7.

⁶⁵ See R Cassin's argument in UNGA, 'Summary Record of the Seventy-Second Meeting [of the Commission on Human Rights]' (1948) UN Doc E/CN.4/SR.72, 5.

realisation is dependent upon the relative affordability of resources, as discussed in Section 2 above.

The wording of Article 2(1) is mirrored in other international human rights treaties which seek to protect ESR of specific groups. Examples include Article 4 of the UN Convention on the Rights of the Child (CRC),⁶⁶ and Article 4(2) of the UN Convention on the Rights of Persons with Disabilities (CRPD).⁶⁷ The ICESCR is also explicitly referred to in the preambles of many UN human rights instruments, such as the CRC, the CRPD, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁶⁸ and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).⁶⁹ The authority of the ICESCR is reinforced by the wider number of ratifications, with around 88% of the UN Member States having ratified it, including all EU Member States.⁷⁰ As will be discussed in Chapters Six and Seven, although HRC in EU trade agreements do not make explicit reference to the ICESCR, the standards in the ICESCR inform the interpretation

⁶⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

⁶⁷ Convention on the Rights of Persons with Disabilities (adopted 24 January 2007) UN Doc A/Res/61/106 (CRPD).

⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

⁶⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) UN Doc A/RES/45/158 (CMW).

⁷⁰ For the present ratification status, see OHCHR, 'Status of Ratification Interactive Dashboard' <<http://indicators.ohchr.org/>> accessed 10 August 2023.

of the parties' obligations under HRC, in so far it is ratified by all the parties to the agreements.

3.3. Council of Europe human rights framework

The CoE, which is a separate entity from the EU, was established in 1949 as part of the western European construction process after the World War II.⁷¹ The Statute of the CoE lays the foundation for the organisation, seeking to achieve a closer unity between European states in their pursuit of peace, based on realisation of human rights, democracy and the rule of law.⁷² Currently, there are a total of 46 member states of the CoE, including all EU Member States, following the removal of Russia in 2022 due to its invasion of Ukraine.⁷³

While the international covenants were being drafted, proposals were already made in Europe that there should be a regional human rights treaty, the implementation of which would be overseen by a court.⁷⁴ Therefore, in 1950, drawing inspiration from the UDHR, the CoE adopted the European Convention

⁷¹ B Wassenberg, *History of the Council of Europe* (CoE Publishing 2013) 13-15.

⁷² Statute of the Council of Europe (signed 5 May 1949, entered into force 3 August 1949) ETS 001, preamble.

⁷³ Council of Europe, 'Chart of signatures and ratifications of Treaty 001: Statute of the Council of Europe' (2022) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001/signatures>> accessed 14 July 2022.

⁷⁴ Council of Europe, 'The Conscience of Europe: 50 Years of the European Court of Human Rights' (2010) <https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf> accessed 22 July 2022, 18.

on Human Rights (ECHR),⁷⁵ under which the European Court of Human Rights (ECtHR) was established to supervise its implementation.⁷⁶ However, from the list of substantive rights covered in Articles 1 – 14 ECHR, it is apparent that the main focus of the ECHR is on CPR, rather than ESR. The disagreement among UN member states as to whether ESR and CPR should be included in the same Covenant was evidently being mirrored in the CoE, and it was decided by the CoE that ESR would be given a separate regime,⁷⁷ which later came under the European Social Charter (ESC) of 1961.⁷⁸

The ESC was adopted as a counterpart to the ECHR, covering a total of 19 ESR in its Part II. Most of these rights correspond to the rights recognised by the UDHR and the ICESCR, such as the right to work under just conditions,⁷⁹ the right to safe and healthy conditions of work,⁸⁰ the right to social security,⁸¹ the right to vocational guidance and training,⁸² and the right to protection of

⁷⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR).

⁷⁶ *ibid* section II.

⁷⁷ C Warbrick, 'Economic and Social Interests and the European Convention on Human Rights' in C Warbrick, *Economic, Social, and Cultural Rights in Action* (OUP 2007) 242-243.

⁷⁸ European Social Charter (signed 18 October 1961, entered into force 26 February 1965) ETS 035 (ESC).

⁷⁹ *ibid* arts 1, 2.

⁸⁰ *ibid* art 3.

⁸¹ *ibid* art 12.

⁸² *ibid* arts 9, 10.

health.⁸³ Some of the rights have more specific standards than the ones found in the UDHR or in the ICESCR, such as the requirement that the minimum age for employment to be set at 15.⁸⁴ The list also covers ESR which are not explicitly mentioned in the UDHR or the ICESCR, such as the right to social and medical assistance,⁸⁵ and the right to benefit from social welfare services.⁸⁶ Special attention is given to the rights of women at work, disabled persons, and migrant workers and their families.⁸⁷ The ESC was revised in 1996 to improve its substantive contents in light of the social changes which had occurred since its adoption.⁸⁸ The revised ESC (RESC) contains 12 additional ESR, four of which have already been introduced by the Additional Protocol.⁸⁹ Examples of the new rights brought by the RESC include the right to housing, the right to protection in cases of termination of employment, and the right to protection against poverty and social exclusion.⁹⁰

⁸³ *ibid* art 11.

⁸⁴ *ibid* art 7(1).

⁸⁵ *ibid* art 13.

⁸⁶ *ibid* art 14.

⁸⁷ *ibid* arts 8, 15, 19.

⁸⁸ European Social Charter (revised) (signed 3 May 1996, entered into force 1 July 1999) ETS 163 (RESC) preamble.

⁸⁹ Additional Protocol to the European Social Charter (signed 5 May 1988, entered into force 4 September 1992) ETS 35.

⁹⁰ The new rights introduced by the RESC are included in arts 24-31 RESC.

It is notable that, whereas the ECHR has been ratified by all the member states of CoE,⁹¹ the ESC has been ratified by 27 member states,⁹² while the RESC has been ratified by 35 member states.⁹³ This again reflects the existence of hierarchy of rights in practice, whereby countries regard CPR to be more fundamental, while the extent of obligations regarding ESR remain more contentious.

In terms of enforcement of rights, there are some discrepancies between the enforcement mechanisms under the ECHR on the one hand, and under the ESC/RESC on the other. Under the ECHR, individuals may bring complaints to the ECtHR, which issues legally binding judgments. However, the individual complaint procedure is not envisaged by the ESC or the RESC. The enforcement of ESC/RESC is largely based on state reports,⁹⁴ which is monitored by the European Committee of Social Rights (ECSR).⁹⁵ The system of collective

⁹¹ Council of Europe, 'Chart of signatures and ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms' (2023) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>> accessed 10 August 2023.

⁹² Council of Europe, 'Chart of signatures and ratifications of Treaty 035: European Social Charter' (2023) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035/signatures>> accessed 10 August 2023.

⁹³ Council of Europe, 'Chart of signatures and ratifications of Treaty 163: European Social Charter (revised)' (2023) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures>> accessed 10 August 2023.

⁹⁴ European Social Charter (signed 18 October 1961, entered into force 26 February 1965) ETS 035 (ESC), Part IV.

⁹⁵ See Council of Europe, 'European Committee of Social Rights' (2023) <<https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>> accessed 31 July 2023.

complaints was introduced in 1995 by an Additional Protocol to the ESC,⁹⁶ allowing organisations of employers and trade unions, as well as non-governmental organisations, to bring complaints to the Committee of Independent Experts, whose report would then be considered by the Council of Ministers.⁹⁷ Compliance with the decisions of the Council of Ministers is monitored by the ECSR, under the principle of good faith.⁹⁸

However, participation in the collective complaints system is voluntary – it is up for the state parties to the ESC to ratify the Additional Protocol, or, if they have ratified the RESC, they can declare their acceptance of the collective complaints system under Article D2 of RESC.⁹⁹ Moreover, it must be noted that the Additional Protocol does not provide for individual complaints system, meaning that ‘the members of the CoE were not prepared to accept a right to individual petition’.¹⁰⁰ Therefore, although the CoE has sought to provide protection for ESR through the adoption of ESC and RESC, the separation of ESR and CPR into different regimes serves to potentially undermine the indivisibility of human rights. Furthermore, the fact that not all EU Member States have ratified ESC or RESC may risk weakening the EU’s legitimacy

⁹⁶ Additional Protocol to the European Social Charter (signed 9 November 1995, entered into force 1 July 1998) ETS 158.

⁹⁷ See A Zimmermann, ‘Council of Europe: Protocol Amending the European Social Charter Providing for a System of Collective Complaints’ (1995) 34 ILM 1453, 1454; Churchill (n 16) 423.

⁹⁸ See Council of Europe, ‘European Committee of Social Rights’ (n 95).

⁹⁹ Churchill (n 16) 423.

¹⁰⁰ Churchill (n 16) 424.

when seeking to assert ESR in its external promotion of human rights.¹⁰¹ As will be seen in Chapter Three, the EU has sought to address this issue by adopting its own Charter of Fundamental Rights (EU Charter) which has elevated the status of ESR in its legal framework.¹⁰²

4. Conclusion

This chapter has evaluated the concept of ESR under international law. The discussion has shown that ESR have been given a fundamental human rights status under international law following the World War II, but that ESR are distinguished from CPR because of their different nature and processes of implementation. Both the UN and CoE human rights frameworks have separated ESR and CPR into two distinguished regimes, with the latter being afforded more priority. One repercussion of separating ESR and CPR into two regimes is that it creates a false illusion that they are ‘two isolated clusters of rights, thereby denying their indivisible and interdependent natures.’¹⁰³ This may pose particular challenges for the EU when it seeks to promote ESR in its external relations, given that ESR have historically been treated as secondary to CPR by the international community. This renders it necessary to examine the extent to which the EU promotes ESR through HRC in its trade agreements in practice, in order to meet its rhetoric of respect for indivisibility of human rights.

¹⁰¹ See Council of Europe, ‘Chart of signatures and ratifications of Treaty 035’ (n 92); Council of Europe, ‘Chart of signatures and ratifications of Treaty 163’ (n 93).

¹⁰² Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (‘EU Charter’).

¹⁰³ Chapdelaine-Feliciati (n 63) 333-334.

This chapter has also analysed the sources of ESR under international law. The UDHR and the ICESCR are the main sources of ESR in the UN human rights framework, while the ESC and the RESC are the main sources of ESR in the CoE human rights framework. As far as labour rights are concerned, the ILO also plays an important role in setting international standards through its Conventions. As mentioned in the beginning of this chapter, these sources have influenced the EU's concept of ESR in its legal framework, which it seeks to promote externally. In the context of EU trade agreements, these sources also serve as important reference points for the parties' obligations to protect ESR, and they provide the normative basis of HRC, as will be seen in Chapters Five – Seven.

Chapter Three: ESR in EU law

1. Introduction

When the European economic integration first began through the establishment of the European Economic Communities (EEC) in the 1950s, there was no reference to human rights in its founding treaties. Addressing issues of human rights was not a priority for the EEC, since its main objective was economic integration, and, as seen in Chapter Two, the UN and the Council of Europe (CoE) were already establishing human rights regimes at international and European levels, respectively.¹ However, from the late 1960s, human rights, including economic and social rights (ESR), emerged as general principles of law which the Court of Justice of the European Union (CJEU) sought to protect.² Since then, EU law has developed in a manner which has strengthened protection of ESR both internally and externally. The purpose of this chapter is to analyse the concept and sources of ESR in EU law, and the EU's obligations to promote ESR in its external relations, including in its trade relations.

¹ J Kenner, *EU Employment Law* (Hart 2003) 2-3; P Eeckhout, *External Relations of the EU: Legal and Constitutional Foundations* (OUP 2004) 465; P Craig and G de Burca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2011) 4-5; C Barnard, 'EU 'Social Policy': From Employment Law to Labour Market Reform' in P Craig and G de Burca, *The Evolution of EU Law* (2nd edn, OUP 2011) 642; KM Anderson, *Social Policy in the European Union* (Palgrave Macmillan 2015) 52-54.

² Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle fur Getreide und Gutertermittel* [1970] ECR 1125; Case C-4/73 *Nold v Commission* [1974] ECR 491.

Section 2 will first begin by introducing the development and the sources of ESR in EU law. As noted in Chapter Two, the development of ESR in EU legal framework has been influenced by different international human rights instruments. Particular focus will be given to the EU Charter of Fundamental Rights (EU Charter)³ which draws on these instruments to strengthen the protection of ESR, internally and externally. The EU Charter, together with the international instruments discussed in Chapter Two, serve as reference points for the EU's interpretation of ESR. The discussion in this section will therefore contribute to understanding what the EU considers to be 'ESR', which it seeks to promote through HRC in its trade agreements.

Section 3 will evaluate the EU's obligations to promote ESR in its external relations. It will discuss the Treaty framework, as well as the tools and institutional machineries developed by the EU to fulfil its obligations. Particular reference will be made to Ian Manners' concept of Normative Power Europe⁴ to discuss why respect for ESR should be seen as constituting the EU's normative identity on the international scene. The discussion will contribute to understanding why it is necessary for the EU to promote ESR in its external relations, and thus demonstrate the need to examine the extent to which this is realised in practice, through HRC in EU trade agreements.

³ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EU Charter).

⁴ I Manners, 'Normative Power Europe: a contradiction in terms?' (2002) 40 *JCMS* 235.

2. Development of ESR in EU legal framework

2.1. General Principles of Law

As mentioned in the beginning of this chapter, there was no express reference to ESR in the founding treaties of the EEC. The founding treaties still had social policy provisions, which sought to protect living and working conditions for workers, in line with ILO standards.⁵ However, express recognition of human rights, including ESR, did not appear until the late 1960s, when concerns were raised regarding interference by the European Community legislation with individual rights, which were protected by the Member States' constitutions.⁶ German courts, in particular, brought persistent challenges before the CJEU to ensure that human rights were recognised in the Community legal order.⁷ It is for this reason that the CJEU decided to recognise human rights as general principles of law drawn from the constitutional principles of Member States, against which Community legislation could be reviewed. This approach was first signified in *Stauder*, where the Court stated that 'fundamental human rights are enshrined in the general principles of Community law and protected by the Court'.⁸ Although

⁵ Treaty establishing the European Economic Community (1957) 4 EurYb 412 (Treaty of Rome), arts 117-125.

⁶ F Schimmelfennig, 'Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union' (2006) 13 JEPP 1247, 1250-1253; I de Jesus Butler and O de Schutter, 'Binding the EU to International Human Rights Law' (2008) 27 YEL 277, 277; P Craig and G de Burca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2011) 383; E Spaventa, 'Fundamental Rights in the European Union' in C Barnard and S Peers (eds), *European Union Law* (2nd edn, OUP 2017) 228.

⁷ Schimmelfennig (n 6) 1250-1253; Jesus Butler (n 6) 277; P Craig and G de Burca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2011) 383; Spaventa (n 6) 228-229.

⁸ *Stauder* (n 2) paras 6, 7.

the Court did not use the term ‘ESR’ in its judgment, the case touched directly upon the applicant’s ESR, namely their entitlement to social security benefits.

This approach was soon followed in subsequent cases where the CJEU sought to identify sources of human rights as general principles of law. In *Internationale Handelsgesellschaft*, the Court reiterated that human rights constituted general principles of law, but added that these rights are ‘inspired by the constitutional traditions common to the Member States.’⁹ Building on *Stauder* and *Internationale Handelsgesellschaft*, the Court in *Nold* further added that international human rights treaties, ‘on which the Member States have collaborated or of which they are signatories’, provide guidance from which the Court draws general principles of law.¹⁰ Therefore, these cases make clear that, when identifying which rights constitute general principles of law, the Court would draw on external sources. The Court’s approach has been codified by the Treaty of Maastricht, signed in 1992,¹¹ and can now be found in Art 6(3) TEU,¹² which suggests that general principles of law provide one of the main sources of human rights in EU legal order.

⁹ *Internationale* (n 2) paras 3-4.

¹⁰ *Nold* (n 2) para 13.

¹¹ Treaty on European Union [1992] OJ C 191/01 (Maastricht Version), art F(2).

¹² Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU), art 6(3).

These cases marked an significant starting point from which, in successive judgments, the CJEU began to develop the EU's concept of human rights that includes ESR. Examples of ESR thus identified by the CJEU as general principles of law include, *inter alia*, the right to non-discrimination¹³ and the right to an annual leave.¹⁴ By formulating human rights as general principles of law, the Court enabled EU secondary legislation to be interpreted in light of these principles, even in the absence of express Treaty provisions. The CJEU case law further makes clear that these principles can apply horizontally in private party disputes. Therefore, the development of human rights as general principles of law serves to elevate the importance of human rights, including ESR, in disputes before national courts of EU Member States, as well as within the wider EU legal framework.

2.2. Community Social Charter

In addition to the emergence of ESR as general principles of law, there was intensification of the European Community's effort to make improvements in the social field throughout the 1970s and 1980s. A high level of social inequality which was apparent by the late 1960s called for the Community to have a 'human face' through harmonisation in the social field.¹⁵ Foreseeing the

¹³ Case C-149/77 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1978] ECLI:EU:C:1978:130, paras 25-27; Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECLI:EU:C:2005:709, paras 74-78; Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] ECLI:EU:C:2018:257, paras 76-77.

¹⁴ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] ECLI:EU:C:2018:871, paras 80-81.

¹⁵ See B Laffan, *Integration and Co-operation in Europe* (Routledge 1992) 131; M Newman,

accession of Denmark, Ireland and the UK to the Community in 1973,¹⁶ the Paris Summit was held in 1972, where it was declared that the Community's economic expansion was 'not an end in itself' but had an aim of improving the quality of life, reducing inequalities, and raising the standards of living.¹⁷ Consequently, the Community's Social Action Programme (SAP) of 1973 proposed a list of measures to be taken to achieve full and better employment, and to improve living and working conditions.¹⁸ The SAP expressly used the term 'rights', suggesting that it considered ESR as inherently belonging to the dignity of each individual, and not merely limited to social policy goals that are secondary to economic objectives. Although there was no express Treaty basis for harmonising social directives, the SAP gave the Commission a mandate to propose social legislation using other legal bases. A number of social directives were adopted in that vein, including directives on transfers of

Democracy, Sovereignty and the European Union (Hurst 1996) 81; Kenner (n 1) 23-24.

¹⁶ Treaty of Accession of Denmark, Ireland and United Kingdom [1972] OJ L 73/5.

¹⁷ Commission, 'Social Action Programme' COM(73) 1600, 14.

¹⁸ *ibid* 15-20.

undertakings,¹⁹ insolvency,²⁰ equal pay and equal treatment,²¹ and social security.²²

In light of this development, the European Community adopted the Single European Act (SEA), which for the first time made express reference to human rights, as recognised in the constitutions of the Member States, as well as in the European Convention on Human Rights (ECHR) and in the European Social Charter (ESC).²³ The reference to the ESC makes clear that the Community's concept of human rights included not only CPR but also ESR. Although this was a mere preambular reference, couched in aspirational phrases, it was a step towards express recognition of the Community's determination to promote ESR. This effort to promote ESR was later demonstrated by the adoption of the Community Social Charter in October 1989.²⁴

¹⁹ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings businesses or parts of businesses (1997) OJ L 61/26.

²⁰ Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L 283/23.

²¹ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.

²² Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.

²³ Single European Act (1986) OJ L 169/1 (SEA), preamble.

²⁴ Community Charter of Fundamental Social Rights of Workers (adopted 9 December 1989)

Inspired by the ILO Conventions, the Community Social Charter was adopted to provide protection for workers' rights in the Community.²⁵ As the notion of EU citizenship was not introduced until 1992, the beneficiaries of the Community Social Charter remains workers, rather than EU citizens. Examples of ESR in the Community Social Charter include: the right to work²⁶; the right to fair remuneration²⁷; the right to adequate social protection²⁸; the right to freedom of association and the right to collective bargaining²⁹; and the right to enjoy satisfactory health.³⁰

Although the Community Social Charter was adopted as a non-legally binding instrument, the Commission's subsequent proposals for social legislation began to make reference to the Community Social Charter in their preambles.³¹ The Treaty of Amsterdam, signed in 1997, explicitly recognised

Social Europe 6/90 (Community Social Charter).

²⁵ *ibid* preamble.

²⁶ *ibid* art 4.

²⁷ *ibid* art 5.

²⁸ *ibid* art 10.

²⁹ *ibid* arts 11-13.

³⁰ *ibid* art 19.

³¹ For example, Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (1992) OJ L 348/1; Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (1993) OJ L 307/18 (Working Time Directive).

the Community's attachment to fundamental social rights as defined in both the ESC and the Community Social Charter,³² and this provision is now found in Article 151 TFEU.³³ The Community Social Charter further serves as a source from which many of the rights in the EU Charter are drawn, such as equality between women and men,³⁴ the rights of the elderly,³⁵ integration of persons with disabilities,³⁶ the right to collective bargaining and action,³⁷ and the right to fair and just working conditions.³⁸ This recognition of the need to protect workers' rights is later reflected in the EU's particular effort to promote labour rights through trade agreements with third countries, as will be seen in Chapters Four, Six and Seven. Therefore, the Community Social Charter should be seen as one of the major developments for ESR in the EU legal framework, and its indirect legal effect has been far reaching than it would have been expected at the time of its adoption.

³² Consolidated Version of the Treaty establishing the European Community [1997] OJ C 340/173 (as amended by the Treaty of Amsterdam), Article 136.

³³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), art 151.

³⁴ Community Social Charter, art 16; EU Charter, art 23; Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on Article 23.

³⁵ Community Social Charter, arts 24-25; EU Charter, art 25; Explanations Relating to the Charter of Fundamental Rights (n 34), explanation on Article 25.

³⁶ Community Social Charter, art 26; EU Charter, art 26; Explanations Relating to the Charter of Fundamental Rights (n 34), explanation on Article 26.

³⁷ Community Social Charter, arts 12-14; EU Charter, art 28; Explanations Relating to the Charter of Fundamental Rights (n 34), explanation on Article 28.

³⁸ Community Social Charter, arts 8, 19; EU Charter, art 31; Explanations Relating to the Charter of Fundamental Rights (n 34), explanation on Article 31.

2.3. EU Charter of Fundamental Rights

Although ESR developed as general principles of law, it was difficult to ascertain the precise scope of ESR protected in the EU legal framework. General principles are unwritten, and, although the CJEU would draw on the constitutional traditions common to the Member States and international human rights treaties which the Member States have signed, these sources are used as mere guidance. Unless it had already been decided by the CJEU, there was uncertainty in relation to whether a particular right would be protected by the Court.³⁹ Although the Treaty reform of Amsterdam made reference to the social rights as contained in the ESC and the Community Social Charter,⁴⁰ these instruments did not have any legally binding status in themselves for the EU. Moreover, the social provisions in the Treaties and social legislation and policies adopted were fragmented, in the sense that they did not seek to address a comprehensive list of ESR protected within the EU. It is for this reason that EU Charter was adopted in 2000, in order to make the rights more visible for EU citizens and to proclaim the ‘overriding importance’ of these rights as a founding principle of the EU.⁴¹

³⁹ See E Hancox, ‘The Relationship between the Charter and General Principles: Looking Back and Looking Forward’ (2020) 22 CYELS 233, 239.

⁴⁰ Consolidated Version of the Treaty establishing the European Community [1997] OJ C 340/173 (as amended by the Treaty of Amsterdam), Article 136.

⁴¹ European Parliament, ‘Cologne European Council 3 -4 June 1999: Conclusion of the Presidency’ (1999) <https://www.europarl.europa.eu/summits/kol2_en.htm> accessed 31 July 2023, annex iv.

The EU Charter is a major step forward strengthening protection of ESR within the EU, because it brings CPR and ESR together in one single document, whereas these rights were given separate regimes in the UN and CoE framework.⁴² Even in the EU's own human rights framework prior to the EU Charter, it was clear that the ECHR was given a special status, as could be seen in Article 6(2)-(3) TEU which includes ECHR as a source of human rights, but not ESC. Therefore, the EU Charter has elevated the status of ESR which tended to be treated as rather secondary to CPR under international regime, as seen in Chapter Two. The preamble of the EU Charter refers to the indivisibility of human rights, and this is reinforced by the mingling of ESR with CPR under different Titles. For example, prohibition of forced labour is included in 'Title I Dignity'⁴³; the right to education and the right to form and join trade unions are included in 'Title II Freedoms'⁴⁴; and principles of equality and non-discrimination, as well as the rights of children, the elderly and the disabled are included in 'Title III Equality'.⁴⁵

Most of ESR are found in 'Title IV Solidarity' – a few examples being the right to collective bargaining and to take collective action,⁴⁶ protection against

⁴² See Chapter Two, Section 3 for the discussion on the separation of CPR and ESR under international human rights regime.

⁴³ EU Charter, art 5.

⁴⁴ *ibid* art 12.

⁴⁵ *ibid* art 20-26.

⁴⁶ *ibid* art 28.

unjustified dismissal,⁴⁷ the right to fair and just working conditions,⁴⁸ entitlement to social security and social assistance,⁴⁹ and the right to health care.⁵⁰ According to the Explanations relating to the EU Charter, which provide reference points for interpreting its provisions, these rights are drawn from various sources, including the ESC, the revised ESC (RESC),⁵¹ the Community Social Charter, and the EU's own body of legislation.⁵²

2.4. Importance of EU human rights framework for human rights clauses in EU trade agreements

Logically, the EU's own human rights framework is not applicable to third countries. To hold otherwise would indicate neo-imperialism.⁵³ Accordingly, the standards in the EU Charter cannot be imposed on third countries. This is confirmed by Article 51(1) of the Charter, which makes clear that the Charter is addressed to the EU institutions and the Member States, when they are implementing EU law. Therefore, it is difficult to argue that the Charter has direct extraterritorial application. Furthermore, Articles 6(1) TEU and Article

⁴⁷ *ibid* art 30.

⁴⁸ *ibid* art 31.

⁴⁹ *ibid* art 34.

⁵⁰ *ibid* art 35.

⁵¹ European Social Charter (revised) (signed 3 May 1996, entered into force 1 July 1999) ETS 163 (RESC).

⁵² Explanations Relating to the Charter of Fundamental Rights (n 34).

⁵³ See P Leino, 'The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law' in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (2008) 260, 262.

51(2) of the Charter confirm that the Charter does not create any new competences for the EU, meaning that the EU does not have competence to impose its own human rights norms on third countries. This is why, even though HRC make reference to international human rights instruments, they do not make reference to the EU Charter.

Although the Charter therefore does not have direct extraterritorial *application* vis-à-vis third countries, it nevertheless creates extraterritorial *obligations* for the EU in the context of trade agreements. This is because of the extraterritorial *effect* of those agreements.⁵⁴ In order to continue with the analysis, it is first important to distinguish between extraterritorial *application* of an instrument and extraterritorial *obligations*. The former refers to whether an instrument applies beyond the EU's jurisdiction,⁵⁵ while the latter refers to obligations 'that have effects on the enjoyment of human rights outside of [the EU's] territory'.⁵⁶ Although extraterritorial obligations are usually derived from the extraterritorial application of human rights instruments, the link is not so straightforward in the context of EU trade and human rights. This is because of the 'competence-based' standard of EU human rights obligations, meaning that the obligations follow wherever the EU exercises its

⁵⁴ C Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (2018) 20 ICLR 374, 377-378.

⁵⁵ M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 7-8.

⁵⁶ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (adopted 28 September 2011), para 8(a). See O de Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084, 1101.

competence.⁵⁷ This contrasts with the ‘effective control’ standard, where the obligations arise once the obligor has effective control of the activities outside its territory.⁵⁸

As mentioned above, the Charter does not have direct extraterritorial application, because it is only addressed to the EU institutions and the Member States, when implementing EU law. Nevertheless, the EU institutions must observe the norms of the Charter in all areas of its action, whether internal or external, as will be explained below.⁵⁹ This is why Moreno-Lax and Costello have argued that ‘EU fundamental rights obligations simply track all EU activities, as well as Member State action when implementing EU law’.⁶⁰ Accordingly, Ryngaert has described the Charter obligations as a ‘competence-based standard’, meaning that where the Charter applies, the EU and the Member States owe ‘obligations to persons affected by [their action], irrespective of those persons.’⁶¹

⁵⁷ Ryngaert (n 54) 380.

⁵⁸ *ibid* 381.

⁵⁹ This duty arises when Article 51(1) of the EU Charter is interpreted in light of Article 21(3) TEU, which will be explained below. See also European Parliament, ‘The institutional aspects of setting up the European External Action Service’ (2010) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:265E:0009:0014:EN:PDF>> accessed 7 May 2024, para 5; Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Human Rights and Democracy at the Heart of the EU External Action’ (Joint Communication) COM(2011) 886 final, 7.

⁶⁰ V Moreno-Lax and C Costello, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’ in S Peers et al, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1658.

⁶¹ Ryngaert (n 54) 380.

This is where extraterritorial *obligations* can be derived from the EU Charter. As will be argued in Chapter Four, international trade can have detrimental impact on the enjoyment of ESR, when conducted solely in pursuit of economic interest. Accordingly, the EU's decision to conclude trade agreements with third countries can have extraterritorial *effect* on the enjoyment of human rights in partner countries.⁶² In such cases, the EU is committing human rights violations not through 'extraterritorial conduct' but through 'extraterritorial effect'.⁶³ It is here that the EU's own human rights framework plays an important role. The EU needs to ensure that its human rights standards are not compromised through the extraterritorial effects of its own decisions.

This obligation to ensure that human rights standards are not compromised through extraterritorial effects also derives from Article 21 TEU. Article 21(1) TEU requires the EU's external action to be guided by the 'principles which inspired its own creation', including respect for universality and indivisibility of human rights. In addition to being a guiding 'principle', respect for human rights constitute one of the objectives of the EU's external action by virtue of Article 21(2)(b). Article 21(3) then obliges the EU to respect the above principles and objectives 'in the development and implementation [not only] of different areas of the Union's external action ... [but also] of the external

⁶² *ibid* 378, 382.

⁶³ *ibid* 382.

aspects of its other policies.’ The phrase ‘external aspects of its other policies’ suggests that the EU must respect human rights not only in its external policies but also in its internal policies that have extraterritorial effects.⁶⁴ It then logically follows that the EU must ensure that both its external and internal policies do ‘not have negative effects on human rights in third countries.’⁶⁵

The EU’s obligation to ensure that the extraterritorial effects of its decisions do not compromise its own human rights standards also finds support in the CJEU caselaw. In *Parliament v Council (Al Qaeda)*, the CJEU confirmed that, according to Article 51(1) of the EU Charter, ‘the duty to respect fundamental rights is imposed ... on all the institutions and bodies of the Union.’⁶⁶ This statement was given in response to the European Parliament’s argument that the common foreign and security policy (CFSP) measures fall outside the EU’s obligations relating to fundamental rights.⁶⁷ From this, it can be inferred that extraterritorial obligations may arise from the Charter, although, as Bartels observed, it is not clear whether these obligations only arise in relation to the EU’s extraterritorial conduct, or whether they can also arise in relation to measures having extraterritorial effect.⁶⁸

⁶⁴ L Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2015) 25 EJIL 1071, 1074.

⁶⁵ *ibid.*

⁶⁶ Case C-130/10 *Parliament v Council (Al Qaeda)* [2012] ECLI:EU:C:2012:472, [83].

⁶⁷ *ibid.*

⁶⁸ Bartels (n 64) 1076.

However, there are other cases which seem to support the latter. In *Mugraby*,⁶⁹ although the claim did not succeed on merits, the CJEU did not question the applicant's assumption that the EU may be held responsible for his injuries resulting from its failure to invoke the non-execution clause in the EU-Lebanon Association Agreement.⁷⁰ Similarly, in *Zaoui*, although the action failed due to a lack of causal link, the CJEU again did not question the applicant's assumption that the EU may be held responsible for its funding of education in Palestinian territories, as it contributed to acts of terrorism.⁷¹ From these cases, it can be inferred that 'there is no obvious bar' to actions against the EU's decisions which have negative effects on human rights in third countries.⁷²

Following the above cases, a more direct recognition of extraterritorial obligations under the EU Charter came from the General Court in *Front Polisario*.⁷³ Although the General Court's decision was set aside by the Court of Justice, as Ryngaert argued there is still value in analysing the General

⁶⁹ Case C-581/11 P *Mugraby v Council and Commission* [2012] ECLI:EU:C:2012:466.

⁷⁰ Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L 143/2, art 86. See Bartels (n 64) 1076.

⁷¹ Case C-288/03 P *Zaoui v Commission*, not yet published [2004] ECLI:EU:C:2004:633. See Bartels (n 64) 1076.

⁷² Bartels (n 64) 1076.

⁷³ Case T-512/12 *Front Polisario v Council* [2015] ECLI:EU:T :2015 :953.

Court's reasoning, as it may be adopted in future cases that do not involve the particular facts of this case.⁷⁴ According to the General Court's reasoning, prior to the conclusion of an agreement with a third country (which in this case is Morocco), the EU must 'examine, carefully and impartially, all the relevant facts in order to ensure that the [agreement] is not conducted to the detriment of the population of the territory concerned, or entails infringement of fundamental rights'.⁷⁵ In the same paragraph of the judgment, the General Court then makes particular reference to the rights in the EU Charter, including, *inter alia*, the right to human dignity,⁷⁶ the right to life,⁷⁷ the prohibition of slavery and forced labour.⁷⁸ Therefore, the General Court seems to have assumed that the EU's decision to conclude trade agreements must ensure that the rights in the Charter are not compromised through extraterritorial effects.⁷⁹

It is for this reason that Ryngaert soundly proposes the shift of academic focus from the traditional notion of extraterritoriality, which mainly revolves around extraterritorial conduct, to territoriality.⁸⁰ This is because the EU's decision to

⁷⁴ Ryngaert (n 54) 381.

⁷⁵ *Front Polisario* (n 73) [228].

⁷⁶ EU Charter, art 1.

⁷⁷ *ibid* art 2.

⁷⁸ *ibid* art 5.

⁷⁹ Ryngaert (n 54) 380.

⁸⁰ Ryngaert (n 54) 377, 383-385.

conclude trade agreements can be seen as a territorial conduct which has extraterritorial *effect*.⁸¹ Taking this approach, the fact that the EU cannot impose its own human rights standards on third countries becomes irrelevant. What is relevant is that the EU must ensure that its territorial conduct, including its decision to conclude trade agreements and the implementation of those agreements, are compatible with its own human rights law.⁸² This is why, in the context of trade agreements, it is necessary for the EU to conduct *ex ante* and *ex post* human rights assessments in order to ensure that its territorial conduct does not violate its human rights obligations through extraterritorial effect.⁸³

This is where HRC can play a useful role. As will be seen in Chapter Five, HRC not only allow the parties to suspend the agreements (through the non-execution clause) in cases of serious human rights violations, but also lay the basis (through the essential element clause) for the parties to take positive measures with a view to promoting human rights. Such positive measures may include dialogue, monitoring (including *ex post* human rights analysis), financial and technical assistance, and other joint programmes. By making use of these positive measures on the basis of HRC, the EU can seek to ensure that its human rights obligations are not compromised by the extraterritorial effects of its trade agreements.

⁸¹ *ibid* 383-385.

⁸² *ibid* 384-385.

⁸³ *ibid* 393.

In this way, HRC can be used as a useful tool to help the EU live up to its own rhetoric of human rights. Furthermore, although HRC do not make reference to the EU's own human rights framework, these clauses make reference to international human rights instruments. To the extent that EU human rights framework has been drawn from and implements the obligations of international human rights law, HRC can also serve as an optional tool to monitor the EU's own human rights obligations. Therefore, importance of EU human rights framework in the context of EU trade relations is that it predisposes the EU and its Member States to respect human rights not only internally but also in their external relations.

3. Obligation to promote ESR in EU trade relations

3.1. Treaty Framework

Throughout the 1980s, not only was the European Community developing protection for ESR internally, but it was also committing itself to promote human rights in its external relations. In particular, in light of the grave human rights violations occurring in African, Caribbean and Pacific (ACP) countries, to which the Community was providing development aid under the Lomé Agreements since 1976,⁸⁴ the Community was facing 'moral and practical dilemma' in continuing to provide development aid.⁸⁵ As will be seen in

⁸⁴ ACP-EEC Convention of Lomé [1976] OJ L 25/2.

⁸⁵ E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 43.

Chapter Five, HRC developed from this context so that the EU can incorporate legally binding provisions on human rights in the Lomé agreement.⁸⁶

In the same vein, several policy documents were issued in the late 1980s and early 1990s, declaring the Community's commitment to promote human rights and democracy in its relations with third countries.⁸⁷ These documents suggested that the EU saw itself as a defender and promoter of norms in international law, including principles of democracy and human rights, and that EU endorsed universality and indivisibility of all human rights.⁸⁸ The reference to universality of human rights demonstrates the EU's belief that these values are shared by all countries, and that the EU was not attempting to impose its own values.⁸⁹ In this context, tools such as HRC in EU trade agreements, which refer to the Universal Declaration on Human Rights (UDHR),⁹⁰ can be seen as a means of bringing 'the practice of other governments more into line with their own professed values'.⁹¹

⁸⁶ HRC first appeared in Lomé IV Agreement as programmatic principles. See Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 [1991] OJ L 229/3 (Lomé IV Agreement), art 5.

⁸⁷ For example, see European Council, 'Conclusions of the Presidency' (Rhodes, 2-3 December 1988) SN 4443/1/88; European Council, 'Conclusions of the Presidency' (Rome, 27-28 October 1990) SN 304/90 Rev 2; Commission, 'Human Rights, Democracy and Development Cooperation Policy' (Communication) COM (91) 61 final.

⁸⁸ See Commission, 'Human Rights, Democracy and Development Cooperation Policy' (n 87) 3-6.

⁸⁹ See Leino (n 53) 260, 262.

⁹⁰ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

⁹¹ Leino (n 53) 263.

Following the fall of the Berlin Wall and the end of the Cold War, the Treaty of Maastricht ‘opened a new age for European construction’ for closer political integration,⁹² and introduced human rights as one of the objectives of common foreign and security policy (CSFP).⁹³ It further introduced the Title on Development Cooperation and framed respect for human rights as a ‘general objective’ to which development cooperation shall contribute.⁹⁴ Similarly, the Treaty of Nice, signed in 2001, introduced the Title on Economic, Financial and Technical Cooperation, where respect for human rights again constituted a ‘general objective’.⁹⁵ These developments are in line with what was envisaged in the Commission Communication of 1991, where it sought to establish a general link between development cooperation policy and promotion of human rights and democracy in developing countries.⁹⁶ The Communication makes clear that ESR fall within the scope of human rights promotion in this area, referring to indivisibility and interdependence of human rights.⁹⁷

⁹² W Wessels, ‘The Maastricht Treaty and the European Council: The History of an Institutional Evolution’ (2012) 34 JEI 753.

⁹³ Treaty on European Union [1992] OJ C 191/01 (Maastricht Version), art J.1.

⁹⁴ *ibid* arts 130(u)(2).

⁹⁵ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80/1 (Treaty of Nice), art 181a(1).

⁹⁶ Commission, ‘Human Rights, Democracy and Development Cooperation Policy’ (n 87) 2.

⁹⁷ *ibid* 6.

By referring to respect for human rights as a ‘general objective’, the Treaties began to mainstream human rights horizontally, going beyond the specific policies.⁹⁸ For example, in the framework of the Treaty of Maastricht, HRC have evolved into essential element clauses, which have been systematically included in EU trade agreements since 1995, as will be seen in Chapter Five. The horizontal application of this general objective has been reaffirmed by the Treaty of Lisbon, which expressly recognises respect for human rights as a cross-cutting principle guiding the EU’s external action.⁹⁹

Under the current EU legal framework, introduced by the Treaty of Lisbon, the main provisions for the EU’s obligations to promote ESR in its external relations can be found in Articles 3(5) and 21 TEU. Article 3(5) obliges the EU to ‘uphold and promote’ its values in its relations with the wider world, and contribute to, inter alia, ‘the protection of human rights ... as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.’ The values which the EU must promote can be found in Article 2 TEU, which makes clear that respect for human rights constitutes its founding values. By framing human rights as a value and an objective, the EU has depicted itself as a human rights actor both by its intrinsic nature and by its action on the international scene.¹⁰⁰

⁹⁸ Eeckhout (n 1) 466.

⁹⁹ TEU, art 21(1).

¹⁰⁰ G de Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 102.

Similarly, while Article 21(2) TEU states that protection of human rights is one of the objectives to be pursued in all fields of external relations, Article 21(1) refers to respect for universality and indivisibility of human rights as a guiding principle, which applies horizontally through all areas of the EU's external policies.¹⁰¹ Those areas of external action include, inter alia, the common commercial policy (CCP) under Articles 206 and 207 TFEU. This means that, when concluding trade agreements on the basis of Article 207(3)-(4) TFEU, the EU is obliged to ensure that its trade relations with the other parties are conducted in line with the principle of human rights.¹⁰² The reference to 'the universality and indivisibility of human rights' in Article 21(1) confirms that ESR are included in the concept of human rights which the EU seeks to promote externally. This interpretation is consistent with the rationale of the EU Charter, which demonstrates EU's own understanding of human rights, as discussed in Section 2.3 above. Therefore, in the framework of the Treaty of Lisbon, tools such as HRC can be interpreted as an important bridge that connects the objective of protecting ESR and the economic objective of international trade, as will be further analysed in Chapter Three.

3.2. Institutional machineries, tools and instruments

¹⁰¹ TEU, art 21(3).

¹⁰² See also Art 21(3) TEU, which obliges the EU to 'ensure consistency between the different areas of its external action and between these and its other policies.'

In line with its obligations under the Treaties, the EU has developed its own institutional machineries to promote human rights in its external relations. The Council Working Party on Human Rights (COHOM) monitors the implementation of the EU's external policies in the field of human rights,¹⁰³ and the EU Special Representative for Human Rights is appointed 'to enhance the effectiveness and visibility of EU human rights policy' in its external relations.¹⁰⁴ As for ESR, the EU has been collaborating with the ILO through the High Level Meetings on policy analysis in the social field.¹⁰⁵

In addition to the institutional machineries, the EU has developed various tools and instruments to fulfil its obligation to promote human rights externally. Examples include special incentive General System of Preferences (GSP+), which removes duties for 66% of EU tariff lines, in return for ratification and effective implementation of 27 international conventions¹⁰⁶; the European Instrument for Democracy and Human Rights (EIDHR), which provides funds for projects that promote democracy, human rights and the rule of law in third

¹⁰³ Council, 'Working Party on Human Rights' <<https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-human-rights/>> (2023) accessed 10 August 2023.

¹⁰⁴ EEAS, 'EU Special Representatives' <https://www.eeas.europa.eu/eeas/eu-special-representatives_en> (2023) accessed 10 August 2023.

¹⁰⁵ European Parliament, 'EU and ILO: Shaping the Future Work' (2019) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2019\)638407](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2019)638407)> accessed 10 August 2023.

¹⁰⁶ Commission Delegated Regulation (EU) No 155/2013 of 18 December 2012 establishing rules related to the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences [2013] OJ L 48/5.

countries¹⁰⁷; policy documents which demonstrate the EU's determination to commit to promoting human rights externally¹⁰⁸; and HRC which establish respect for human rights as an essential element of parties' agreements, as will be evaluated in Chapter Five.

These institutional and instrumental developments help the EU at least partly to resolve the issue with 'constitutional fetishism', which implies that human rights promotion 'can effectively [be] steered by [merely] putting words in a constitutional document'.¹⁰⁹ They further suggest that the EU is developing a constitutional identity as a normative actor on the international scene.

3.3. EU as a normative power

Throughout the previous sections, it has been argued that the EU has gradually shaped its self-identity not only as an economic union but as a political union which promotes human rights and other international norms in its external relations. As its 27 Member States unite together to speak with one voice on

¹⁰⁷ Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L 77, 85.

¹⁰⁸ For example, see Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy (25 June 2012) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf> accessed 20 August 2023; Council of the European Union, *EU Action Plan on Human Rights and Democracy* (European Union 2015).

¹⁰⁹ B de Witte, 'Too much Constitutional Law in the European Union's Foreign Relations' in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008), 12-13.

the international scene, with the vast single market at the core of its economic power, the EU arguably has a strong leverage in influencing the norms and standards in international relations. This has led some commentators to describe the EU as various powers, such as civilian and normative powers, which will be discussed in this section, and market power, which will be discussed in Chapter Four.

The EU has been described as a civilian power due to its preference for soft rather than military means to secure peace and stability in international relations.¹¹⁰ The EU is contrasted to the ‘realistic’ US, which adopts the approach of ‘Hobbesian war of all against all’, and relies on its military measures.¹¹¹ The EU’s use of soft powers serve as a means of engaging with third countries in a peaceful manner, while influencing their reform and stability.¹¹² As it acts as a promoter of norms, some commentators argue that the EU is not only a civilian power but a normative power, and that norms such as human rights are intrinsic to the EU’s identity.¹¹³ The identity

¹¹⁰ R Kagan, *Of Paradise and Power: America and Europe in the New World Order* (Knopf 2003); KE Smith, *European Union Foreign Policy in a Changing World* (Polity Press 2003) 111; A Menon, K Nicolaidis and J Walsh, ‘In defence of Europe – a response to Kagan’ (2006) 13 *Journal of European Public Policy* 270.

¹¹¹ Kagan (n 110) 111.

¹¹² H Sjusren, ‘The EU as a ‘normative’ power: how can this be?’ (2006) 13 *JEPP* 235, 238.

¹¹³ R Rosencrance, ‘The European Union: a new type of international actor’ in J Zielonka (ed), *Paradoxes of European Foreign Policy* (Kluwer Law International 1998); R Whitman, *From Civilian Power to Superpower? The International Identity of the European Union* (Macmillan 1998); Manners, ‘Normative Power Europe: a contradiction in terms?’ (n 3); I Manners, ‘The constitutive nature of values, images and principles in the European Union’ in S Lucarelli and I Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006).

argument in relation to the EU's normative power has been elaborated by Ian Manners, who first posed the term 'Normative Power Europe' (NPE).¹¹⁴

The NPE approach generates its claim not from what the EU can do, but what the EU is – hence a 'normative power of an ideational nature'.¹¹⁵ Manners derives the EU's normative identity from its historical, institutional, legal and political makeup. 'The idea of pooling sovereignty, the importance of a transnational European Parliament, the requirements of democratic conditionality, and the pursuit of human rights' are all 'constitutive norms' which make the EU a unique actor, 'redefining what can be normal in international relations'.¹¹⁶ Thus, Manners has argued that the EU is 'constructed on a normative basis', which 'predisposes it to act in a normative way in politics', and that it is this conceptual identity which in essence shapes how the EU acts and how it should act, in international relations.¹¹⁷ Under this account, human rights are an intrinsic element of the EU, and this is supported Article 2 TEU which expresses human rights as the EU's founding values, as noted in Section 3.2 above. Taking this approach, respect for ESR are part of the EU's ideational nature, which prompts the EU to make efforts to promote ESR.

¹¹⁴ Manners, 'Normative Power Europe: a contradiction in terms?' (n 3).

¹¹⁵ *ibid* 239.

¹¹⁶ *ibid* 253.

¹¹⁷ *ibid* 252.

However, sceptics adopting the realist and utilitarian perspectives argue that the EU's human rights promotion is not necessarily generated from its identity per se, but from its own interest and utility based calculations.¹¹⁸ Promotion of human rights at EU level has the benefit of constructing its normative image which gives it a more credible and powerful voice on the international scene, thereby protecting its security, or furthering its strategic or economic interest.¹¹⁹ Moreover, even if the EU does not consider human rights as secondary to its other interests, it is true that interests play a key role in the EU's external relations. As put by Article 3(5) TEU, the EU is obliged to promote both interests and values in its external relations, which means that, unless its interests and values correspond or complement each other, conflicts may arise where the EU has to choose one over the other.

Some commentators have supported the above view by observing that the EU tends to adopt a more strict approach to human rights protection in developing countries, whereas it is more lenient in its approach with countries that are more economically and strategically important to the EU.¹²⁰ As will be seen in Section Four, the incorporation of HRC is sometimes compromised during the negotiation of trade agreements, when the EU's economic interest outweighs the value promotion. Such incoherence in the EU's value promotion generates

¹¹⁸ R Youngs, 'Normative dynamics and strategic interests in the EU's external identity', (2004) 42 *JCMS* 415; U Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (CUP 2008) 447-452; R Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012).

¹¹⁹ *ibid.*

¹²⁰ Khaliq (n 118) 447-452; Balfour (n 118).

doubts as to the extent to which the EU is committed to promoting ESR through HRC in its trade agreements with different countries. As explained in Chapter One, the case studies in this thesis (Chapters Six – Seven) will therefore provide a comparative analysis of the EU’s promotion of ESR through HRC in the EU-Korea Trade Agreement on the one hand, and in the EU-Colombia/Peru Trade Agreement on the other, because of the different dynamics of relations that the EU has with Korea, Colombia and Peru. The findings of the comparative analysis will be provided in Chapter Eight.

The conflict between the EU’s values and interest may also manifest itself in the context of EU’s promotion of ESR in its external relations in general. The EU has previously been criticised for failing to promote ESR as much as it promotes CPR.¹²¹ Although EU’s notion of human rights embraces both CPR and ESR, there are several challenges which are particular to promotion of ESR in the EU’s external relations. As seen in Chapter Two, the concept of ESR and the precise obligations of ESR tend to be more contentious within the international community, because the realisation of ESR tends to be progressive in nature and depends on the economic and social models of each country.

¹²¹ FRAME, ‘European Policy Brief: the EU and Human Rights – 2’ (2015) <<http://www.fp7-frame.eu/wp-content/uploads/2016/03/FRAME-PB-No-2-Deliverable-7.6-Revised-8-November-2015.pdf>> accessed 10 August 2023, 5, 9.

For that reason, where the EU promotes ESR in third countries, there is a risk that such promotion may rather be perceived as interference with State sovereignty, in which case the legitimacy of the EU's human rights promotion could be questioned by third countries. The standards expected by the EU may not be appropriate to the economic and social circumstances of the country concerned, or they may be perceived as imposition of EU norms, rather than universal human rights.¹²² This is why HRC are a useful tool for the EU to promote ESR in its external relations, as they are couched in general language by reference to international instruments which both parties have ratified. The positive function of HRC also provides the basis upon which the parties can cooperate in the fields of ESR through dialogue, which can strengthen the legitimacy of the EU's promotion of ESR, as will be seen in Chapter Five. Whether this opportunity to usefully promote ESR through HRC is realised in practice will be illustrated through case studies in Chapters Six and Seven.

6. Conclusion

This chapter has evaluated the development of ESR in EU legal framework. The CJEU jurisprudence on general principles of law from the 1970s significantly enhanced protection of ESR in the EU legal order as a primary source of law, while the Community Social Charter for the first time made a list of social rights visible in the context of the single market. As it began to expand its competence and to develop into a closer political union, the EU

¹²² Sjursen (n 112) 241.

reoriented its identity towards normative values, including respect for human rights. All these developments, together with the development of international human rights law, provided a foundation upon which the EU Charter has been drawn, with a view to make EU human rights more visible, and to reinforce indivisibility of human rights.

Although it is addressed to the EU institutions and the Member States when they are implementing EU law, the EU Charter nevertheless has extraterritorial applicability, as discussed in Section 2.3 above. This means that when the EU promotes human rights through HRC in its trade agreements, the norms of the Charter must be observed. In this context, the EU's concept of human rights in HRC clearly implies ESR, which is reaffirmed by the reference to the UDHR, as will be seen in Chapter Five. This is consistent with Article 21(1) TEU under which indivisibility of human rights constitutes one of the guiding principles of EU external action.

This chapter has also evaluated the EU's obligations to promote ESR in its external relations. The reforms of the Treaties, together with EU policy documents, suggest that the EU has been developing a constitutional identity as a human rights actor on the international scene. Respect for ESR constitutes part of this normative identity, as argued in Section 3.3 above. The development of institutional machineries and tools, such as HRC, suggests that

the EU's human rights rhetoric goes beyond 'constitutional fetishism',¹²³ as noted in Section 3.2 above. Against this background, the next chapter will evaluate why HRC in EU trade agreements particularly serve as a useful tool for the EU to promote ESR in its external relations.

¹²³ Witte (n 81).

Chapter Four: Economic and Social Rights and EU Trade Agreements

1. Introduction

As seen in Chapter Three, the EU's obligation to promote economic and social rights (ESR) stretches across all areas of its external action. Accordingly, the common commercial policy (CCP), which governs the EU's external trade, must be conducted in line with the objective of promoting ESR.¹²⁴ The CCP is an important area where the EU can use its market power to usefully promote ESR in its external relations. There are several instruments that contribute to promoting ESR in the area of CCP, one of the main instruments being trade agreements. Trade agreements can incorporate various legally binding provisions, including human rights clauses (HRC), with the purpose of promoting ESR. The purpose of this chapter is to evaluate why trade provides an important forum for the EU to promote ESR, and why trade agreements are a useful instrument in that regard.

Section 2 will firstly begin by examining the relationship between international trade and ESR, which will demonstrate why it is necessary for the EU to promote ESR in its trade relations. It will discuss the convergence between the objective of international trade and the objective of ESR, and lay

¹²⁴ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), arts 205, 207(1). See also Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU), art 21.

the basis for understanding why HRC can and should be used for promoting ESR particularly in the context of trade agreements.

Section 3 will evaluate the legal framework which mandates the EU to promote ESR in its external trade. The discussion will also make reference to Chad Damro's concept of 'market power Europe', which will explain why trade provides a useful forum for the EU to promote ESR. This will help determine the scope of the EU's legal and practical powers when promoting ESR through trade agreements and the extent to which HRC can be used for that purpose. The discussion will suggest that there are also practical limitations to exercising these powers. It is important to recognise these limitations when assessing the EU's promotion of ESR in practice, which will be illustrated through case studies in Chapters Six – Seven.

Section 4 will look more specifically into EU trade agreements. It will give an overview of the development of EU trade agreements, which have evolved in a manner that increasingly strengthened the link between trade and ESR. There are various provisions, including HRC and Trade and Sustainable Development (TSD) Chapters, which the EU seeks to negotiate with third countries and to include in their trade agreements to promote ESR. The analysis in this section will therefore substantiate the importance of EU trade agreements as an instrument for promoting ESR, and contribute to understanding the relationship between HRC and ESR in the framework of trade agreements.

2. Relationship between trade and economic and social rights

As discussed in Chapter Two, realisation of ESR tends to be progressive in nature, because it requires continuous effort to improve standards of living, in light of the prevailing economic and social conditions. This entails continuous investment of resources in relevant infrastructure, job creation, public services and social assistance, which are all necessary components for realisation of ESR. Both private and public income play an important role in this process, and this is where the ultimate goal of international trade converges with the objective of protecting ESR.¹²⁵

By enhancing efficiency in the market and facilitating cross-border movement of goods, services and labour, international trade can bring economic and social benefits to society. Private income yielded by trade provides individuals with personal autonomy and freedom to take care of their own housing, foods, clothing and other social needs. Public income yielded by trade provides States with necessary resources which can be invested in areas that positively contribute to ESR.¹²⁶ Examples of those areas include health, education, social security, vocational training, research and development, and

¹²⁵ See E Fierro, 'Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?' (2001) 7 ELJ 41, 49-50, 51; E Petersmann, 'Human Rights and International Trade Law: Defining and Connecting the Two Fields' in T Cottier, J Paulwelyn and E Bürgi (eds), *Human Rights and International Trade* (OUP 2005) 32, 58-59. See also A Sen, *Development as Freedom* (OUP 1999) 40.

¹²⁶ Sen (n 2) 40.

employment. In this context, international trade not only pursues economic objectives but also a broader social objective: economic prosperity is not an end in itself, but a means to achieve better standards of living.¹²⁷

This social objective of international trade is recognised by the World Trade Organisation (WTO), which is the main international body that sets the global legal framework for international trade. The preamble of the WTO Agreement recognises that international trade must be ‘conducted with a view to raising standards of living’, ‘ensuring full employment’ and ‘allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development’.¹²⁸ Similarly, the 2030 Agenda for Sustainable Development recognises that ‘[i]nternational trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development’.¹²⁹ There is a close link between sustainable development and ESR. For example, if one looks at the Sustainable Development Goals (SDGs) in the 2030 Agenda,¹³⁰ Goals 1¹³¹ and 2¹³² essentially reflect the right to

¹²⁷ See Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement), preamble.

¹²⁸ WTO Agreement, preamble.

¹²⁹ UNGA, ‘Transforming our world: the 2030 Agenda for Sustainable Development’ (2015) UN Doc A/RES/70/1, para 68.

¹³⁰ The summary of the goals are provided in: UNGA (n 6) 14.

¹³¹ Eradication of poverty.

¹³² Eradication of hunger.

adequate standard of living and the right to social assistance, Goals 3¹³³ and 6¹³⁴ reflect the right to health, Goal 4¹³⁵ reflects the right to education, Goal 5¹³⁶ reflects the principle of non-discrimination on grounds of sex, and Goal 8¹³⁷ reflects the right to just and favourable working conditions. It is clear from the 2030 Agenda that the international community regards trade as a means of promoting sustainable development, which in essence promotes ESR.

The EU also endorses this social objective of international trade. Article 3(5) TEU obliges the EU to contribute to not only protection of human rights but also ‘free and fair trade’, in its relations with the wider world. The reference to ‘fair trade’ reflects that the EU recognises that trade should not only pursue commercial objectives but also be conducted in an equitable manner, ensuring fair distribution of profit to producers and workers, reflecting the amount of their input.¹³⁸ In addition, Article 207(1) TFEU states that the CCP must be conducted in line with the objectives of the EU’s external action.¹³⁹ Those

¹³³ Health and well-being.

¹³⁴ Sustainable management of water and sanitation.

¹³⁵ Quality education.

¹³⁶ Gender equality.

¹³⁷ Promotion of ‘full and productive employment and decent work for all’.

¹³⁸ See Commission, ‘On “fair trade”’ (Communication) COM(1999) 619 final, 3; A Dimopoulos, ‘The effects of the Lisbon Treaty on the principles and objectives of the Common Commercial Policy’ (2010) 15 EFAR 153, 163.

¹³⁹ TFEU, art 207(1).

objectives are found in Article 21(2) TEU, which include, *inter alia*, the consolidation and support for human rights,¹⁴⁰ promotion of sustainable development,¹⁴¹ and eradication of poverty.¹⁴² The EU trade policy has sought to give effect to these obligations under the Treaties. For example, in 2015, the Commission revised the EU trade strategy and put emphasis on ensuring that the benefits of trade are shared by everyone, including ‘citizens, consumers, workers and the self-employed, small, medium and large enterprises, and the poorest in developing countries’.¹⁴³ It recognised that economic growth generated by trade must go ‘hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection.’¹⁴⁴ As will be seen in Section 4, in light of this policy framework, the link between trade and ESR has been intensified in EU trade agreements through TSD Chapters.

Whereas the social objective of international trade thus exists, such an objective cannot be achieved without conscious effort by trading countries to remind themselves of the objective and to take positive steps to achieve it. Contrary to its social objective, international trade, when conducted solely for the purpose of economic interest, can backfire in relation to ESR. The pressure

¹⁴⁰ TEU, art 21(2)(b).

¹⁴¹ *ibid* art 21(2)(d), (f).

¹⁴² *ibid* art 21(2)(d).

¹⁴³ Commission, *Trade for all: Towards a more responsible trade and investment policy* (European Union 2015) 7.

¹⁴⁴ *ibid* 22.

of having to compete internationally may result in the ‘race to the bottom effect’, whereby countries lower their regulatory standards at the expense of protecting ESR, and whereby employers seek to cut the cost of labour at the expense of workers’ right to just and favourable working conditions.¹⁴⁵ It is therefore necessary for the EU and its trade partners to explicitly engage with ESR while conducting trade, so that trade does not become an end in itself but a means to achieve better standards of living. As will be seen in Chapter Four, HRC and TSD Chapters in trade agreements are particularly useful in this regard, as they provide the basis for ongoing dialogues between the parties, civil society consultations, and monitoring mechanisms for the purpose of protecting ESR.

3. The EU’s market power and obligation to promote economic and social rights in trade

The CCP constitutes an extensive area of the EU’s external action, largely given that the EU was originally an economic union, the main focus of which was on its common market.¹⁴⁶ The Treaty provisions for the CCP are found in Part V of TFEU, which deals with different areas of the EU’s external action. Article 205 opens Part V by reaffirming that the EU’s action in these areas are guided by the principles and objectives set out in Article 21 TEU, which

¹⁴⁵ See BA Silverglade, ‘The WTO agreement on sanitary and phytosanitary measures: weakening food safety regulations to facilitate trade?’ (2000) 55 FDLJ 517, 520-521; S Pahle, ‘The rise and demise of the social clause proposal in the 1990s: implications of a discourse theoretical reading’ (2010) 51 Labour History 389, 394.

¹⁴⁶ P Craig and G de Burca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2011) 4-5.

include human rights, as discussed in Chapter Three. This is reiterated in Article 207(1) TFEU, which requires the CCP to be ‘based on uniform principles, particularly regard to ... [*inter alia*] the conclusion of trade agreements’, and ‘be conducted in the context of the principles and objectives of the Union’s external action’. Article 207(1), when read in the light of Articles 3(5) and 21 TEU, suggest that the EU should uphold, promote, respect, consolidate and support ESR in its external trade.¹⁴⁷ Therefore, it has been rightly argued that ESR constitute not only an external objective of the EU but also an ‘inherent’ objective of the EU’s external trade, and that both the EU’s action in this area and its trade agreements should be consistent with the objectives of ESR.¹⁴⁸

In implementing the above obligations under the Treaties, the EU is able to use its market power to promote its values, including ESR, in its trade relations. The term ‘market power Europe (MPE)’ was introduced by Chad Damro to conceptualise the EU’s identity as a market power, independently of its role as a normative power.¹⁴⁹ The crux of the MPE approach is that the EU possesses a large single market, which provides it ‘with considerable leverage to externalize its internal regulatory measures through trade’,¹⁵⁰ thereby

¹⁴⁷ I Mancini, ‘Fundamental Rights in the EU’s External Trade Relations: From Promotion ‘Through’ Trade Agreements to Protection ‘in’ Trade Agreements’ in E Kassoti and RA Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (ASSER Institute 2020) 66.

¹⁴⁸ *ibid* 67.

¹⁴⁹ C Damro, ‘Market Power Europe’ (2012) 19 *JEPP* 682.

¹⁵⁰ *ibid* 695.

influencing the regulatory standards and the behaviour of third countries.¹⁵¹ The size of its market thus provides relative incentives for third countries to seek favourable trade relations with the EU. The EU may use this as a bargaining chip to promote its norms by, for example, seeking to include certain provisions, such as HRC, in its trade agreements.¹⁵² This has been recognised in the EU trade policy, which seeks to ensure that its trade contributes to promoting best standards and human rights, through regulatory cooperation and trade agreements, while at the same time acknowledging the limits of trade in fully achieving its social objectives without being complemented by domestic policies and other international policies.¹⁵³

Likewise, the EU's use of human rights tools, such as HRC in its trade agreements, derives its strength not only from the EU's own Treaty obligations and the parties' shared obligations under international law, but also from the fact that economic benefits of having trade relations with the EU act as an incentive for third countries to consider the EU's preferences in a more favourable light.¹⁵⁴ One may argue that this is a form of Europeanisation by

¹⁵¹ *ibid* 686-695.

¹⁵² *ibid*.

¹⁵³ Commission, 'Promoting decent work for all: The EU contribution to the implementation of the decent work agenda in the world' (Communication) COM (2006) 249 final, 4-5, 8-9 ; Commission, *Trade for all* (n 20) 7, 20-22, 25-26.

¹⁵⁴ See P Eeckhout, *External Relations of the EU: Legal and Constitutional Foundations* (OUP 2004) 481; B Van Vooren and RA Wessel, *EU External Relations Law* (CUP 2014) 284; Damro (n 26) 686-687; S Velluti, 'The Promotion of Social Rights and Labour Standards in the EU's External Trade Relations' in S Poli (ed), *Protecting Human Rights in the European Union's External Relations* (ASSER Institute 2016) 83.

which the EU influences its trade partner's policy orientation and behaviour by exporting its values, but it must be noted that, in doing so, the EU tends to refer to the universal norms shared by the international community, thereby avoiding potential accusation of neo-imperialism.¹⁵⁵

However, there are certain factors which limit the EU's exercise of its market power to promote ESR. First, the EU's own institutional framework can restrain the extent to which it pursues the objective of promoting ESR through trade agreements. The EU's trade negotiations are chiefly conducted through the Commission's Directorate-General for Trade, which tends to adopt liberal views on trade, in the commercial interest of the EU.¹⁵⁶ The issue of human rights is dealt at a separate table during the negotiations through the European External Action Service (EEAS), which seeks to ensure coherence between the EU's different areas of external action, and to promote the EU's values, such as human rights.¹⁵⁷ Since the Treaty of Lisbon, the European Parliament's role has been widened, as the Council has to obtain consent from the European Parliament before concluding an agreement in cases covered by Article

¹⁵⁵ P Leino, 'The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law' in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (2008) 260, 262-263.

¹⁵⁶ AR Young, 'Trade Politics Ain't What It Used to Be: The European Union in the Doha Round' (2007) 45 *JCMS* 789, 799; L McKenzie and KL Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 *JCMS* 832, 837.

¹⁵⁷ D Spence, 'The Early Days of the European External Action Service: A Practitioner's View' (2012) 7 *The Hague Journal of Diplomacy* 115, 127; D Sicurelli, 'The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of the Negotiations with Vietnam' (2015) 11 *JCER* 230, 232.

218(6)(a) TFEU, except where the agreement exclusively relates to the common foreign and security policy (CFSP).¹⁵⁸ This applies to the conclusion of trade agreements,¹⁵⁹ and the European Parliament has the power to veto the conclusion of trade agreements.¹⁶⁰ The Member States further operate through the Trade Policy Committee, which seeks to coordinate their interests with the Commission.¹⁶¹ The Member States working through the Trade Policy Committee may have differing interests, but overall it has been argued that the Trade Policy Committee tends to favour commercial interests over other values.¹⁶² It has been argued that the EU institutions themselves engage in a turf battle, where their differing interests come into conflict, particularly where the EU's promotion of human rights is contested by third countries.¹⁶³

The picture becomes even more complicated where the agreement is a mixed agreement, in which case the Member States have to participate as joint parties in the processes of negotiation, conclusion and implementation of the

¹⁵⁸ TFEU, art 218(6).

¹⁵⁹ *ibid* 207(3).

¹⁶⁰ *ibid* art 218(6)(b).

¹⁶¹ Council of the European Union, 'Trade Policy Committee' (2023) <<https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/trade-policy-committee/>> accessed 31 July 2023.

¹⁶² M Carbone, 'Mission Impossible: the European Union and Policy Coherence for Development' (2008) 30 JEI 323, 334-335; S Woolcock, *European Union Economic Diplomacy: The Role of the EU in External Economic Relations* (Ashgate 2012) 54-55; L McKenzie and KL Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 JCMS 832, 837-838.

¹⁶³ McKenzie (n 39) 834, 839

agreement.¹⁶⁴ The duty of cooperation becomes an important element in this context, in order to ensure coherence between the EU and the Member States' actions on the international scene, and not to undermine the ability of the EU to speak in one voice. Although the Member States should work to facilitate, rather than undermine, the objectives of the EU, in reality this is easier said than done, as shown in the case of the EU-Canada Comprehensive Economic and Trade Agreement (CETA),¹⁶⁵ where the Belgian government during the CETA negotiation process had to seek approval from all its five regional governments and was vetoed by one of the governments– the Walloon Parliament.¹⁶⁶

As such, the number of actors involved in trade negotiations suggests that there is a risk of the negotiation ending up in a deadlock because of different interests between the EU institutions, and between the EU and the Member States, including their regional governments and parliaments, and between the Member States themselves. Moreover, the EU needs to ensure that all its Member States live up to the standards and afford at least the same level of protection for ESR which the EU expects from third countries, in order not to

¹⁶⁴ Case C-25/94 *Commission v Commission* [1996] ECLI:EU:C:1996:114, [48]; Craig and G de Burca (n 23) 352; G de Baere, 'EU External Action' in C Barnard and S Peers (eds), *European Union Law* (2nd edn, OUP 2017) 746.

¹⁶⁵ Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23 (CETA).

¹⁶⁶ See Economist, 'Tears over the collapse of the EU-Canada trade deal' (2016) <<https://www.economist.com/europe/2016/10/21/tears-over-the-collapse-of-the-eu-canada-trade-deal>> accessed 31 July 2023; M Tatham, 'The Rise of Regional Influence in the EU – From Soft Policy Lobbying to Hard Vetoing' (2018) 56 *JCMS* 672, 680-682.

be seen as hypocritical.¹⁶⁷ Such double standards would undermine the credibility of the EU's external promotion of ESR in general.¹⁶⁸

Another limit to the EU's exercise of market power to promote ESR is the potential conflict between different objectives of the EU's external trade. The EU is obliged to promote both its values and interests in its trade relations,¹⁶⁹ and to contribute to its commercial objectives through the CCP.¹⁷⁰

Coordinating its values and interests is not always an easy task, and the EU has occasionally compromised its promotion of human rights in favour of its commercial interests, particularly where concluding a trade agreement with the third country concerned is of great economic significance for the EU.¹⁷¹ For example, during the negotiations leading up to the signing of the EU-Singapore Trade Agreement¹⁷² and the EU-Singapore Partnership and Cooperation Agreement (EU-Singapore PCA),¹⁷³ the EU faced opposition

¹⁶⁷ FRAME, 'Coherence of human rights policymaking in EU institutions and other EU agencies and bodies' (2014) <<http://www.fp7-frame.eu/wp-content/uploads/2016/08/06-Deliverable-8.1.pdf>> accessed 10 August 2023, 9.

¹⁶⁸ Ibid.

¹⁶⁹ TEU, art 3(5).

¹⁷⁰ TFEU, art 207(1).

¹⁷¹ See U Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (CUP 2008) 447-452; FRAME, 'Mapping, analysing and implementing foreign policy instruments in human rights promotion' (2014) <<http://www.fp7-frame.eu/wp-content/uploads/2016/08/11-Deliverable-6.1.pdf>> accessed 10 August 2023, 55-57; FRAME, 'Coherence of human rights policymaking in EU institutions and other EU agencies and bodies' (n 44) 83-86.

¹⁷² Free Trade Agreement between the European Union and the Republic of Singapore [2019] OJ L 294/3 (EU-Singapore Trade Agreement).

¹⁷³ Partnership and Cooperation Agreement between the European Union and its Member

from the Singaporean government on the inclusion of HRC that may have implication for its law on death penalty.¹⁷⁴ As a result, although the EU-Singapore PCA contains HRC and has been linked to the EU-Singapore Trade Agreement through the *passarelle* clause,¹⁷⁵ the effect of the non-execution clause has been watered down by the Side Letter accompanying the PCA:

...both sides confirm their understanding that, at the time of this signature of this Agreement, they are not aware, based on objectively available information, of any of each other's domestic laws, or their application, which could lead to the invocation of [the non-execution clause] of this Agreement.¹⁷⁶

The Side Letter has been incorporated notwithstanding Singapore's human rights issues, such as the death penalty. It has been argued that such a compromise had to be made because the trade deal with Singapore was considered to bring significant economic benefit for the EU, particularly given Singapore's political and economic links with other ASEAN countries, and given the relationship between ASEAN and the EU's competitors such as the US and China.¹⁷⁷ This case illustrates how the EU's commercial interest has taken precedence over the EU's promotion of human rights, and may support

States, of the one part, and the Republic of Singapore, of the other part [2018] EU/SG/en/1 (EU-Singapore PCA).

¹⁷⁴ See McKenzie (n 39) 840.

¹⁷⁵ Free Trade Agreement between the European Union and the Republic of Singapore [2019] OJ L 294/3 (EU-Singapore FTA), art 16.18(1).

¹⁷⁶ This Side Letter is attached on the last page of the EU-Singapore PCA.

¹⁷⁷ McKenzie (n 39) 839, 841.

the argument that the EU's human rights promotion may be a 'mere 'window dressing' or 'luxury goods' that will be dropped as soon as they conflict with weighty...interests'.¹⁷⁸

In a similar vein, power asymmetry between the EU and its trade partners also plays an important role in setting the dynamics of trade negotiations. Where a country has a small market size and the export to the EU remains very important for its economy, the bargaining power of the country is much more likely to decrease during the trade negotiations with the EU.¹⁷⁹ The more symmetry there is in terms of the parties' negotiating power, the more difficult it is for either of the parties to set their terms which the other party is reluctant to accept.¹⁸⁰ In that regard, the EU's market power is relative to 'the extent to which securing market access is a policy priority for a given country'.¹⁸¹ In other words, the more the country is dependent on the EU for its exports, the bigger the market power the EU possesses in relation to that country.

¹⁷⁸ FRAME, 'Mapping, analysing and implementing foreign policy instruments in human rights promotion' (n 48) 57.

¹⁷⁹ See M Saguier and D Tussie, 'Emerging trade politics: the continuous pendulum from multilateralism to asymmetric trade negotiations' (2014) 2 *Pontificia Universidade Católica de Minas Gerais Estudos Internacionais* 9, 18.

¹⁸⁰ See A Hirschman, *National Power and the Structure of Foreign Trade* (University of California Press 1980) 41-52; RH Wagner, 'Economic Interdependence, Bargaining Power, and Political Influence' (1988) 42 *IO* 461; Saguier (n 56) 18-19.

¹⁸¹ Saguier (n 56) 9, 18.

In this regard, the incorporation of HRC in trade agreements, as well as the EU's promotion of ESR through HRC, may be more difficult where the parties enjoy more symmetrical power relations and where the partner country concerned is reluctant to accept the EU's demands. As will be seen in Chapter Five, the EU's rhetoric of including HRC in its trade agreements has occasionally not been followed through in relation to countries, such as New Zealand and Australia, where there is less power asymmetry.¹⁸² Similarly, although the incorporation of HRC in EU trade agreements can be seen as a means of implementing the EU's obligations to promote human rights under the Treaties, the above practical limitations may pose challenges for the extent to which the EU usefully promotes ESR through HRC in its trade agreements. The EU's market power can certainly act as a lever to make the EU's terms appear more acceptable by third countries, but successful incorporation of HRC in its trade agreements and useful promotion of ESR through HRC will depend on the EU's strong commitment to adhere to its human rights rhetoric in practice, in light of the above challenges.

4. EU Trade Agreements as an instrument for promotion of economic and social Rights

¹⁸² E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 287-302; V Miller, 'The Human Rights Clause in the EU's External Agreements' (2004) <<https://commonslibrary.parliament.uk/research-briefings/rp04-33/>> accessed 29 August 2023, 58-60; EM Hafner-Burton, 'The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe' (2009) 7 *Perspectives on Politics* 33, 34; AC Prickartz and I Staudinger, 'Policy v practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements' (2019) 3 *Europe and the World: A Law Review* 1, 19.

The EU trade agreements have developed in a manner which has strengthened the link between ESR and trade. According to the EU's own categorisation, its first generation agreements, which were mostly concluded before 2006, were primarily concerned with tariff elimination.¹⁸³ There are notable variations within these agreements: for example, trade agreements in the 1970s were the least comprehensive of the kind, which tended to focus mainly on freedom of movement of goods and agricultural products.¹⁸⁴ As part of the EU's European Neighbourhood Policy (ENP) which seeks to promote stability and security in its neighbourhood,¹⁸⁵ the EU has concluded a number of trade agreements with its neighbouring countries, and these agreements are not only concerned with freedom of movement of goods but also with freedom of movement of workers and capital, providing for liberalisation of services and investment, as well as the right of establishment.¹⁸⁶

The evolutionary step from these first generation trade agreements to what is now known as the 'new generation' trade agreements has taken place since the

¹⁸³ Commission, '2019 Annual Report on the Implementation of EU Trade Agreements' (2019) <<https://www.consilium.europa.eu/media/41263/2019-annual-report-on-the-implementation-of-eu-ftas.pdf>> accessed 20 August 2023, 1.

¹⁸⁴ See M Katunar, M Maljak and S Martinic, 'The Evolution of EU's Foreign Trade Policy' (2014) 47 *Lawyer* 123, 125.

¹⁸⁵ EEAS, 'European Neighbourhood Policy (ENP)' (2023) <https://www.eeas.europa.eu/eeas/european-neighbourhood-policy_en> accessed 29 August 2023.

¹⁸⁶ For example, see Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L35/1. See also Katunar (n 61) 125.

2006 Commission Communication, ‘Global Europe’.¹⁸⁷ In that communication, the Commission outlined its plans for concluding more ambitious trade agreements with countries which possess large market potentials and are able to provide protection against EU export interests.¹⁸⁸ Examples of those countries include, *inter alia*, South Korea, the ASEAN, the Mercosur and India.¹⁸⁹ The EU-South Korea Trade Agreement is the first new generation trade agreement that has come into force, being provisionally applied since 2011,¹⁹⁰ followed by the EU-Peru/Colombia trade agreement, being provisionally applied since 2013. As explained in Chapter One, these two agreements provide the subjects of case studies in Chapters Six and Seven.

As in the case of these two agreements, the new generation trade agreements often carry the name ‘free trade agreements’ (FTAs), a term which suggests comprehensive integration of trade areas between the EU and its partner countries through removal of barriers to trade.¹⁹¹ Although the term FTA has already been used in relation to some of the previous agreements between the EU and other countries, the new generation FTAs are more comprehensive in

¹⁸⁷ Commission, ‘Global Europe: Competing in the World’ (Communication) COM (2006) 567 final.

¹⁸⁸ *ibid* 9.

¹⁸⁹ *ibid* 9.

¹⁹⁰ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6 (EU-Korea Trade Agreement).

¹⁹¹ See Commission, *Trade for all* (n 20) 9.

scope, ‘aiming at the highest possible degree of trade liberalisation including far-reaching liberalisation of services and investment’, with stronger provisions on intellectual property rights and competition.¹⁹² This is in line with the EU’s obligation to contribute to ‘free and fair trade’ under Article 3(5) TEU. The concept of ‘fair’ trade refers to both abiding by the rules of international trade, hence compliance with WTO rules, and ethical trade whereby the profit of trade is distributed equitably to producers and workers,¹⁹³ as discussed in Section 2 above. Therefore, it could be argued that free and fair trade allows for more liberal economic integration but at the same time obliges the EU to promote its values and norms. As with the EU’s other trade agreements, the new generation trade agreements continue to include HRC, usually in the form of *passarelle* clause, as will be seen in the case of EU-Korea Trade Agreement in Chapter Six.

The element of free and fair trade is further enhanced by the introduction of TSD Chapters, which reflect that these agreements seek to address ‘behind-the-border measures’ through social regulation,¹⁹⁴ providing for labour standards and environmental protection.¹⁹⁵ On the question of whether these areas fall within the scope of the CCP, the Court in *Opinion 2/15* considered the nature of these provisions in the EU-Singapore Trade Agreement, in light

¹⁹² Commission, ‘Global Europe’ (n 64) 9, 12.

¹⁹³ Commission, ‘On “fair trade”’ (n 15) 3; Dimopoulos (n 15) 163.

¹⁹⁴ AR Young (n 33) 791.

¹⁹⁵ Commission, ‘Global Europe’ (n 64) 9, 12.

of the general principles and objectives of the EU's external action in Article 21 TEU. According to the *Opinion*, in so far the parties did not intend to specifically regulate these areas but only to condition their trade relations on the observance of their international obligations, the provisions fell within the scope of the CCP.¹⁹⁶ The Court has thus widened the scope of the CCP in the post-Lisbon framework by reference to the general principles and objectives of the EU's external action, and this is an important development for the EU's promotion of ESR, as the objectives of sustainable development and labour standards constitute positive contribution to the realisation of ESR.¹⁹⁷

TSD Chapters can be seen as a new innovation of EU trade agreements which, when complemented by HRC, strengthen the EU's promotion of ESR through trade. As will be seen in Chapters Six and Seven, TSD Chapters require parties to observe the principles of fundamental ILO Conventions, which fall within the scope of ESR. These include: the right to freedom of association and collective bargaining, prohibition of forced labour, prohibition of child labour, and the right to non-discrimination at workplace.¹⁹⁸ When read in light of HRC, these provisions serve as binding obligations which form part of the parties' commitment to respect human rights under HRC.

¹⁹⁶ *Opinion 2/15* [2017] ECLI:EU:C:2017:376, [142]-[145], [155], [166]

¹⁹⁷ C Briere and A Navasartian, 'Lex Generalis and the Primacy of EU Law as Source of the EU's Duty to Respect Human Rights Abroad: Lessons Learned from The Case-Law of the CJEU' in E Kassoti and RA Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (ASSER Institute 2020) 34.

¹⁹⁸ See the discussions in Chapter Six, Section 3.2, and the discussion in Chapter Seven, Section 3.

In this context, EU trade agreements can serve as a useful instrument for the EU's promotion of ESR, as they can incorporate binding provisions, including HRC and TSD Chapters, which commit the parties to their international obligations regarding ESR. Although the extent to which the EU can successfully incorporate HRC is subject to practical limitations noted in Section 3, the EU can still seek to use its relative market power, as well as its normative power discussed in Chapter Three, as a lever to negotiate HRC and to promote ESR through HRC. When successfully incorporated, the focus of HRC in the EU new generation trade agreements can particularly be oriented on the promotion of ESR, by complementing the TSD Chapters. These provisions then serve as legal reference points for the parties to take positive measures with a view to promote ESR, as will be seen in Chapters Five – Seven.

Trade agreements are also useful in that the parties can establish mechanisms to monitor or review the implementation of their agreements. In the case of the new generation trade agreements, various bodies have been set up with different mandates to monitor the implementation of the agreements, and the EU carries out ex-post evaluation of the agreements, as will be seen in Chapters Six and Seven. Given that HRC apply horizontally throughout the whole agreements, the parties' obligations regarding ESR under HRC can be reviewed through these mechanisms. The TSD Chapters further provide for civil society discussion forums, where issues of ESR can be discussed on the

basis of HRC.¹⁹⁹ These mechanisms play a key role in contributing to progressive realisation of ESR. As discussed in Chapter Two, justiciability of ESR ‘essentially inheres in the idea of review’, which takes the form of inquisitorial justiciability through reports and comments from international bodies, and constructive dialogue at international level.²⁰⁰

5. Conclusion

This chapter has explored the relationship between trade and ESR to demonstrate why it is necessary that ESR are promoted in the EU’s trade relations. In so far the economic objective of trade is not an end in itself but a means to achieve better standards of living, the economic benefits of trade can contribute to progressive realisation of ESR. However, in order to achieve this social objective of trade, it is necessary for the EU and its partner countries to consciously to take efforts to ensure that trade contributes to ESR. Trade agreements are particularly useful in this regard, because they can incorporate binding provisions, including HRC, with a view to promoting ESR. When successfully negotiated, HRC can serve as a basis upon which the parties can take positive measures to promote ESR, as will be seen in Chapter Five. As discussed in Section 3, the introduction of TSD Chapters in new generation trade agreements can be seen as a positive contribution in the context of the

¹⁹⁹ See the discussion in Chapter Six, Section 4, and the discussion Chapter Seven, Section 4.

²⁰⁰ DM Hill, ‘Right and their Realisation’ in R Beddard and DM Hill (eds), *Economic, Social and Cultural Rights* (Macmillan 1992) 17-18

EU's promotion of ESR, as they complement HRC to strengthen the parties' obligations regarding ESR.

This chapter has also discussed the EU's market power, which gives it certain leverage to promote its values in its external relations. In light of the social objective of trade, the EU should orient its market power to promote ESR in its trade agreements. However, as seen in Section 3 above, there are practical limitations to the EU's exercise of market power, including the EU's own institutional framework, the partner countries' receptiveness, and those countries' relative bargaining power. These limitations should be taken into account when assessing the extent to which the EU usefully promotes ESR through HRC in its trade agreements.

Chapter Five: Human Rights Clauses in EU Trade Agreements

1. Introduction

From programmatic principles to a standard human rights clause, which is based on the 1995 Commission Communication,¹ human rights clauses (HRC) have undergone a series of developments, conditioning the relations between the EU and third countries on respect for human rights and democratic principles. The standard HRC establishes this condition as an essential element of their relations, where a serious breach of this condition may trigger potential suspension of the agreements, as will be discussed in Section 2. The EU has been seeking to systematically include the standard HRC in all its trade agreements since 1995,² although has not always succeeded.³ Against this background, this chapter seeks to evaluate the scope of HRC in EU trade agreements, and the extent to which ESR are included therein.

As will be seen in Sections 2 and 3, the exact wording of HRC differ from agreement to agreement, even when they are based on the standard model set in the 1995 Commission Communication. Recent developments suggest that

¹ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (Communication) COM(95) 216 final, 12-13.

² See Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 10; E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 380-382.

³ For example, the negotiations with Australia and New Zealand were not successful because of their reluctance to accept HRC. See Section 4.

passerelle clauses are being increasingly used to link new generation trade agreements to HRC in the parties' broader political agreements.⁴ Those HRC in the political agreements are nevertheless still based on the Commission's 1995 standard model. Therefore, the evaluation of the scope of HRC in this chapter will mainly focus on the standard HRC, although Section 2 will initially analyse the clause in the context of its origins.

As will be seen in Section 4, the EU's efforts to include HRC in trade agreements are not without any opposition from its partner countries. The challenges become even more evident when the partner countries have more symmetrical power relations at the negotiating table, as discussed in Chapter Four. In those cases, the EU's own commercial and other interest may outweigh its determination to promote human rights, as will be seen in Section 4.

Nevertheless, it will be argued in this chapter that the value of HRC should not be negated by these challenges. These clauses provide an important basis for the EU to take positive measures for promotion of ESR within the framework of trade agreements. Those positive measures may include political dialogue, human rights impact assessments and ex-post monitoring mechanisms which

⁴ For example, 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 [2011] OJ L127/6 (EU-Korea Trade Agreement), art 15.14(2), which refers to Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [2013] OJ L 20/2 (EU-Korea Framework Agreement).

all contribute to inquisitorial justiciability of ESR.⁵ Moreover, as HRC apply horizontally throughout the whole trade agreements, they complement the other provisions of the agreements, such as provisions on labour standards, sustainable development and protection of public health, to strengthen the EU's overall promotion of ESR. Even with countries which have more symmetrical bargaining power with the EU, respect for indivisibility of human rights remains as their shared values under international law, and HRC therefore provide an important foundation for the EU and its partner countries to cooperate in the fields of human rights in their trade relations, taking into account the broader social objectives of trade, which contributes to protection of ESR.⁶

Section 2 will first give an overview of the evolution of HRC in EU trade agreements and analyse the scope of the standard HRC, which is modelled on the 1995 Commission Communication. Section 3 will evaluate the extent to which ESR are included in the scope of these clauses. Although HRC do not explicitly mention ESR, it will be argued that the EU's approach to indivisibility of human rights, and the instruments referred to by the clauses suggest that ESR are implied by the concept of 'human rights' in these clauses. It will evaluate how these clauses may complement the other provisions of trade agreements to reinforce the indivisibility of human rights and to strengthen the EU's overall promotion of ESR. Section 4 will analyse practical

⁵ See Chapter Two for discussion on inquisitorial justiciability.

⁶ See Chapter Four for discussion on the link between the social objective of trade and protection of ESR.

challenges in promoting ESR through HRC, particularly when the partner countries have more symmetrical bargaining power with the EU. These discussions will provide the basis for understanding the role and the scope of HRC before analysing the case studies in the subsequent chapters.

2. The Evolution of Human Rights Clauses in EU Trade Agreements

The EU's approach to human rights conditionality in its external agreements first began to appear *de facto* in the 1970s.⁷ The then European Economic Community (EEC) was providing development aid to African, Caribbean and Pacific (ACP) countries under the Lomé I Agreement,⁸ but widespread murder and torture were being committed by the government of Uganda.⁹ Concerns arose within the EEC that the aid which it was providing could have been used by the government of Uganda in committing atrocities.¹⁰ There was no express legal basis under the Lomé I Agreement which allowed suspension of the agreement by reason of human rights violations. Respecting the international customary rule of *pacta sunt servanda*,¹¹ the EEC did not suspend the

⁷ Fierro (n 2) 43; L Bartels, 'Human Rights and Democracy Clauses in the EU's International Agreements' (2005) <https://www.europarl.europa.eu/meetdocs/2004_2009/documents/nt/584/584520/584520en.pdf> accessed 31 July 2023, 4

⁸ ACP-EEC Convention of Lomé [1976] OJ L 25/2.

⁹ Amnesty International, 'Human Rights Violations in Uganda' (1978) <<https://www.amnesty.org/download/Documents/204000/afr590071978en.pdf>> accessed 31 July 2023; European Parliament, 'Written Question No 941/76 by Mr Van der Hek to the Council of the European Communities (28 February 1977)' [1977] OJ C 214/1. See also Fierro (n 2) 43; Bartels, 'Human Rights and Democracy Clauses in the EU's International Agreements' (n 7) 4.

¹⁰ Fierro (n 2) 44-45.

¹¹ *Pacta sunt servanda* means that agreements must be carried out in good faith. See II Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation Under

agreement.¹² Instead, it tried to ensure that aid was not being used by the government in reinforcing or prolonging ‘the denial of basic human rights to its people’,¹³ and the aid was only partially suspended.¹⁴ Further grave human rights violations began to occur in other African countries and, despite the request from the Members of European Parliament (MEPs) for suspension of aid,¹⁵ the EEC continued to respect the principle of *pacta sunt servanda*.¹⁶

These events nevertheless reflected the need to insert legally binding provisions on human rights into future Lomé agreements, so that the EEC would not have to face the same ‘moral and practical dilemma’.¹⁷ Initially, there was strong opposition from the ACP countries to the inclusion of such clauses, particularly during the negotiation of Lomé II Agreement.¹⁸ Moreover, the EEC continued to trade with South Africa despite the latter’s apartheid regime, thereby weakening its own bargaining position on human rights during the negotiation of Lomé III Agreement. Although the attempts to

International Law’ (1989) 83 AJIL 513.

¹² Fierro (n 2) 44; P Eeckhout, *External Relations of the EU: Legal and Constitutional Foundations* (2004) 475.

¹³ Council of the European Union, ‘Answer (20 July 1977)’ [1977] OJ C 214/1.

¹⁴ Fierro (n 2) 44-45.

¹⁵ European Parliament, ‘Written Question No 943/77 by Mr Adams to the Commission of the European Communities (5 January 1978)’ [1978] OJ C 74/17.

¹⁶ Commission, ‘Answer (6 March 1978)’ [1978] OJ C 74/18. See also Commission, ‘Answer (22 January 1980)’ [1980] OJ C 49/47; Fierro (n 2) 46.

¹⁷ Fierro (n 2) 43.

¹⁸ Fierro (n 2) 47-48; AC Prickartz and I Staudinger, ‘Policy v practice: The use, implementation and enforcement of human rights clauses in the European Union’s international trade agreements’ (2019) 3 *Europe and the World: A Law Review* 1, 8.

include such clauses were not successful during both of these negotiations, the EEC succeeded in inserting a HRC in the draft Lomé IV agreement, later signed in 1989.¹⁹ The express link between development cooperation and human rights was addressed by Article 5 of Lomé IV Agreement, which made clear that the concept of ‘human rights’ referred to both civil and political rights (CPR) and ESR.²⁰ However, the clause in Lomé IV Agreement was formulated as programmatic principles, in the form of aspirational and general language, such as ‘[c]ooperation shall be directed towards...’ and ‘respect for human rights is recognized as a basic factor of real development’.²¹ There is no mention of respect for human rights as a basic or essential condition for the parties’ relations under the agreement, or that breach of human rights obligations would trigger any measures in response. This is why Bartels saw ‘little operative value’ to the clause as introduced in Lomé IV Agreement.²²

A more strongly worded clause was later introduced in the framework agreement for trade and economic cooperation with Argentina, signed in 1990.²³ Article 1 of that agreement stated that cooperation between the parties is ‘based on respect for the democratic principles and human rights which

¹⁹ Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 [1991] OJ L 229/3 (Lomé IV Agreement).

²⁰ *ibid* art 5(2).

²¹ *ibid* art 5(1).

²² L Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ (2013) 40 *Legal Issues of Economic Integration* 297, 298.

²³ Framework Agreement for Trade and Economic Cooperation between the European Economic Community and the Argentine Republic [1990] OJ L 295/67.

inspire the domestic and external policies of the Community and Argentina'. This so-called 'basic clause' is also found in agreements signed with several other countries in the early 1990s.²⁴ The rationale behind the basic clause is linked to the international customary principle of *rebus sic stantibus*, which is codified in Article 62 of the Vienna Convention on the Law of Treaties (VCLT).²⁵ This principle enables suspension or termination of an agreement where there has been a fundamental change of circumstances, which were not foreseen by the parties at the time of the conclusion of the agreement. Therefore, the basic clause sought to establish such circumstances which, if changed, would allow the EU to rely on the *rebus sic stantibus* principle to suspend the agreement.²⁶

However, there are several critical loopholes in the basic clause. First, the basic clause does not contain any legally binding human rights commitment. Rather, it is a statement of 'an assumption on which the continuing application of the agreement is based'.²⁷ As such, the vagueness of the wording may make it difficult to trigger Article 62 VCLT in practice.²⁸ Moreover, the *rebus sic*

²⁴ For example, Framework Agreement for Cooperation between the European Economic Community and the Eastern Republic of Uruguay [1992] OJ L 94/2, art 1; Framework Agreement for Cooperation between the European Economic Community and the Republic of Paraguay [1992] OJ L 313/72, art 1.

²⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

²⁶ L Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements* (German Institute for Human Rights 2014) 12.

²⁷ *ibid.*

²⁸ E Riedel and M Will, 'Human Rights Clauses in External Agreements of the EC' in P Alston, MR Bustelo and J Heenan (eds), *The EU and Human Rights* (OUP 1999) 729; Prickartz (n 18) 8.

stantibus principle could only apply where a fundamental change in the circumstances were unforeseen at the time when the obligations were undertaken.²⁹ It is difficult to invoke the principle where violations of human rights are evident at the time of the signing of the agreement. As such, in the absence of any express suspension mechanism in the agreement between the parties, reliance on the principle may not be a straightforward exercise. This was the case in *Racke*, where the Council's decision to suspend trade concessions under the agreement with Yugoslavia was challenged in the absence of an express suspension mechanism under the agreement.³⁰ Although the Court of Justice held that the Council had not made 'manifest errors' when assessing whether there had been a fundamental change of circumstances,³¹ the case suggests potential disputes that may arise when the EU tries to rely on the principle of *rebus sic stantibus*.³² As will be seen later in this section, these issues have been addressed when the basic clause developed into an essential element clause, complemented by a suspension mechanism.

With these initial developments of HRC, different EU institutions expressly recognised the importance of including HRC in future agreements with third countries. The European Council, meeting in Luxembourg in 1991, saw it as a means of actively promoting human rights in the EU's external relations,³³ and

²⁹ Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements* (n 26) 12.

³⁰ Case C-126/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655.

³¹ *ibid* para 52.

³² Fierro (n 2) 220.

³³ European Council, 'Presidency Conclusions' (Luxembourg, 28-29 June 1991) SN 151/3/91,

the Council statement of 1992 referred to respect for human rights and democratic principles as ‘essential components of cooperation or association agreements.’³⁴ The term ‘essential components’ was then used in the cooperation agreement with Brazil, signed in 1992,³⁵ transforming the basic clause into an essential element clause. Article 1 of that agreement thus stated that the parties’ cooperation is ‘based on respect for the democratic principles and human rights which inspire the domestic and international policies of both [parties] and which constitute an essential component of this Agreement.’ Subsequent agreements signed with other countries began to include a similar clause, with the phrase ‘essential components’ being replaced with ‘essential elements’.³⁶ The EU’s conditionality approach vis-à-vis human rights as an essential requirement was further crystallised in the context of EU accession, as human rights became one of the preconditions for accession criteria (the so-called ‘Copenhagen criteria’) from 1993.³⁷

When one looks at the wording of an essential element clause as laid down above, it is written as a statement of assumption (that respect for human rights

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³⁴ Council of the European Union, ‘Statement on respect for democratic principles, human rights and the principles of market economy’ (Bulletin of the European Communities, No 5/1992, 83) pt 1.2.13.

³⁵ Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil [1995] OJ L 262/54, art 1.

³⁶ For example, Agreement between the European Economic Community and the Republic of Latvia on Trade and Commercial and Economic Cooperation [1992] OJ L 403/11, art 1; Cooperation Agreement between the European Community and the Republic of India on Partnership and Development [1994] OJ L 223/24, art 1.

³⁷ European Council, ‘Presidency Conclusions’ (Copenhagen, 21-22 June 1993) SN/180/1/93 Rev 1.

constitute an essential element of the agreement), rather than that of obligation (the failure of which would bring certain consequences).³⁸ In that regard, the legal effect of an essential element clause can be questioned. This question is of less relevance nowadays, since non-execution clauses and the interpretative declarations make clear that a breach of essential elements can trigger ‘appropriate measures’, as will be seen below. However, even in the absence of such non-execution clauses and interpretative declarations, an essential element clause in itself is not completely without any legal effect.³⁹

This is because essential element clauses can be seen as transposing Article 60 of the VCLT, rather than relying on *rebus sic stantibus* principle.⁴⁰ Article 60(1) VCLT allows a party to an agreement to terminate or suspend the agreement in response to a ‘material breach’ committed by the other party.

Article 60(3) VCLT defines a ‘material breach’ as following:

- (a) a repudiation of the treaty not sanctioned by the present Convention; or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

³⁸ L Bartels, *Human Rights Conditionality in the EU’s International Agreements* (OUP 2005) 93.

³⁹ *ibid.*

⁴⁰ N Ghazaryan, ‘A new generation of human rights clauses? The case of Association Agreements in the Eastern neighbourhood’ (2015) 40(3) ELR 1, 10. See also, Riedel (n 28) 729-30; V Miller, ‘The Human Rights Clause in the EU’s External Agreements’ (2004) <<https://commonslibrary.parliament.uk/research-briefings/rp04-33/>> accessed 29 August 2023, 58-60, 13; Bartels, *A Model Human Rights Clause for the EU’s International Trade Agreements* (n 26) 12-13.

The relevant question to be asked here is whether a partner country's failure to respect human rights can amount to a 'violation of a provision essential to the accomplishment of the object or purpose' of a trade agreement containing an essential element clause. If so, the EU would be able to suspend or terminate the agreement based on Article 60(3)(b). However, as Bartels argued, a provision being 'essential to the accomplishment of the object or the purpose of a treaty' is not the same as 'a clause *deemed* to be 'essential''.⁴¹ If an essential element clause is simply a statement of assumption, then it is difficult to argue that the EU would be able to suspend or terminate the agreement based on article 60(3)(b), since Article 60(3)(b) assumes that there is a provision of obligation which is being violated.⁴² The EU would only be able to rely on Article 60(3)(b) when the agreement makes clear that respect for human rights is essential to accomplishing the purpose or the object of the agreement.⁴³

Therefore, a more appropriate legal basis for suspending or terminating an agreement for undermining an essential element clause would be Article 60(3)(a) VCLT.⁴⁴ Article 60(3)(a) allows the EU to suspend or terminate the agreement where its partner country repudiates their agreement. In order to rely on Article 60(3)(a), it is not necessary to establish a link between the provision concerned and the object or the purpose of the agreement. What

⁴¹ Bartels, *Human Rights Conditionality in the EU's International Agreements* (n 38) 25.

⁴² *ibid* 25, 103-104.

⁴³ *ibid* 103-104.

⁴⁴ *ibid* 106.

needs to be established is ‘an unjustified repudiation of [an agreement]’, not sanctioned by the VCLT.⁴⁵ Therefore, where a partner country fails to respect human rights, this can be interpreted as an implied repudiation of the agreement by virtue of the essential element clause. In this way, the EU would be able to suspend or terminate the agreement based on Article 60(3)(a).

However, as mentioned above, the application of Article 60 VCLT is of less importance in relation to the standard HRC modelled on the 1995 Commission Communication, which will be discussed below, because it is complemented by a non-execution clause that deals with cases of such violations.⁴⁶ As the essential element clause makes reference to both domestic and international policies, it could be argued that the clause not only affects the relations between the EU and its partner countries, but has broader implications for their external policies as a whole, thereby potentially influencing a wider value promotion, albeit indirectly, in relations with third countries.

There are two limbs to the essential element clause, which has become the gist of the standard HRC. The first concerns what constitute ‘essential elements’, and the second concerns the normative basis laid down by international instruments referred to by the clause. As regards the former, it is clear that the scope of essential elements varies from agreement to agreement. For example,

⁴⁵ International Law Commission, ‘Draft Articles on the Law of Treaties and Commentaries (reprinted)’ (1967) 61 AJIL 387, 425-6.

⁴⁶ See F Martines, ‘Human Rights Clauses in EU Agreements’ in S Poli (ed), *Protecting Human Rights in the European Union’s External Relations* (ASSER Institute 2016) 52.

the stabilisation and association agreements with Western Balkan countries have added the principle of market economy as one of the essential elements.⁴⁷ Proliferation of weapons of mass destruction (WMD) is added as one of the essential elements in a number of agreements, including in the agreements with Korea, Singapore, Peru and Colombia.⁴⁸ The Association Agreement with Ukraine has an extensive list of essential elements, including human rights, democratic principles, fundamental freedoms, proliferation of WMD, the rule of law, principles of sovereignty and territorial integrity, inviolability of borders and independence.⁴⁹ Therefore, the closer geographical and political proximity between the parties tend to include more essential elements in their agreements, and that the extensive list of essential elements in the agreement with Ukraine reflects the EU's support for Ukraine during the Russian annexation of Crimea.⁵⁰

Therefore, HRC may include a number of essential elements, depending on the political context and the relations between the EU and the third country

⁴⁷ For example, Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L 164/2, art 2.

⁴⁸ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/1 (EU-Colombia/Peru FTA), art 2; Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [2013] OJ L 20/2 (EU-Korea Framework Agreement), art 4; Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part [2018] EU/SG/en/1 (EU-Singapore PCA), art 7.

⁴⁹ Association Agreement between the European union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3, art 2.

⁵⁰ Ghazaryan (n 40) 13-14.

concerned. However, as the essential element clause developed from the basic clause, human rights and democratic principles remain the cornerstone of the essential elements. Unlike the other essential elements, human rights and democratic principles feature consistently across all agreements containing an essential element clause, and they are the two elements which have been explicitly included in the model standard HRC laid down by the Commission in its 1995 Communication,⁵¹ as will be seen below.

However, the clause does not define these elements by itself, but instead refers to international instruments, which constitute the second limb of the clause. Attempting to lay down the standards for the essential elements by the parties themselves, during the negotiations of the agreements, could become a cumbersome procedure. Therefore, reference to international instruments which both parties have ratified, or may ratify in the future, should be seen as a more practical means of reinforcing their existing obligations under international law. These instruments, which will be evaluated in Section 3, moreover imply that ESR are included within the scope of essential element clauses, even though they are not explicitly mentioned by these clause.

The essential element clause was linked to a suspension clause in the agreements signed with Baltic countries and Albania in 1992.⁵² The

⁵¹ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 12-13.

⁵² For example, see Agreement between the European Economic Community and the Republic of Latvia on Trade and Commercial and Economic Cooperation [1992] OJ L 403/11, art 21;

suspension clause, or the so-called ‘Baltic clause’, gave the parties the right to suspend the agreement with immediate effect where there had been a serious violation of the essential elements in the agreement.⁵³ The inclusion of express a suspension mechanism under the agreement seeks to address the issues faced by the EU in *Racke*, as seen earlier in this section.⁵⁴ Since the reliance on the customary principle of *rebus sic stantibus* raised difficulties with suspending the agreement with an immediate effect, the Baltic clause was worded strongly as to allow for an immediate suspension. However, the Baltic clause did not make any distinction in relation to the gravity of the violations.⁵⁵

Moreover, whereas the evolution of HRC pursued the customary principles codified in the VCLT, the Baltic clause was rather incompatible with the logic of the VCLT.⁵⁶ Whereas Articles 60 and 62 of the VCLT allow for suspension in cases of material breach or where there has been a fundamental change of circumstances, respectively, the VCLT intended suspension to be subject to prior notification with minimum expiry period of three months, except in cases of special urgency.⁵⁷ Where a party raises objection to suspension before the

Agreement between the European Economic Community and the Republic of Albania, on Trade and Commercial and Economic Cooperation [1992] OJ L 343/2, art 21.

⁵³ For example, see Agreement between the European Economic Community and the Republic of Latvia on Trade and Commercial and Economic Cooperation [1992] OJ L 403/11, art 21; Agreement between the European Economic Community and the Republic of Albania, on Trade and Commercial and Economic Cooperation [1992] OJ L 343/2, art 21.

⁵⁴ Fierro (n 2) 219.

⁵⁵ Eeckhout (n 12) 477.

⁵⁶ Fierro (n 2) 219.

⁵⁷ VCLT, art 65(3). See also Fierro (n 2) 220.

expiry period, the parties can seek a mutual solution under Article 65(3).

Therefore, the immediate suspension envisioned by the Baltic clause was more extreme than the mechanisms of the VCLT, and lacks flexibility for more amenable solutions.

These issues were resolved when the suspension clause was replaced with a non-execution clause in the agreements signed with Bulgaria and Romania in 1993.⁵⁸ Although its exact wording tends to differ from agreement to agreement,⁵⁹ the main tenet of the non-execution clause is to allow either party to the agreement to ‘take appropriate measures’ in response to the failure of the other party to fulfil an obligation under the agreement.⁶⁰ It further provides for a consultation procedure, ‘except in cases of special urgency ... for a thorough examination of the situation’.⁶¹ The ‘cases of special urgency’ may include a ‘material breach’ of the agreement, including a breach of an essential element of the agreement.⁶² Therefore, the transition from the Baltic clause to

⁵⁸ Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L 358/205, art 118(2); Europe Agreement establishing an Association between the European Economic Communities and their Member States, of the one part, and Romania of the other part [1994] OJ L 357/2, art 119(2).

⁵⁹ Partly it is because it depends on which joint institutions have been established under the agreement to be responsible for the consultation procedure.

⁶⁰ Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L 358/205, art 118(2); Europe Agreement establishing an Association between the European Economic Communities and their Member States, of the one part, and Romania of the other part [1994] OJ L 357/2, art 119(2).

⁶¹ *ibid.*

⁶² See Commission, ‘On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (n 1) 8-13.

the non-execution clause should be seen as more in line with the logic of the VCLT, allowing the parties the option to seek mutual solutions other than suspension, except in cases of special urgency.

The non-execution clause does not specify what ‘appropriate measures’ may be, leaving a degree of flexibility for the parties in light of each context. Examples of potential appropriate measures may include both negative (such as suspension of trade and other benefits under the agreement) or positive (such as financial co-operation within the framework of the agreement) measures. In extreme cases, it would include suspension of the agreement.⁶³ However, by providing for consultation procedures and using the phrase ‘appropriate measures’, it could be argued that the non-execution clause seeks to ensure that the measure is proportionate to the violation concerned and is appropriate to the context, and, therefore, suspension of the whole agreement would be the last resort.⁶⁴ This is supported by the fact that, the non-execution clause contains further explanation that, ‘[i]n the selection of measures, priority must be given to those which least disturb the functioning of the Agreement’.⁶⁵

⁶³ As will be seen in Section 3, there have been cases where the EU invoked the non-execution clause to suspend the agreement in cases of political coups.

⁶⁴ Eeckhout (n 12) 477. See also Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ (n 22) 303.

⁶⁵ Commission, ‘On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (n 1) 13, 15.

Furthermore, as will be seen below, the standard non-execution clause is complemented by an interpretative declaration, which requires appropriate measures to be ‘taken in accordance with international law’.⁶⁶ Therefore, in the context of appropriate measures, regard should be had to, *inter alia*, the International Law Commission’s Draft Articles on State Responsibility, which provides for various conditions regarding countermeasures, and which also reflects customary international law.⁶⁷ Examples of such conditions include the requirement of notification,⁶⁸ the requirement to make an offer for negotiation,⁶⁹ the requirement to ensure that the counter measure does not affect obligations regarding human rights and peremptory norms of international law, and proportionality.⁷⁰ Therefore, when seeking to adopt appropriate measures under non-execution clauses, the EU should ensure that the above conditions in international law are met. Some interpretative declarations, such as the one annexed to the EU-Korea Framework Agreement, even make explicit reference to the principle of proportionality in relation to appropriate measures.⁷¹ Although such explicit reference may not be necessary since customary international law already requires proportionality to be

⁶⁶ Commission, ‘On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (n 1) 12-13.

⁶⁷ International Law Commission, ‘Draft Articles on Responsibility of States for internationally wrongful acts’ (2001) UN Doc A/56/10. See Bartels, *Human Rights Conditionality in the EU’s International Agreements* (n 38) 118.

⁶⁸ International Law Commission, ‘Draft Articles on Responsibility of States for internationally wrongful acts’ (n 67) art 52(1)(b).

⁶⁹ *ibid*

⁷⁰ International Law Commission, ‘Draft Articles on Responsibility of States for internationally wrongful acts’ (n 67) art 51.

⁷¹ Joint Interpretative Declaration Concerning Articles 45 and 46, annexed to EU-Korea Framework Agreement.

ensured, it can still be seen as a statement of ‘reinforcement’ of these international rules on countermeasures.⁷²

On the other hand, one may argue that allowing flexibility in selecting responses to the violations may undermine the ‘essential’ nature of HRC.⁷³ However, it is submitted that the essential elements, including respect for human rights, need to be seen as an ongoing commitment which, in cases of violations, may be improved through consultation and dialogue, rather than through an outright suspension of the agreement. In fact, as will be seen in Section 3, the non-execution clause has been invoked only in a small number of cases which involve major political upheavals, suggesting that the EU rarely relies on the suspension mechanism under the non-execution clause. Rather, the non-execution clause should be seen as playing a preventative role, in the sense that the possibility of suspension could deter potential violations of the parties’ obligations under the agreement. It is for these reasons that Martines appropriately described HRC as ‘[establishing] a ‘self-contained regime’, allowing for the adoption of ‘appropriate measures’ to compel compliance’.⁷⁴

Following these developments, the Commission issued a Communication in 1995, proposing a systematic inclusion of a standard HRC in all future

⁷² Bartels, *Human Rights Conditionality in the EU’s International Agreements* (n 38) 120.

⁷³ Eeckhout (n 12) 447-448.

⁷⁴ Martines (n 46) 38.

agreements with third countries.⁷⁵ As discussed in Chapter Three, since the signing of the Treaty of Maastricht in 1992,⁷⁶ human rights began to be mainstreamed in the EU external action, and the Commission Communication in this context could be seen as giving effect to these developments. While HRC had evolved from programmatic principles to an essential element clause supplemented by a non-execution clause, the Commission viewed that a model standard HRC was necessary to ensure consistency throughout the EU's agreements with third countries, to establish visibility of the EU's human rights promotion, and to adopt a systematic approach to the inclusion of HRC.⁷⁷

The Communication makes clear that, by including an essential element clause, the EU sought to take a positive approach by making human rights a subject of common interest and a part of an ongoing dialogue between the parties,⁷⁸ while pursuing the international norms codified in the VCLT vis-à-vis suspension mechanisms through the non-execution clause.⁷⁹ The Commission emphasised the principle of proportionality when reacting to violations of human rights, and the non-execution was seen as embodying this

⁷⁵ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 10-13.

⁷⁶ Treaty on European Union [1992] OJ C 191/01 (Maastricht Version).

⁷⁷ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 12.

⁷⁸ *ibid* 7.

⁷⁹ See Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 8.

principle, as it allows for a selection of measures in ‘proportion to the gravity of the offence’, while leaving the option for suspension in cases of serious and persistent violations.⁸⁰ The model standard HRC proposed by the Commission in its Communication, and approved by the Council just after a few days, consists of the following provisions:

- a) Preambular references to human rights and democratic values, and to international instruments common to the parties;
- b) An essential element clause;
- c) A non-execution clause;
- d) An interpretative declaration complementing the non-execution clause, stating that the term ‘cases of special urgency’ refers to the ‘material breach’ of the agreement, including a violation of the essential element clause, and that the ‘appropriate measures’ must be ‘taken in accordance with international law’.⁸¹

The EU has since sought to include the standard HRC modelled on the above Communication, in all its agreements with third countries. However, despite its effort to take a systematic approach to the inclusion of the standard HRC, the EU’s overall practice suggests that there are many variations in practice. First, the wording of the essential elements clause differs from agreement to agreement. As seen earlier in this section, some agreements contain more

⁸⁰ Commission, ‘On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (n 1) 7.

⁸¹ *ibid* 12-13.

essential elements than the others, and the number of instruments referred to by the clause also differs, as it depends on what instruments the parties have commonly ratified.⁸² Secondly, the way in which interpretative provisions are included differs from agreement to agreement. For example, the Framework Agreement with South Korea has a separate interpretative declaration attached at the end of the agreement,⁸³ whereas the EU-Colombia/Peru Trade Agreement contains the interpretive provision in the same article as the non-execution clause.⁸⁴ Article 478 of the Association Agreement with Ukraine does not even explicitly mention ‘cases of special urgency’ or ‘material breach’, but instead uses the word, ‘exceptions’, to suggest that the procedures in paragraphs (1) and (2) do not have to apply in cases of violations of the essential element clause.⁸⁵

HRC which are being used in the agreements between the EU and third countries today still follow these modalities of the standard HRC. However, as for new generation trade agreements, HRC do not tend to be directly included in the standard form, but are included as *passerelle* clauses. *Passerelle* clauses serve to link the trade agreements to the parties’ political agreements, which

⁸² See Section 3

⁸³ Joint Interpretative Declaration Concerning Articles 45 and 46, annexed to EU-Korea Framework Agreement.

⁸⁴ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3 (EU-Colombia/Peru Trade Agreement), art 8.

⁸⁵ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3, art 478.

contain the standard HRC.⁸⁶ As will be explained in Chapter Six, trade agreements containing *passerelle* clauses must therefore be read together with the HRC in the parties' political agreements.

3. Economic and Social Rights within the Scope of Human Rights Clauses in the EU's Trade Agreements

As discussed in the previous section, there are two dimensions to the essential element clause: a) values which are considered as 'essential elements', and b) the normative basis as laid down by the international instruments referred to in the clause. It is the latter which provides the reference point for the parties' human rights obligations. As discussed in Section 2, precisely which instruments and how many of them are referred to by the clause largely depends on which instruments have been commonly ratified by both parties, and their geographical and political relations. However, there are two main instruments which have been explicitly suggested by the Commission in its 1995 Communication to be included in the standard HRC.⁸⁷ These are either

⁸⁶ For example, see EU-Korea Trade Agreement, art 15.14(2), which refers to EU-Korea Framework Agreement.

⁸⁷ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 12-13.

the Universal Declaration of Human Rights (UDHR)⁸⁸ or the Helsinki Final Act⁸⁹ and the Charter of Paris for a New Europe.⁹⁰

As the latter two are regional instruments, it is the UDHR which has become the most commonly referred instrument, reflecting the EU's understanding of universality and indivisibility of human rights,⁹¹ as also endorsed by its own Treaties and the Charter of Fundamental Rights.⁹² As the reference to the UDHR has the effect of incorporating all the fundamental rights contained therein, the EU's concept of human rights in the essential element clause should be understood as covering both CPR and ESR. In the same vein, the Helsinki Final Act and the Charter of Paris for a New Europe recognise indivisibility of human rights and incorporate ESR.⁹³ In some agreements, such as the EU-Korea Framework Agreement, the essential element clause refers to the UDHR and 'other relevant international human rights

⁸⁸ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

⁸⁹ Conference on Security and Co-operation in Europe: Final Act (1975) 14 ILM 1292 (Helsinki Final Act).

⁹⁰ Charter of Paris for a New Europe (1990) 30 ILM 190.

⁹¹ Ghazaryan (n 40) 10-11.

⁹² Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU), art 21(1); Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EU Charter).

⁹³ Conference on Security and Co-operation in Europe: Final Act (1975) 14 ILM 1292 (Helsinki Final Act), 6-7; Charter of Paris for a New Europe (1990) 30 ILM 190, 4.

instruments',⁹⁴ leaving the scope open for future ratification of other human rights instruments,⁹⁵ which may further provide protection for ESR.

It is notable that EU Charter of Fundamental Rights, being the EU's own instrument which is only addressed to the EU institutions and the Member States when they are implementing the EU law, has never been referred to by any of the essential element clauses. This is plausible since the Charter does not create new competences for the EU to impose human rights on third countries, and the EU simply seeks to reinforce already existing obligations under international law through HRC.⁹⁶ Nevertheless, the Charter is relevant in so far it represents the EU's own understanding of human rights, and contains the norms which the EU must observe in all areas of its internal and external action, as discussed in Chapter Three.

Nevertheless, it is one thing to simply recognise the principle of indivisibility, and another to translate this rhetoric into legally binding effects in practice. As far as HRC are concerned, the latter partly depends on the extent to which the EU and its partner countries make use of the positive function of the HRC in relation to ESR. It must be noted that, to date, the non-execution has never been invoked in relation to ESR. On the one hand, this may suggest that violations of ESR are not considered serious enough to trigger the clause. On

⁹⁴ EU-Korea Framework Agreement, art 1(1).

⁹⁵ Martines (n 46) 39-40.

⁹⁶ TEU, arts 3(6), 6(1); EU Charter, art 51(2).

the other hand, the non-execution is in fact rarely used: it has only been invoked in a small number of cases involving political upheaval, coup d'état, or flawed elections.⁹⁷ The number of incidents where it has been invoked reflects the EU's reluctance to rely on the negative conditionality of HRC in practice.

Since the non-execution clause is rarely used, the real value of HRC should be seen as embedded in the positive function of HRC. The positive function of HRC refers to various positive measures which may be undertaken to promote the essential elements within the general framework of the agreements, and by complementing the other provisions of the agreements. The essential element clause provides a basis for the parties to cooperate in the fields of human rights through, for example, political dialogue, monitoring, funding and other joint strategies.⁹⁸

⁹⁷ Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (n 22) 304-305; Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements* (n 26) 10; JD Saltenes, 'The EU's Human Rights Policy: Unpacking the literature on the EU's implementation of aid conditionality' (2013) <<https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2013/wp2-13.pdf>> accessed 31 July 2023, 7; Ghazaryan (n 40) 22; Prickartz (n 18) 20.

⁹⁸ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 7; Commission, 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners: Strategic guidelines' (Communication) COM(2003) 294 final, 11; L Bartels, 'A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements' (2004) 9 *Mediterranean Politics* 368, 370; Ghazaryan (n 40) 25-29; Martines (n 46) 38.

The value of the positive function of HRC has been acknowledged by the Commission, which recognised that HRC do not necessarily imply negative conditionality but can be used for promotion of dialogue and cooperation.⁹⁹ It is in this sense that Ghazaryan correctly argued that the negative conditionality of the non-execution clause ‘complements’ the essential element clause, rather than defining the main function of HRC.¹⁰⁰ The essential element clause provides a basis for legally binding commitment to protect human rights, and clarifies that human rights, particularly ESR, are not only a matter of domestic policies and their legal systems. Therefore, it could be argued that the lack of suspension in response to violations of ESR is rather a positive sign which indicates that the parties are resorting to positive measures through cooperation on these issues. Whether the EU and its trade partners actually make use of the positive function of HRC in practice will be further analysed through case studies in Chapters Six and Seven.

There are thus different ways in which HRC can be used by the parties and by the institutions established under trade agreements. In terms of dialogue, HRC can be used to legitimise bringing the subject of human rights within the scope of the parties’ dialogues. These human rights dialogues can take place in different forums, but the meetings of the committees and the subcommittees established under trade agreements provide a good opportunity for these

⁹⁹ Commission, ‘Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners’ (Communication) COM(2003) 294 final, 11.

¹⁰⁰ Ghazaryan (n 40) 26

dialogues to take place. For example, under the EU-Korea Trade Agreement¹⁰¹ which will be analysed in Chapter Six, human rights dialogues have been taking place during the meetings of the Joint Committee and the Committee on Trade and Sustainable Development.¹⁰² The EU has been particularly insistent on the issue of Korea's ratification of fundamental ILO Conventions during these meetings, and their dialogues later contributed to the EU's decision on whether to initiate dispute settlement under the Trade and Sustainable Development Chapter.¹⁰³ Similarly, under the EU-Colombia/Peru Trade Agreement¹⁰⁴ which will be analysed in Chapter Seven, human rights dialogues have been taking place in the meetings of the Trade Committee and the Sub-committee on Trade and Sustainable Development.¹⁰⁵ These dialogues have provided a useful forum for the parties to share their practices and policies regarding human rights, and helped the EU to determine whether the parties have been making visible effort to make improvements.¹⁰⁶

However, it must be noted that HRC are not always necessary for the EU to hold human rights dialogues with third countries.¹⁰⁷ Human rights dialogues

¹⁰¹ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6 (EU-Korea Trade Agreement).

¹⁰² See Chapter Six, Section 4.1.

¹⁰³ See Chapter Six, Sections 4.1, 4.3.

¹⁰⁴ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3 (EU-Colombia/Peru Trade Agreement).

¹⁰⁵ See Chapter Seven, Section 4.1.

¹⁰⁶ *ibid.*

¹⁰⁷ L Bartels, 'Assessment of the implementation of the human rights clause in international and sectoral agreements' (2023)

are one of the tools developed by the EU in line with its Action Plan on Human Rights and Democracy,¹⁰⁸ and the subject of human rights can be discussed in different forms of dialogues, regardless of HRC.¹⁰⁹ For example, the European External Action Service (EEAS) conducts human rights dialogue with third countries within the framework of Common Foreign and Security Policy (CFSP).¹¹⁰ The EU's special incentive Generalised Scheme of Preferences (GSP+),¹¹¹ which was discussed in Chapter Three, can also facilitate human rights dialogues in light of the conditions of the scheme,¹¹² which requires the beneficiary countries to ratify and effectively implement 27 international conventions.¹¹³ Therefore, HRC are an optional tool, rather than the only tool, that the EU can use to facilitate human rights dialogues. Nevertheless, HRC can still be useful in reminding the partner countries that

<[https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2023\)702586](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2023)702586) > accessed 7 May 2024, 22.

¹⁰⁸ Council of the European Union, *EU Action Plan on Human Rights and Democracy* (European Union 2015).

¹⁰⁹ See Bartels, 'Assessment of the implementation of the human rights clause in international and sectoral agreements' (n 107) 22.

¹¹⁰ EEAS, 'Revised EU Guidelines on Human Rights Dialogues with Partner/Third Countries' (2021) <https://www.eeas.europa.eu/sites/default/files/human_rights_dialogue_guidelines_0.pdf> accessed 7 May 2024, 3.

¹¹¹ Commission Delegated Regulation (EU) No 155/2013 of 18 December 2012 establishing rules related to the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences [2013] OJ L 48/5.

¹¹² EEAS (n 110) 4.

¹¹³ Commission Delegated Regulation (EU) No 155/2013 (n 100).

they have made legal commitment to respect human rights, and that failure to comply with this obligation may trigger the non-execution clauses.¹¹⁴

In terms of implementation, HRC can be used by the EU, and by the institutions established under trade agreements, to legitimatise their ‘promotional activities’ in the partner countries.¹¹⁵ Since the parties have agreed that respect for human rights is an ‘essential element’ of their agreements and that it underlies their internal and external policies, HRC serve to preclude any potential claims by the partner countries that such promotional activities ‘contravene the principle of non-interference in [their] affairs’.¹¹⁶ The case studies in the next two chapters will suggest that such promotional activities have indeed taken place, both under the EU-Korea Trade Agreement and the EU-Colombia/Peru Trade Agreement. For example, under the EU-Korea Trade Agreement, the Domestic Advisory Group (DAG) arranged a workshop to discuss the issue of non-regular employment in Korea,¹¹⁷ and, under the EU-Colombia/Peru Trade Agreement, the EU has provided capacity building and technical and financial assistance for projects aimed at improving ESR.¹¹⁸ Although HRC were not explicitly referenced in these activities,

¹¹⁴ See Bartels, ‘Assessment of the implementation of the human rights clause in international and sectoral agreements’ (n 107) 21.

¹¹⁵ *ibid* 2, 23.

¹¹⁶ *ibid* 23.

¹¹⁷ See Chapter Six, Section 4.1.2.

¹¹⁸ See Chapter Seven, Sections 4.1-4.2, 4.3.2.

should the partner countries seek to object to these activities, the EU can refer to the HRC for their legitimacy.

In terms of monitoring and enforcement of the parties' human rights obligations, there are again various measures that can be taken. As will be seen in the case studies in the next two chapters, the EU has been conducting ex-post evaluation to monitor the economic and social effects of the trade agreements.¹¹⁹ Although ex-post evaluation of trade agreements can take place regardless of HRC, HRC provide the legal basis for a human rights analysis to be included in the evaluation. As will be seen in the case studies, the human rights analysis in the ex-post evaluation makes explicit reference to HRC and seeks to evaluate the effects of the agreements on the enjoyment of human rights in the partner countries.

In addition to ex-post evaluation, meetings of the committees and civil society consultations can provide another means of monitoring the parties' human rights obligations.¹²⁰ In particular, Trade and Sustainable Development (TSD) Chapters in new generation trade agreements have contributed to this process. This is because TSD Chapters establish important institutional machineries, including DAGs and committees responsible for overseeing the implementation of TSD Chapters.¹²¹ Since fundamental labour rights fall

¹¹⁹ See Chapter Six, Section 4.2; Chapter Seven, Section 4.2.

¹²⁰ Bartels, 'Assessment of the implementation of the human rights clause in international and sectoral agreements' (n 107) 26.

¹²¹ See Bartels, 'Assessment of the implementation of the human rights clause in international

within the scope of ESR, these institutional machineries can contribute to the monitoring of the parties' human obligations vis-à-vis those ESR.

Furthermore, there are separate dispute settlement mechanisms established under TSD Chapters, and these mechanisms can also help enforce the parties' obligations, as will be discussed in the next chapter.

However, again, it must be noted that the monitoring and enforcement of human rights obligations can take place regardless of HRC. In fact, when the Panel of Experts was making its decision during the EU-Korea labour dispute,¹²² the Panel did not even mention HRC. Similarly, the study conducted by Bartels in 2023 suggests that in practice human rights abuses tend to be dealt under the EU's sanctions regime in the context of CFSP, rather than through HRC.¹²³ It may be that the EU prefers to use CFSP sanctions, as they tend to follow a 'targeted approach', whereby restrictive measures are imposed specifically on those responsible for human rights violations.¹²⁴ In addition to CFSP sanctions, GSP+ can provide another tool for enforcement of the parties' human rights obligations, through withdrawal of preferences.¹²⁵

and sectoral agreements' (n 107) 26.

¹²² Commission, 'Report of the Panel of Experts' (2021) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d4276b0f-4ba5-4aac-b86a-d8f65157c38e/details>> accessed 7 May 2024.

¹²³ Bartels, 'Assessment of the implementation of the human rights clause in international and sectoral agreements' (n 107) 16.

¹²⁴ C Portela, 'Are EU GSP Withdrawals and CFSP Sanctions Becoming More Alike?' (2023) 28 EFAR 35, 47-48. See also Bartels, 'Assessment of the implementation of the human rights clause in international and sectoral agreements' (n 107) 18.

¹²⁵ Portela (n124) 36.

Another alternative tool is EU financing agreements, which now ‘routinely’ contain HRC in themselves,¹²⁶ as a result of the 2018 Financing Regulation.¹²⁷ The threat of suspension of financial assistance on the basis of these HRC can thus further contribute to enforcement of human rights obligations of third countries.

Therefore, HRC are not always a necessary tool for the EU to take monitoring and enforcement measures. Instead, HRC should be understood as an additional tool that can complement these other human rights tools at the EU’s disposal. In that regard, as mentioned above, HRC have the value of reminding the partner countries that they have legally committed to respect human rights. Furthermore, CFSP sanctions and withdrawal of preferences under GSP+ are unilateral in nature, whereas HRC can be used by both parties to a trade agreement. Therefore, HRC can hold the EU accountable for its own human rights record and thus add more legitimacy in the EU’s enforcement measures.

Moreover, HRC can also be used in the monitoring and enforcement of situations which do not necessarily result from the implementation of agreements. As Bartels argued, where the EU seeks to take ‘appropriate

¹²⁶ Bartels, ‘Assessment of the implementation of the human rights clause in international and sectoral agreements’ (n 107) 29

¹²⁷ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union [2018] OJ L 193/1, art 236(4).

measures' outside the scope of the agreements, such as suspending preferences under GSP+, the EU can refer to HRC to remind the partner countries that they have 'agreed to certain norms [under HRC], rather than simply acting in a certain way to comply with EU conditions on [those preferences].'¹²⁸

In that regard, it must be noted that the wording of essential element clauses do not limit the parties' obligation to respect human rights only when they are implementing the agreements. For example, the essential element clause in the EU-Korea Framework Agreement simply states that: 'Respect for democratic principles and human rights ... underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.'¹²⁹ Similarly, the essential element clause in the EU-Colombia/Peru Trade Agreement states that: 'Respect for democratic principles and fundamental human rights ... underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement.'¹³⁰ Neither of these essential element clauses, nor any other essential element clauses found in other EU agreements, make explicit reference to the requirement that the parties must respect human rights 'when implementing the agreements'. In the absence of such reference, and in light of the phrase, '[respect for human rights] underlie their internal and international policies', these clauses must be interpreted as meaning that

¹²⁸ See Bartels, 'Assessment of the implementation of the human rights clause in international and sectoral agreements' (n 107) 22.

¹²⁹ EU-Korea Framework Agreement, art 1(1).

¹³⁰ EU-Colombia/Peru Trade Agreement, art 1.

the parties must respect human rights regardless of whether the situations fall within the scope of the agreements.

Therefore, even for situations not resulting from implementation of the agreements, the EU is able to invoke non-execution clauses where its partner countries are in serious violations of their human rights obligations. On that basis, the committees which are responsible for overseeing the implementation of the agreements, such as the Joint Committee under the EU-Korea Framework Agreement and the Trade Committee under the EU-Colombia/Peru Trade Agreement, should be able to monitor issues even when they do not result from implementation of the agreements.

In the post-Lisbon framework, it could be argued that the positive function of HRC, particularly in trade agreements, has been further strengthened. As seen in Chapter Three, the obligations under Articles 3(5) and 21 TEU establish a general framework for positive action by the EU to promote human rights, including ESR, in all areas of its external relations.¹³¹ In the field of external trade, Articles 205 and 207 TFEU directly link trade with these obligations to promote human rights, while the term ‘free and fair trade’ in Article 3(5) suggests that trade should not only pursue commercial objectives but must also be conducted in an equitable manner, as argued in Chapter Four. As discussed in that Chapter, the ultimate goal of trade is not only rooted in

¹³¹ Ghazaryan (n 40) 11; Prickartz (n 18) 13.

economic rationale, but also has a broader social objective – economic prosperity yielded by trade is a means to raise the standard of living, which is fundamental for progressive realisation of ESR. In light of this convergence between trade and ESR, those provisions introduced by the Treaty of Lisbon lay down an important foundation for taking positive promotion of ESR through HRC in trade agreements.

In this context, trade agreements contain other provisions which, when read in light of HRC, could positively strengthen promotion of ESR. Examples of those provisions include provisions on labour standards, sustainable development, cooperation and technical assistance for health and food safety. New generation trade agreements, in particular, contain more extensive scope of such provisions because of the introduction of TSD Chapters, as discussed in Chapter Four. As When read in light of HRC, the provisions under the TSD Chapters regarding prohibition of discrimination at workplace, protection of public health, the right to collective bargaining and prohibition of child labour, which all overlap with ESR, must be interpreted as legally binding obligations, which demonstrate the parties' commitment under HRC. However, this potential for promotion of ESR through HRC in trade agreements is not always fully realised. There are practical limitations to the application of the positive scope of HRC, particularly in relation to ESR. The following section will evaluate these limitations and discuss how the EU may address these issues.

4. Challenges to the promotion of economic and social rights through human rights clauses

The previous section has argued that ESR are included within the scope of HRC, and that HRC can complement the other provisions of trade agreements to strengthen the EU's promotion of ESR. However, acknowledging this potential of HRC is one thing, and making full use of this potential in practice is quite another. The essential element clause entails a presumption of shared values between the parties, which include the essential and legally binding nature of human rights. This raises questions as to how far the EU's partner countries intended ESR to be included within the scope of HRC. As discussed in Section 3, the principle of indivisibility, which is endorsed by both the EU and the international community, suggests that the notion of 'human rights' logically implies both CPR and ESR. However, as seen in that section, HRC do not define the precise scope of human rights, apart from referring to international instruments. The instrument which is mostly referred to by the clause is the UDHR, but, despite encompassing both CPR and ESR, it was signed by the international community as a non-legally binding document because of the difficulty in reaching the precise content of the rights.¹³² As a result, the UDHR identifies ESR only in six articles,¹³³ without elaborating on

¹³² See Chapter Two. The Charter of Paris for a New Europe and the Helsinki Final Act, which are the two other instruments mentioned in the model standard human rights clause in the 1995 Commission Communication, are also non-legally binding instruments, and they only refer to the ESR without listing what they are.

¹³³ ESR are contained in arts 22-27. By contrast, an extensive number of provisions for CPR are contained in arts 1-21.

the detailed scope of obligations, as argued in Chapter Two.¹³⁴ The wording of the UDHR provisions are thus relatively general.¹³⁵

Therefore, where the essential element clause only refers to the UDHR or other similarly non-binding instruments, the extent of ESR obligations remain vague, particularly in light of the contentious nature of ESR within the international community, which is seen in Chapter Two. Despite the principle of indivisibility of human rights, the complexity involved in the progressive realisation of ESR has placed them in a rather secondary position to CPR in practice, as discussed in Chapter Two. Determining the precise scope of obligations for ESR is therefore not a straightforward exercise, as it depends on each State's economic and social model, and their affordability.¹³⁶

Therefore, whereas the reference to the UDHR by HRC is to be welcomed because it shows respect for international norms and reaffirms the principle of indivisibility, it lacks a more robust set of standards for ESR, such as those found in the International Covenant on the Economic, Social and Cultural Rights (ICESCR).¹³⁷ It is notable that the two international covenants, the

¹³⁴ The task for elaborating on the scope of obligations was to be decided during the negotiations of the international covenants. See Chapter Two for discussion on the events leading up to the adoption of the UDHR and the international covenants.

¹³⁵ This is further reflected in the long period of gap (17 years) between the adoption of the UDHR and the final adoption of the international covenants, due to disagreement on the nature and the scope of ESR. See Chapter Two for discussion on states' disagreement on the issue.

¹³⁶ See Chapter Two

¹³⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1978) 993 UNTS 3 (ICESCR).

International Covenant on Civil and Political Rights (ICCPR)¹³⁸ and the ICESCR, have not been mentioned in any essential element clauses, despite the fact that all EU Member States and many of its partner countries are parties to both. As the ICESCR is the most authoritative legally binding document setting out a broad scope of ESR obligations at international level, the reference to the ICESCR would have strengthened the parties' legal obligations in relation to ESR under HRC.

At European level, a similar pattern can be observed. The essential element clause in the association agreements with Moldova, Georgia and Ukraine make references to the European Convention on Human Rights (ECHR),¹³⁹ but there are no references to the European Social Charter (ESC)¹⁴⁰ or the revised European Social Charter (RESC).¹⁴¹ As discussed in Chapter Two, the ECHR primarily focuses on protection of CPR, whereas the ESC and the RESC have been adopted as counterparts to the ECHR. The ESC and the RESC contain a comprehensive and detailed set of standards for ESR, and the inclusion of these instruments in HRC could have strengthened the principle of indivisibility within the EU's promotion of human rights through HRC. The

¹³⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹³⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR).

¹⁴⁰ European Social Charter (signed 18 October 1961, entered into force 26 February 1965) ETS 035 (ESC).

¹⁴¹ European Social Charter (revised) (signed 3 May 1996, entered into force 1 July 1999) ETS 163 (RESC).

omission of the ESC or the RESC may again suggest that the international community tends to prioritise CPR as more fundamental human rights.

On the other hand, essential element clauses which make reference to ‘other relevant instruments’ can be seen as positive development.¹⁴² In the case of the EU-Korea Framework Agreement, for example, those instruments may include the ICESCR, as will be discussed in Chapter Six.¹⁴³ It is submitted that the reference to ‘other relevant instruments’ should be included in future HRC to provide for a broad range of instruments which the parties have both ratified. Those instruments may provide for more robust obligations regarding ESR, and the reference to other relevant instruments will also reinforce the parties’ human rights commitments under international law. However, one may argue that the inclusion of a broad scope of ESR obligations within the scope of HRC may risk opposition from partner countries. Developed countries, or even emerging economies, which are less dependent on their trade relations with the EU or have less asymmetric bargaining power,¹⁴⁴ may oppose the inclusion of HRC in trade agreements, partly because of its symbolic suggestion that the EU may be interfering with their domestic political systems and policy choices. Indeed, the EU has already faced opposition from some of these countries in the past.

¹⁴² As in, for example, EU-Korea Framework Agreement, art 1(1).

¹⁴³ South Korea has ratified the ICESCR in 1990. See UNTS, ‘Status of Treaties’ (2021) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 31 July 2023.

¹⁴⁴ See Chapter Four for discussion on power asymmetry.

For example, in 1997, the negotiations for trade and cooperation agreements with Australia and New Zealand failed because they refused to sign agreements which included HRC.¹⁴⁵ It was not because they opposed to references to human rights per se, and, in fact, human rights were accepted as their shared values, and they had no problem with including them in the preamble or in political joint declarations.¹⁴⁶ However, it was the operative provision on human rights and the non-execution clause which were seen as problematic.¹⁴⁷ The fact that the EU insisted on the inclusion of the clause notwithstanding their opposition, even though it did not have particular concerns with their human rights record, suggests that the EU was prepared to stand strong by its policy of including HRC, even if it could cost non-conclusion of the draft agreement.¹⁴⁸ However, as will be seen below in relation to Canada and Singapore, this is not how the EU always responds to its partners' opposition. It may be the case that, because of this experience with Australia and New Zealand, the EU has been more willing to make concessions on HRC while negotiating with its partner countries which strongly oppose such inclusion.

¹⁴⁵ Fierro (n 2) 287-302; Miller (n 38) 58-60; EM Hafner-Burton, 'The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe' (2009) 7 Perspectives on Politics 33, 34; Prickartz (n 18) 19.

¹⁴⁶ Fierro (n 2) 301; Miller (n 38) 59-60.

¹⁴⁷ *ibid.*

¹⁴⁸ Prickartz (n 18) 19.

Canada opposed the inclusion of a HRC during the negotiations of the Comprehensive Economic and Trade Agreement (CETA).¹⁴⁹ The legally binding nature of the clause was again the issue for Canada, and it did not want to link the CETA to the EU-Canada Strategic Partnership Agreement (SPA),¹⁵⁰ which was being negotiated at the same time.¹⁵¹ According to the interviews carried out by Meissner and McKenzie, the Directorate General for Trade (DG Trade), the European External Action Service (EEAS), and some Member States were initially open to making concessions on the clause, in favour of their commercial interests in concluding the CETA.¹⁵² However, the European Parliament actively insisted on the inclusion of HRC throughout the negotiations,¹⁵³ and the other EU institutions and the Canadian negotiators were aware that the non-inclusion of HRC could risk potential rejection of the agreement by the Parliament.¹⁵⁴ As a result, the SPA contains HRC, and the CETA was linked to the SPA through a *passerelle* clause.¹⁵⁵ The fact that the

¹⁴⁹ Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23 (CETA).

¹⁵⁰ Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] OJ L 329/45 (EU-Canada SPA).

¹⁵¹ KL Meissner and L McKenzie, 'The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes' 26 JEPP 1273, 1280-1281.

¹⁵² *ibid* 1281.

¹⁵³ European Parliament, 'Resolution of 8 June 2011 on EU-Canada trade relations' [2012] OJ CE 380/20, para 8; European Parliament, 'Report containing the European Parliament's recommendation to the Council, the Commission and the European External Action Service on the negotiations for an EU-Canada Strategic Partnership Agreement' (2013) 2013/2133(INI), para 1(b)-(c).

¹⁵⁴ KL Meissner and L McKenzie, 'The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes' 26 JEPP 1273, 1285-1286.

¹⁵⁵ Article 28(7) of the EU-Canada SPA states that '...the Parties recognise that a particularly serious and substantial violation of human rights ... could also serve as grounds for the termination of the [CETA]...'.

key players of the negotiations of the CETA were initially willing to make a concession on HRC suggests that, where there is a conflict between commercial interests and human rights promotion, the former could outweigh the latter.¹⁵⁶ If it was not for the European Parliament's strong demands in support of HRC, it is possible that HRC would not have been included in the CETA.

Moreover, it is not always the case that the European Parliament strongly insists on the inclusion of HRC. As seen in Chapter Four, the HRC in the agreement with Singapore was watered down as a result of Singapore's opposition to HRC, resulting in a side letter which said that the parties were not aware of each other's laws which could trigger the non-execution clause, even though the issue of death penalty persisted in Singapore. One of the Singaporean negotiators viewed that the HRC represented the idea that the EU was enforcing its own norms as 'the best way'.¹⁵⁷ Unlike in the CETA negotiations, the European Parliament remained rather passive on the issue of the HRC, and instead supported the conclusion of the agreement.¹⁵⁸ Being the first new generation trade agreement with a country from the ASEAN region, the commercial interest in concluding the agreement with Singapore could be seen as being more important than the EU's human rights promotion.

¹⁵⁶ See also FRAME, 'Mapping, analysing and implementing foreign policy instruments in human rights promotion' (2014) <<http://www.fp7-frame.eu/wp-content/uploads/2016/08/11-Deliverable-6.1.pdf>> accessed 31 July 2023, 57.

¹⁵⁷ L McKenzie and KL Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 *JCMS* 832, 840.

¹⁵⁸ *ibid* 842-843.

Therefore, it is clear that the inclusion of HRC in trade agreements is affected by the EU institutions' preferences, the degree of conflict between its commercial interest and human rights promotion, and the receptiveness and the bargaining power of the partner country, as noted in Chapter Four.

Although the above examples were concerned with the inclusion of HRC, rather than with how far ESR should be included within the scope of HRC, they still serve to suggest that demanding compliance with ESR obligations through HRC could be controversial for some countries. Even though CPR tend to be given more priority over ESR by the international community, promotion of CPR, namely the right to life, was still compromised by the EU in favour of its commercial interest, when negotiating with Singapore. Even when third countries attach importance to human rights and acknowledge that human rights are shared values, the negotiations with Australia, New Zealand and Canada showed that the legally binding nature of HRC can be perceived as problematic, particularly when it could interfere with their trade relations. As the nature and scope of ESR tend to be more contentious in the international community as seen in Chapter Two, enforcing ESR obligations through HRC could potentially raise further objections from partner countries and risk being seen as interference with their domestic economic, social and political systems.¹⁵⁹

¹⁵⁹ See also U Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (CUP 2008) 29-31; Prickartz (n 18) 15.

Therefore, the emphasis needs to be placed on the positive function of HRC when promoting ESR. The improvement of ESR in partner countries largely depends on the political will of these countries, but HRC can still provide a useful platform for the EU to participate in the inquisitorial justiciability of ESR,¹⁶⁰ as long as it is determined to bring up the subject of ESR through the positive function of HRC. Even where the wording of HRC has been watered down, as a result of the partner country's reluctance to accept HRC, the EU should continue to initiate human rights dialogue and make full use of positive measures within the framework of HRC, in order to progress their cooperation in the field of human rights. As seen in Section 3, trade agreements provide an important basis for the parties to continue their dialogue through various institutional machineries, such as specialised subcommittees and joint councils. It is submitted that the EU should use these opportunities to include the subject of human rights, particularly ESR, thereby ensuring the horizontality of HRC and reinforcing the link between ESR and trade.

5. Conclusion

This chapter has analysed the evolution of HRC, which pursued the rationale of customary rules codified in the VCLT, and the scope of the standard HRC based on the 1995 Commission Communication.¹⁶¹ It has been argued in Section 3 that ESR are included within the concept of 'human rights' in HRC,

¹⁶⁰ See Chapter Two for discussion on inquisitorial justiciability of ESR.

¹⁶¹ Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (n 1) 12-13.

and must thus be promoted as much as CPR. In that regard, trade agreements provide a useful opportunity for the EU to promote ESR through the positive function of HRC, as HRC complement the other provisions of trade agreements which can positively contribute to the improvement of ESR. The positive function of HRC provides a basis for parties' political dialogue, and, by framing human rights as an essential element which underlies the whole agreements, HRC enable the subject of human rights to be brought up in the dialogue of different institutions established under the trade agreements.

Bilateral dialogue is particularly useful in the sense that progressive realisation of ESR needs to take into account each States' resource affordability and economic and social models, as discussed in Chapter Two. To negate the criticism that the EU priorities CPR when promoting human rights in its external relations,¹⁶² it is submitted that the EU should place more emphasis on ESR in its dialogue, and clarify that the concept of human rights in the essential element clause includes ESR. Moreover, the EU should ensure that ESR issues are included in its ex-post evaluations of trade agreements, taking into account reports by the UN and the ILO. In this way, HRC can contribute to inquisitorial justiciability of ESR through its positive function.¹⁶³

¹⁶² Bartels, 'A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements' (n 84) 386; A Gatto, 'The Integration of Social Rights Concerns in the External Relations of the European Union' in G de Burca, B de Witte and L Ogertschnig (eds), *Social Rights in Europe* (OUP 2005) 4; FRAME, 'European Policy Brief: the EU and Human Rights – 2' (2015) <<http://www.fp7-frame.eu/wp-content/uploads/2016/03/FRAME-PB-No-2-Deliverable-7.6-Revised-8-November-2015.pdf>> accessed 31 July 2023, 5; Prickartz (n 18) 21.

¹⁶³ Prickartz (n 18) 22.

The next two chapters will therefore evaluate whether the EU is in fact usefully promoting ESR through the positive function of HRC in its trade agreements with Korea, Peru and Colombia. As discussed in Chapter One, they are the first countries to sign new generation trade agreements with the EU in each of their regions. As discussed in Chapter Four, new generation agreements provide more scope for the EU to promote ESR through HRC. The following chapters will therefore analyse whether this is realised in practice.

Chapter Six: EU's Promotion of Economic and Social Rights through the Human Rights Clause in EU-Korea Trade Agreement

1. Introduction

This and the following chapters involve case studies which will evaluate the usefulness of the EU's promotion of economic and social rights (ESR) through human rights clauses (HRC) within the framework of trade agreements with third countries. The country chosen for the first case study is the Republic of Korea ('Korea').

As explained in Chapter One, Korea has been chosen for the first case study because of its strategic and economic importance for the EU. Korea is an important regional player that provides the EU with opportunities to strengthen relations with other Asian countries.¹⁶⁴ Its fast growing economy and close economic ties with EU competitors, especially with the US, also renders it of direct interest for the EU.¹⁶⁵ Its unique situation regarding the division with North Korea and its shared objectives with the EU concerning nuclear non-proliferation have strengthened the tripartite dimension of their relations,

¹⁶⁴ See Chapter One.

¹⁶⁵ Commission, 'Global Europe: Competing in the World' (Communication) COM(2006) 567 final,9; A Marx et al, 'Introduction' in A Marx et al (eds), *EU-Republic of Korea Relations in a Changing World* (2013) <<https://ghum.kuleuven.be/ggs/publications/books/rapport-ggs-eu-korea-relations-in-a-changing-world.pdf>> accessed 6 July 2023. See also Korea Customs Service, 'FTA Trend in Korea' (2023) <<https://www.customs.go.kr/engportal/cm/cntnts/cntntsView.do?mi=7304&cntntsId=2329>> accessed 6 July 2023, 1-2.

consisting of: political pillar (EU-Korea Framework Agreement¹⁶⁶), economic pillar (EU-Korea Trade Agreement¹⁶⁷), and security pillar (EU-Korea Framework Participation Agreement¹⁶⁸). The EU's desire to strengthen its relations with Korea has led to the upgrading of their relations in 2010 to the level of 'strategic partnership', a concept which is analysed in Section 3 below.

As such, the strategic and economic interest of Korea renders EU-Korea trade relations an ideal subject to be examined in this case study. On the one hand, their strategic partnership consists of continuous dialogue and closer cooperation in a wide range of areas, rendering more opportunity for the EU to promote ESR through the positive function of the HRC. As will be seen in Section 3 below, their trade agreement is strongly based on shared normative values, which potentially make it easier for the EU to promote ESR in their trade relations. On the other hand, the EU has been criticised for being shy to promote its values when in conflict with its economic and strategic interests,¹⁶⁹ and

¹⁶⁶ Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [2013] OJ L 20/2 (EU-Korea Framework Agreement).

¹⁶⁷ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6 (EU-Korea Trade Agreement).

¹⁶⁸ Agreement between the European Union and the Republic of Korea establishing a framework for the participation of the Republic of Korea in European Union crisis management operations [2014] OJ L166/3 (EU-Korea Framework Participation Agreement).

¹⁶⁹ U Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (CUP 2008) 447-452; FRAME, 'Policy Brief: Fostering Human Rights Among European (External and Internal) Policies' (2014) <<https://www.fp7-frame.eu/wp-content/uploads/2016/03/FRAME-PB-No-2-Deliverable-7.6-Revised-8-November-2015.pdf>> accessed 6 July 2023, 5; L McKenzie and KL Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 *JCMS* 832, 835; L Ginsborg and G Finlay, 'Towards every greater coherence? Human rights policies in the evolving EU' in J Wouters et al, *The European Union and Human Rights* (OUP 2020)

therefore it is necessary to analyse whether such criticism still stands in the EU's trade relations with Korea, especially where Korea is reluctant to address issues of ESR raised by the EU.

Section 2 will begin by giving an overview of Korea. It will examine Korea's socio-economic status, its relations with the international community, and various issues of ESR that have been identified by international organisations. The discussion will contribute to understanding the development and the dynamic of the relations between the EU and Korea, and why Korea is an important trade partner for the EU. The issues of ESR which are identified in this section will also contribute to the analysis in Section 4, where the positive measures taken by the EU through the HRC will be evaluated.

Section 3 will analyse the legal framework governing trade relations between EU and Korea, and the scope of HRC therein. There are two main documents governing the EU-Korea trade relations. The first is the EU-Korea Framework Agreement, signed in 2010. This agreement sets out the broad framework governing the overall relations between the EU and Korea and establishes a basis for negotiating other sectoral agreements in the future. It contains the standard HRC, which applies horizontally throughout the whole agreement, and therefore applies to any other sectoral agreements concluded by the parties. The second important document is the EU-Korea Trade Agreement, which was also

575-577.

signed in 2010. This is a new generation trade agreement, which contains a Trade and Sustainable Development (TSD) chapter. It also contains a *passerelle* clause that directly links the agreement to the EU-Korea Framework Agreement.¹⁷⁰ The discussion will demonstrate the normative dimension of the trade relations between the EU and Korea and evaluate various measures that the EU is able to take through the positive function of the HRC. Whether the EU usefully makes use of the opportunity thus given by the HRC will be illustrated in Section 4.

Section 4 will examine positive measures taken by the EU to promote ESR through the HRC in the EU-Korea Trade Agreement. This will directly contribute to answering the main question of this thesis, by illustrating, through examples, the extent to which the EU usefully promotes ESR through the HRC in practice. The findings of this case study will serve as the basis for the comparative analysis in the next two chapters, where the EU's approach to promoting ESR through the HRC in EU-Korea Trade Agreement will be compared with that in EU-Colombia/Peru Trade Agreement. As Peru and Colombia enjoy a different dynamic of relations with the EU both in terms of trade and political cooperation, the comparison of these two case studies will help evaluate the coherence of the EU's actual promotion of ESR through HRC in its trade agreements and its usefulness. The final comparative findings will be presented in Chapter Eight.

¹⁷⁰ EU-Korea Trade Agreement, art 15.14.2.

2. Korea

2.1. Country Profile

Located in Northeast Asia, the Korean peninsula is divided along the line of the 38th parallel. This line demarcates the border between the Democratic People's Republic of Korea (also known as 'North Korea') and the Republic of Korea (also known as 'South Korea', hereby 'Korea'). The demarcation results from Korea's painful history of 1940s-1950s. When the Japanese annexation ended in 1945, the Korean peninsula came under the trusteeship of the US (occupying the 'South' of the peninsula) and the Soviet Union (occupying the 'North' of the peninsula). In the years leading up to the Cold War, the ideological conflict between communism and capitalism took over the Korean peninsula.¹⁷¹ The communist-led North Korea attempted to invade the South in 1950, leading to an outbreak of what is known as the 'Korean War'.¹⁷² The war came to an armistice in 1953,¹⁷³ and, to date, Korea remains a capitalist democratic society, whereas North Korea remains a communist regime.

¹⁷¹ See JI Matray, *Korea Divided: The 38th Parallel and the Demilitarized Zone* (Chelsea House 2000) 69; J Kim, *A History of Korea: From Land of the Morning Calm to States in Conflict* (IUP 2012) 367-383.

¹⁷² Matray (n 8) 406-409.

¹⁷³ Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers, on the other hand, concerning a military armistice in Korea (1953) <<https://2001-2009.state.gov/t/ac/rls/or/2004/31006.htm>> accessed 6 July 2023.

Although it was one of the world's poorest nations in the aftermath of the Korean War,¹⁷⁴ Korea began to see rapid economic progress from the 1980s,¹⁷⁵ gradually transforming itself into a high income country.¹⁷⁶ Today, Korea has a population of 51.7 million and GDP per capita of 34,998 USD,¹⁷⁷ which is comparable with that of the EU (38,411 USD).¹⁷⁸ Exports of goods and services constitute 42% of GDP, indicating that international trade remains an important source for Korea's income.¹⁷⁹ Korea is also a member of G20, where it cooperates economically with other major global economies, including the EU.¹⁸⁰ In 2006, the EU explicitly regarded Korea as a priority partner with which it sought to conclude a new generation trade agreement, because of Korea's large market potential and its active conclusion of trade agreements with EU competitors.¹⁸¹ As a result, the EU-Korea Trade Agreement was signed in 2010, and they remain to be important trade partners. Korea is the ninth largest destination for the EU's export in goods, while the EU is Korea's third

¹⁷⁴ United Nations in the Republic of Korea, 'About Korea' (2023) <<http://www.un-rok.org/about-un/about-rok/>> accessed 6 July 2023.

¹⁷⁵ C Chung, 'Democratization in South Korea and Inter-Korean Relations' (2003) 76 PA 9, 10.

¹⁷⁶ World Bank, 'World Bank Country and Lending Groups' (2023) <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>> accessed 6 July 2023.

¹⁷⁷ World Bank, 'GDP per capita (current US\$)' (2023) <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD>> accessed 6 July 2023.

¹⁷⁸ *ibid.*

¹⁷⁹ World Bank, 'Exports of goods and services (% of GDP)' (2023) <<https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS>> accessed 6 July 2023.

¹⁸⁰ G20, 'About G20' (2023) <<https://www.g20.org/en/about-g20/#members>> accessed 6 July 2023.

¹⁸¹ Commission, 'Global Europe' (n 2) 9.

largest destination.¹⁸² Industrial sectors constitute the largest part of their trade (95.9%).¹⁸³

Internationally, Korea is in a unique position due to its division with North Korea, as the international community shares general concern in relation to North Korea's continuous development of nuclear programmes.¹⁸⁴ Korea's strongest military ally is the US: the US and the UN troops were the main forces which helped Korea during the Korean War, and the US troops have remained in Korea to defend the country against North Korean threats, even after the armistice.¹⁸⁵ On the basis of this alliance, Korea further cooperates with the North Atlantic Treaty Organization (NATO), of which the majority of EU Member States are members, in the area of non-proliferation of weapons of mass destruction (WMD).¹⁸⁶ In 2003, US President GW Bush initiated a Proliferation Security Initiative to prevent the delivery of WMD and related

¹⁸² Commission, 'South Korea' (2023) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/south-korea_en> accessed 6 July 2023.

¹⁸³ *ibid.*

¹⁸⁴ For example, see UNSC Res 2087 (22 January 2013) UN Doc S/RES/2087; UNGA 'Situation of human rights in the Democratic People's Republic of Korea' (2017) UN Doc A/RES/71/202; NATO, 'NATO Secretary General condemns North Korea military satellite launch' (2023) <https://www.nato.int/cps/en/natohq/news_215089.htm> accessed 6 July 2023.

¹⁸⁵ J Kim (n 8) 588. There are 28,500 US troops in Korea today. See S Choe, 'South Korea Will Pay More for U.S. Troops Presence' (2021) <<https://www.nytimes.com/2021/03/10/world/asia/US-troops-korea-payments.html>> accessed 6 July 2023; J Garamone, 'U.S., South Korea Want Peace in Indo-Pacific' (2023) <<https://www.defense.gov/News/News-Stories/Article/Article/3282870/us-south-korea-want-peace-in-indo-pacific/>> accessed 6 July 2023.

¹⁸⁶ Yoon et al, 'Views on NATO from Mongolia and the Republic of Korea: Hedging Strategy, and "Perfunctory Partnership?"' (2018) 14 *Asian Security* 51, 60; NATO, 'Relations with the Republic of Korea' (2023) <https://www.nato.int/cps/en/natohq/topics_50098.htm> accessed 6 July 2023.

technology into and out of North Korea.¹⁸⁷ Some of the EU Member States have actively participated in this initiative, including Germany, France, Spain and (the then Member State) the UK.¹⁸⁸ The UN Security Council has also imposed various sanctions on North Korea, such as freezing assets and imposing arms embargo.¹⁸⁹ The EU has taken its own initiatives to further cooperate with Korea on the issue of North Korea: it has supported Korea's efforts to facilitate inter-Korean reconciliation, while expressing concerns in international forums about North Korea's human rights violations.¹⁹⁰ North Korea's secret development of uranium enrichment programme in 2002 and its withdrawal from the Nuclear Non-Proliferation Treaty in 2003 have led to EU imposition of autonomous sanctions.¹⁹¹ These measures by the EU thus contributed to the strengthening of EU-Korea partnership, and, as will be seen in Section 3 below, non-proliferation of WMD is one of the essential elements underlying their partnership.¹⁹²

¹⁸⁷ US Department of State, 'Proliferation Security Initiative' (2023) <<https://www.state.gov/proliferation-security-initiative/>> accessed 6 July 2023.

¹⁸⁸ M Esteban, 'The EU's role in stabilising the Korean Peninsula' (2019) <<https://www.realinstitutoelcano.org/en/work-document/the-eus-role-in-stabilising-the-korean-peninsula/>> accessed 6 July 2023, 15.

¹⁸⁹ UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718; UNSC Res 2087 (22 January 2013) UN Doc S/RES/2087; UNSC Res 2375 (11 September 2017) UN Doc S/RES/2375; UNSC Res 2397 (22 December 2017) UN Doc S/RES/2397.

¹⁹⁰ Esteban (n 25) 16.

¹⁹¹ Council Regulation (EC) No 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea [2007] OJ L 88/1; Council Decision (CFSP) 2016/849 of 27 May 2016 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Decision 2013/183/CFSP [2016] OJ L141/79; Esteban, (n 25) 15-18.

¹⁹² EU-Korea Trade Agreement, art 4(2).

2.2. Economic and Social Rights (ESR) in Korea

Korea has ratified various international treaties which seek to protect ESR, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁹³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁹⁴ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁹⁵ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW),¹⁹⁶ the Convention on the Rights of the Child (CRC),¹⁹⁷ and the Convention on the Rights of Persons with Disabilities (CPRD).¹⁹⁸ It has ratified all the Fundamental Conventions of the ILO, apart from C105 on Abolition of Forced Labour Convention.¹⁹⁹ As will be seen in Section 4 below, the EU-Korea Labour Dispute has facilitated Korea's ratification of three ILO fundamental Conventions: C98 Right to Organise and

¹⁹³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1978) 993 UNTS 3 (ICESCR).

¹⁹⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

¹⁹⁵ Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

¹⁹⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) UN Doc A/RES/45/158 (CMW).

¹⁹⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

¹⁹⁸ Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) UN Doc A/RES/61/106 (CRPD).

¹⁹⁹ Abolition of Forced Labour Convention, C105 (adopted 25 June 1957, entered into force 17 January 1959). For the ratification status of Korea, see ILO, 'Ratifications for Republic of Korea' (2023) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103123> accessed 6 July 2023.

Collective Bargaining Convention,²⁰⁰ C87 Freedom of Association and Protection of the Right to Organise Convention,²⁰¹ and C29 Forced Labour Convention.²⁰²

In the last three years, Korea has demonstrated remarkable management of the impact of COVID-19 on ESR.²⁰³ Owing to its successful track-and-tracing system, no national lockdown needed to be imposed, and the rates of deaths from COVID-19 remained relatively low compared to other countries throughout the pandemic.²⁰⁴ Through emergency cash transfers and supplementary budgets, the incomes of households in the bottom 20% actually increased by 14% in 2020.²⁰⁵ As of 2022, the unemployment rate stands at 2.8%, which is much lower than the average rate among EU Member States (6.1%).²⁰⁶

Although the rate of unemployment is thus relatively low, a significant proportion of those in work are in non-regular employment,²⁰⁷ and there is a

²⁰⁰ Right to Organise and Collective Bargaining Convention, C98 (adopted 1 July 1949, entered into force 18 July 1951).

²⁰¹ Freedom of Association and Protection of the Right to Organise Convention, C87 (adopted 9 July 1948, entered into force 4 July 1950).

²⁰² Forced Labour Convention, C29 (adopted 28 June 1930, entered into force 1 May 1932).

²⁰³ OECD, *OECD Economic Surveys: Korea 2022* (OECD 2022) 10.

²⁰⁴ *ibid* 16.

²⁰⁵ *ibid* 18-19.

²⁰⁶ World Bank, 'Unemployment total (% of total labor force) (modeled ILO estimate)' (2023) <<https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS>> accessed 6 July 2023.

²⁰⁷ In 2022, 37.5% of the workforce was employed in non-regular employment. See KOSIS, 'Proportion of non-regular employees (cities and provinces)' (2022) <https://kosis.kr/statHtml/statHtml.do?orgId=101&tblId=DT_1YL15002> accessed 6 July

wide gap between regular and non-regular workers in terms of adequate social insurance, benefits and wages.²⁰⁸ For example, 90% of regular employees are enrolled in compulsory employment insurance, whereas the figure is much lower for non-regular employees (75%).²⁰⁹ 88% of regular workers have national insurance and 92.6% have health insurance, whereas the figures are 37.8% and 49% for non-regular workers, respectively.²¹⁰ This directly affects non-regular workers' right to social assistance and the right to work under just and favourable working conditions.

Despite its rapid economic progress, Korea faces a stark level of income inequality and has the highest level of gross gender wage gap among OECD countries.²¹¹ In 2022, the rate of employment was 71.5% for men and 52.9% for women.²¹² Women are also disproportionately represented in non-regular

2023 (translated by the author).

²⁰⁸ ILO, *Non-Standard Employment Around the World* (ILO 2016) 121; Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of the Republic of Korea' (2017) UN Doc E/C.12/KOR/CO/4, paras 28-29; OECD (n 40) 18, 43, 60; ILO, 'Observation (CESCR): Employment Policy Convention, 1964 (No. 122) – Republic of Korea' (2023) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4315208,103123> accessed 6 July 2023.

²⁰⁹ OECD (n 40) 62. See also A Yun, 'Back to the Future: Towards a fairer recovery with corporate responsibility' (7th Conference of the Regulating for Decent Work Network, Geneva, 6-9 July 2021) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms_818112.pdf> accessed 6 July 2023, 3, 6, 13-14.

²¹⁰ KLI, *2020 Non-regular Workers Statistics* (KLI 2020) (translated by the author) 54, 59.

²¹¹ OECD (n 40) 62. See also Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of the Republic of Korea' (14 March 2018) UN Doc CEDAW/C/KOR/CO/8, paras 38-39; ILO, 'Observation (CESCR)' (n 45).

²¹² KOSIS, 'Total economically active population by gender' (2023) <https://kosis.kr/statHtml/statHtml.do?orgId=101&tblId=DT_1YL15002> accessed 6 July

employment.²¹³ In 2020, 45% of women in workforce were working in non-regular employment, whereas the figure was 29.4% for men.²¹⁴ A similar discrepancy was found in 2022, with 46% of women in workforce working in non-regular employment, whereas the figure was 30.6% for men.²¹⁵ As noted above, there is a notable wage gap between regular and non-regular workers. In 2022, the average monthly salary for regular workers was 3,480,000 KRW (around 2,654 USD), whereas the average monthly salary for non-regular workers was 1,881,000 KRW (around 1,435 USD).²¹⁶ Income inequality also disproportionately affects the aged workers. Korea has more than 40% poverty rate among the elderly due to inadequate pension system and low income for aged workers.²¹⁷ These all negatively affect Korean citizens' right to non-discrimination based on sex and age, the right to fair remuneration, the right to social assistance, and the right to an adequate standard of living.

Discrimination is also prevalent against migrant workers and their family members. Migrant workers' employment permits require them to obtain

2023 (translated by the author). See also ILO, 'Observation (CESCR)' (n 45).

²¹³ Committee on the Elimination of Discrimination against Women (n 48) paras 38-39; ILO, 'Observation (CESCR)' (n 45). See also OECD (n 40) 46.

²¹⁴ KOSIS, '(Total) size and proportion of paid workers by gender/job types' (2022) <https://kosis.kr/statHtml/statHtml.do?orgId=101&tblId=DT_1YL15002> accessed 7 July 2023 (translated by the author).

²¹⁵ *ibid.*

²¹⁶ KOSIS, 'Average salary and variations by job types' (2022) <https://kosis.kr/statHtml/statHtml.do?orgId=101&tblId=DT_1YL15002> accessed 6 July 2023.

²¹⁷ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of the Republic of Korea' (19 October 2017) UN Doc E/C.12/KOR/CO/4, paras 46-47; OECD (n 40) 12, 43, 60.

employers' authorisation before moving their workplace, thereby increasing the risk of being exploited.²¹⁸ They have limited access to social security system, such as the National Basic Livelihood Security System and health insurance.²¹⁹ Although Korean children are entitled to the right to compulsory education, the same right is not guaranteed in relation to the children of migrant workers.²²⁰ Despite a number of recommendations made by international organisations, Korea is yet to adopt a comprehensive anti-discrimination legislation that seeks to address discrimination on all grounds, including sex, religion, age, sexual orientation, disability, race and nationality.²²¹

Finally, one of the controversial issues of ESR in Korea that has drawn much of EU's attention in the last eight years concerns the right to freedom of association and collective bargaining. As mentioned above and as will be examined further in Section 4 below, Korea's ratification of three ILO fundamental conventions (C98, C87, and C29) was the result of EU's constant demands in light of various complaints made by civil society organisations. The EU's complaints mainly concerned, *inter alia*, the legislative obstacles which prevented self-employed

²¹⁸ Committee on Economic, Social and Cultural Rights (n 54) paras 26-27; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined seventeenth to nineteenth periodic reports of the Republic of Korea' (10 January 2019) UN Doc CERD/C/KOR/CO/17-19, paras 9-10.

²¹⁹ Committee on the Elimination of Racial Discrimination (n 55) paras 21-22,31-34; OECD (n 40) 61.

²²⁰ Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of the Republic of Korea' (24 October 2019) UN Doc CRC/C/KOR/CO/5-6, para 41(c).

²²¹ Committee on Economic, Social and Cultural Rights (n 54) para 22; Committee on the Elimination of Racial Discrimination (n 55) para 5; Committee on the Rights of the Child (n 57) para 16.

persons, dismissed persons and non-employed persons from joining trade unions, criminalisation of strikes on the basis of ‘obstruction of business’, and the establishment of trade unions being subjected to discretionary certification procedure.²²² These concerns were also shared by international organisations in their human rights reports.²²³ As will be argued in Section 4 below, the EU-Korea labour dispute could therefore be seen as a positive impetus that brought legislative reforms in this regard, although it is still to be seen whether such reforms can bring effective protection for the rights to freedom of association and collective bargaining.

3. Human Rights Clause in the EU-Korea Trade Agreement

3.1. EU-Korea Framework Agreement

In order to understand the operation of HRC in the EU-Korea Trade Agreement, it is first important to examine the EU-Korea Framework Agreement. As mentioned in Section 1 above, the Framework Agreement sets out the broad framework governing the overall relations between the EU and Korea. It was

²²² See European Union, ‘Republic of Korea – compliance with obligations under chapter 13 of the EU -Korea Free Trade Agreement: Request for Consultation by the European Union’ (2018) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d082c86b-296a-4e6b-9621-09ad76d45245/details>> accessed 7 July 2023, 1-2; Commission, ‘Request: Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korean Free Trade Agreement’ (2019) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/dfc6a2fa-eb47-4f37-85d0-c8d6cbb266c7/details>> accessed 7 July 2023.

²²³ Committee on Economic, Social and Cultural Rights (n 54) paras 40-41; Committee on the Elimination of Racial Discrimination (n 55) paras 15-16.

signed by the parties in 2010 as part of their effort to take their relations to the level of strategic partnership.²²⁴

Traditionally, the EU took two different approaches to its partnerships with third countries. First, ‘equal partnership’ was established with developed countries based on their ‘longstanding economic and political relations with the EU’.²²⁵ Secondly, ‘junior partnership’ was established with less developed countries, whereby the EU helped them achieve domestic reforms so that their national systems come in line with EU standards.²²⁶ However, from the late 1990s, a new form of partnerships began to develop – the so-called ‘strategic partnership’. This concept was first officially used to describe the EU’s relations with Russia in 1998,²²⁷ but it still lacks clear conceptualisation.²²⁸ When the EU introduced the concept in the context of the European Security Strategy (ESS) in 2003, following the September 11 terrorist attack in 2001 and the US-UK joint

²²⁴ Commission, ‘EU-Republic of Korea Summit, Joint Press Statement: Brussels, 6 October 2010’ (2010) <https://ec.europa.eu/commission/presscorner/detail/en/PRES_10_266> accessed 7 July 2023; Commission, Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea – Final Report: Main Report’ (2018) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/5be99665-6477-49a1-b6cc-30c6370c28fa/details>> accessed 7 July 2023, 40.

²²⁵ V Voynikov, ‘The EU-Russia Strategic Partnership: Its nature and perspectives’ (Workshop: Strategic Partnership as an Instrument of EU Foreign Policy, Carleton, 13 April 2015) <<https://carleton.ca/canadaeurope/2015/strategic-partnership-workshop-report/>> accessed 7 July 2023, 19.

²²⁶ *ibid.*

²²⁷ See European Council, ‘Presidency Conclusions’ (Vienna, 11 and 12 December 1998) <https://www.europarl.europa.eu/summits/wie1_en.htm> accessed 7 July 2023, para 111.

²²⁸ LC Ferreira-Pereira and AVG Vieira, ‘Introduction: The European Union’s strategic partnerships: conceptual approaches, debates and experiences’ (2016) 29 CRIA 3, 4; M Lee, ‘The EU-South Korean Strategic Partnership: Normative Objectives in Mind’ (2020) 11 Korean Journal of European Integration 179, 183.

invasion of Iraq in 2003, the EU explicitly identified the US, Japan, Canada, India and China as its strategic partners.²²⁹ It suggested that countries who share [EU's] goals and values, and are prepared to act in their support' would be potential candidates for strategic partnership.²³⁰ Brazil, South Africa and Mexico were further added to the list in 2006-2008,²³¹ and these countries, together with Russia and South Korea, constitute the 10 strategic partners of the EU.

In the absence of a precise definition of strategic partnership at EU level, there have been attempts to define the concept in the academic community.²³² Given that the concept had developed in the context of the ESS, the security dimension appears to be implicit in strategic partnership,²³³ and this is manifested in the EU-Korea Framework Agreement which places international security as one of the objectives of the parties' cooperation.²³⁴ Some academics also argue that strategic partnership is based on shared interests, particularly material interests

²²⁹ Council of the European Union, 'A Secure Europe in a Better World: European Security Strategy' (2003) 15895/03, 16.

²³⁰ *ibid.*

²³¹ Commission, 'Towards an EU-South Africa Strategic Partnership' (Communication) COM (2006) 367 final; Commission, 'Towards an EU-Brazil Strategic Partnership' (Communication) COM (2007) final; Commission, 'Towards an EU-Mexico Strategic Partnership' (Communication) COM (2008) 0447 final.

²³² For example, see Marx (n 2) 8; J Wouters et al, 'Some Critical Issues in the EU-India Free Trade Agreement Negotiations' (2014) 20 ELJ 848, 861; Voynikov (n 62) 19; Ferreira (n 65) 183.

²³³ Ferreira-Pereira (n 65) 4.

²³⁴ EU-Korea Framework Agreement, arts 2(2)(f), 3(2)(c).

and mutual respect for one another.²³⁵ Other academics argue that it is closely linked to the EU's value framework in line with Article 21 TEU, meaning that shared values and norms tend to be one of the primary considerations, with exception of Russia and China.²³⁶ In fact, strategic partnership evolved differently in relation to different countries, so it is better to understand the term in the context of each bilateral relations, rather than as a universal concept.²³⁷ For example, in the EU's relations with Russia, it is difficult to suggest that their partnership is based on common understanding and values.²³⁸ Rather, their partnership is based on various factors, such as geographical proximity, historical relations, economic interdependence and influence at global level.²³⁹ In light of the Ukrainian Crisis, it is even speculated that their strategic partnership has come to a 'frozen state'.²⁴⁰

In contrast, Korea is the newest strategic partner of the EU, but there is much larger value dimension in their partnership. Article 1 of the EU-Korea Framework Agreement lists a number of values which form the basis of their cooperation, including human rights, the rule of law, democratic principles, sustainable development, and the values expressed in the UN Charter. Article

²³⁵ Wouters (n 69) 861; Voynikov (n 62) 19; Lee, (n 65) 183.

²³⁶ MK Kim, 'The European Union's Democracy Promotion Policy and the Revision of the Korea-EU Framework Agreement: New Challenges in Korean Foreign Policy' (2010) 3 *The Social Sciences Institute of Chosun University* 51, 55 (translated by the author). See also Wouters (n 69) 861.

²³⁷ Voynikov (n 62) 19-20.

²³⁸ Kim (n 73) 51, 55.

²³⁹ Voynikov (n 62) 20.

²⁴⁰ *ibid* 21.

1(7) describes the EU and Korea as ‘Parties sharing the same values and respect’. The Framework Agreement puts much emphasis on continued political dialogue, which will be based on their shared values, including democracy and human rights.²⁴¹ These values govern the parties’ cooperation in a wide range of areas, such as political cooperation, education, culture, health, trade, climate change and environment.

The EU-Korea Framework Agreement contains the standard HRC, largely modelled on the 1995 Commission Communication.²⁴² This consists of: preambular reference, an essential clause, and a non-execution clause, which must be read together with an interpretive declaration.²⁴³ Firstly, the preamble reaffirms the parties’ ‘strong attachment ... to democratic principles and human rights as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments as well as the principles of the rule of law and good governance’. It further states that the parties are ‘[determined] to strengthen cooperation in sectors of mutual interest’ which include, *inter alia*, ‘notably promoting democratic principles and respect for human rights’.

Secondly, the essential element clause is found in Article 1(1):

²⁴¹ EU-Korea Framework Agreement, arts 1(7), 2(1)(b), 3.

²⁴² Commission, ‘On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (Communication) COM(95) 216 final, 12-13.

²⁴³ See Chapter Five for discussion on the standard HRC.

The Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element.

As discussed in Chapter Five, there are two limbs to the essential element clause: a) what constitutes essential elements, and b) the normative basis laid down by reference to international instruments. As for the first limb, it is clear that democratic principles, human rights and the rule of law all constitute ‘essential elements’ of the EU-Korea Framework Agreement. However, there is another essential element, which is not mentioned in Article 1(1) but is instead mentioned in Article 4(2): countering of proliferation of WMD. This comes as a result of the EU’s European Security Strategy, where the EU regarded proliferation of WMD as one of the main threats for European security.²⁴⁴ Since 2003, there has been a growing trend in EU trade agreements to include countering of the proliferation of WMD as an essential element.²⁴⁵ The issue of WMD constitutes even more pressing area of shared interest between the EU and Korea, because of the continued nuclear and WMD related programmes in North Korea.

²⁴⁴ Council, ‘A Secure Europe in a Better World: European Security Strategy’ (2003) 15895/03, 5. See F Martines, ‘Human Rights Clauses in EU Agreements’ in S Poli (ed), *Protecting Human Rights in the European Union’s External Relations* (ASSER Institute 2016) <<https://www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20165-poli-ed/>> accessed 7 July 2023, 42.

²⁴⁵ Martines (n 81) 42.

As for the second limb of the essential element clause, the Universal Declaration of Human Rights (UDHR) is one of the main instruments which lay down the normative basis for the parties' respect for human rights. As discussed in Chapter Five, the reference to the UDHR makes clear that ESR are included within the scope of HRC. Besides the UDHR, Article 1(1) also makes reference to 'other relevant international human rights instruments'. The wording here is rather vague, so there is ambiguity as regards whether certain instrument is included within the scope of HRC. For example, all the EU Member States and Korea have ratified the ICESCR, which provides for a more detailed set of standards for ESR than the UDHR does. The reference to 'other relevant international human rights instruments' may imply that the ICSECR is one of those instruments, in which case it can strengthen the parties' obligations. However, it remains unclear whether the parties in fact intended the ICESCR standards to be included in a legally binding clause. One positive way of understanding this vagueness is by perceiving it as providing flexibility for the parties to continue their human rights dialogue, rather than determining the precise standards as being fixed at the negotiation stage.

Finally, the non-execution clause can be found in Article 45(3):

If either Party considers that the other Party has failed to fulfil its obligations under this Agreement, it may take appropriate measures in accordance with international law. Before doing so, except in cases of special urgency, the Party shall present all the information required to the Joint Committee for a thorough examination of the situation. The Parties shall hold consultations within the

Joint Committee and, if both Parties agree, these consultations may be facilitated by a mediator appointed by the Joint Committee.

According to the Joint Interpretive Declaration,²⁴⁶ which forms an integral part of the Framework Agreement,²⁴⁷ a case of ‘special urgency’ is interpreted as ‘a case of a material breach of this Agreement’.²⁴⁸ A ‘material breach’ is interpreted as ‘[consisting] in either repudiation of this Agreement not sanctioned by the general rules of international law or particularly serious and substantial violation of an *essential element* of this Agreement’.²⁴⁹ This means that that the parties’ violation of human rights obligations, including those concerning ESR, could in theory be considered as ‘cases of special urgency’. However, as seen in Chapter Five, the EU rarely invokes non-execution clauses in practice, and those clauses have not been invoked in relation to ESR.²⁵⁰ It seems therefore highly unlikely that the non-execution clause in the EU-Korea Framework Agreement will be invoked on the basis of violations of ESR obligations alone. Nevertheless, the non-execution clause can serve as a

²⁴⁶ Joint Interpretative Declaration Concerning Articles 45 and 46, annexed to EU-Korea Framework Agreement.

²⁴⁷ EU-Korea Framework Agreement, art 51.

²⁴⁸ Joint Interpretative Declaration (n 83) para 3.

²⁴⁹ *ibid* (emphasis added).

²⁵⁰ L Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ (2013) 40 *Legal Issues of Economic Integration* 297, 304-305; L Bartels, *A Model Human Rights Clause for the EU’s International Trade Agreements* (German Institute for Human Rights 2014) 10; N Ghazaryan, ‘A new generation of human rights clauses? The case of Association Agreements in the Eastern neighbourhood’ (2015) 40(3) *ELR* 1, 22; AC Prickartz and I Staudinger, ‘Policy v practice: The use, implementation and enforcement of human rights clauses in the European Union’s international trade agreements’ (2019) 3 *Europe and the World: A Law Review* 1, 20; L Bartels, ‘Assessment of the implementation of the human rights clause in international and sectoral agreements’ (2023) <[https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2023\)702586](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2023)702586)> accessed 7 July 2023, ch 4.1.

deterrent mechanism which informs the parties that the possibility of suspension still exists.

Although the inclusion of legally binding HRC has generated opposition from developed countries and countries with emerging economies in the past,²⁵¹ the negotiation of HRC with Korea was relatively easy, because of Korea's support for its inclusion in the Framework Agreement.²⁵² This reinforces the idea that human rights constitute the parties' common interest and shared values. Institutionally, a Joint Committee is established to oversee the implementation of the Framework Agreement.²⁵³ This Joint Committee is comprised of representatives of the Commission and of the Member States in the Council, and representatives of Korea.²⁵⁴ It has the power to make suggestions on issues of common interest and to resolve disputes in relation to the application or interpretation of the Framework Agreement.²⁵⁵ Therefore, the Joint Committee meetings can be useful forum to discuss issues of ESR on the basis of HRC.

3.2. EU-Korea Trade Agreement

As mentioned in Section 2.1, in its 2006 Communication, the Commission explicitly referred to Korea as its priority partner with which it sought to

²⁵¹ See Chapters Four and Five on the discussion in relation to Australia, New Zealand, Singapore and Canada.

²⁵² McKenzie (n 6) 836.

²⁵³ EU-Korea Framework Agreement, art 44(1).

²⁵⁴ *ibid.*

²⁵⁵ *ibid* art 44(3).

conclude a new generation trade agreement.²⁵⁶ Subsequently, the EU-Korea Trade Agreement was signed in 2010, and Korea became the first country to sign a new generation trade agreement with the EU. The EU-Korea Trade Agreement was signed by the EU on the basis of Articles 91 and 100(2) TFEU which concern transport, Article 167(3) TFEU which concerns culture, and Article 207 TFEU which concerns the common commercial policy. As a mixed agreement, both the EU and the Member States are joint parties to the agreement. The agreement was provisionally applied from July 2011 and has been fully in force since December 2015.

As a new generation trade agreement, it covers not only trade in goods and services, but also liberalisation of investment, intellectual property rights, competition and procurement.²⁵⁷ For the EU, the signing of this agreement was important because it sets a precedent and a model for future agreements, while signalling to the wider international community that the EU is committed to far-reaching trade liberalisation, coupled with advancement of ESR in the form of TSD chapter.²⁵⁸ It was also seen as a springboard for the EU to expand its trade links in the Asian market,²⁵⁹ and easing access to Korea's industries that were

²⁵⁶ Commission, 'Global Europe' (n 2) 9.

²⁵⁷ See Commission, 'Global Europe' (n 2) 9, 12.

²⁵⁸ Marx (n 2) 6; GI Neszemlyi, 'An Overview of the Trade Relations between the Republic of Korea and the European Union in the light of the KOREU Free Trade Agreement' in C Moldicz (ed), *Economic Development Strategies of Changing East-Asian Countries After 2009* (Budapest Business School 2018) 182.

²⁵⁹ Marx et al, (n 2), 11.

protected previously, such as automobile and agricultural sectors.²⁶⁰ The EU-Korea Trade Agreement has removed customs duties on 98.7% of products,²⁶¹ and, in 2021, trade in goods between the parties amounted to 106.3 billion euros, an increase of 70.8% from the provisional application of the agreement in 2011.²⁶²

Unlike the Framework Agreement, the EU-Korea Trade Agreement does not contain the HRC in the standard form. Instead, the HRC takes the form of the following: preambular references and the *passerelle* clause. Firstly, the preamble of the EU-Korea Trade Agreement reaffirms the parties' commitment to the UN Charter and the UDHR, implying that respect for human rights informs not only their political relations but also their trade relations. This is further implied by reference to the parties' desire to 'raise living standards', to 'create new employment opportunities and improve the general welfare', and to 'promote basic workers' rights', which all have direct implication for the right to adequate standards of living, the right to work, and the right to work under just and favourable conditions. Secondly, the *passerelle* clause is found in Article 15.14.2, which states that this agreement 'shall be an integral part of the overall bilateral relations as governed by the Framework Agreement'. The role of the *passerelle* clause is to directly link the EU-Korea Trade Agreement to the EU-Korea Framework Agreement. This means that respect for human rights,

²⁶⁰ Neszmelyi (n 95) 176.

²⁶¹ Commission, 'EU-Korea Free Trade Agreement' (2023) <<https://trade.ec.europa.eu/access-to-markets/en/content/eu-south-korea-free-trade-agreement>> accessed 7 July 2023.

²⁶² Commission, 'South Korea' (n 19).

including ESR, forms the essential element of the Trade Agreement in the same way as in relation to the Framework Agreement.

One of the innovative features of this agreement, which strengthens the protection of ESR within the scope of HRC, is that it introduced for the first time a TSD Chapter. The TSD chapter incorporates provisions on international labour and environmental standards, with the aim of ensuring that the objective of sustainable development is reflected in the parties' trade relations.²⁶³ As discussed in Chapter Four, there is significant overlap between sustainable development and ESR, and the core labour rights, which are promoted in the TSD Chapter,²⁶⁴ also fall within the scope of ESR.²⁶⁵ As far as those labour rights are concerned, the ILO standards are the main reference point for the parties' substantive obligations under the TSD Chapter.²⁶⁶

There are three aspects to the parties' substantive obligations regarding labour rights. First, the parties must respect, promote and realise the principles concerning fundamental rights in their laws and practices.²⁶⁷ Those fundamental rights are: a) 'freedom of association and the effective recognition of the right

²⁶³ EU-Korea Trade Agreement, art 13.1.

²⁶⁴ *ibid* art 13.4.3.

²⁶⁵ The core labour rights included in Article 13.4.3 are: the right to freedom of association and collective bargaining, the right to non-discrimination at workplace, prohibition of forced labour, and prohibition of child labour.

²⁶⁶ *ibid* art 13.4.3.

²⁶⁷ *ibid* art 13.4.3.

to collective bargaining’; b) ‘the elimination of all forced or compulsory labour’; c) ‘the effective abolition of child labour’; and d) ‘the elimination of discrimination in respect of employment and occupation’.²⁶⁸ Secondly, the parties have an obligation to ‘effectively [implement] the ILO Conventions’ which they have ratified respectively.²⁶⁹ This can be seen as reiteration of the parties’ already existing obligations under international law, by virtue of *pacta sunt servanda*.²⁷⁰ The value of this provision nevertheless lies in the fact that it brings this obligation within the scope of the parties’ cooperation, and serves as a legal reference point for enforcing the obligation in their bilateral relations. Thirdly, the parties have an obligation to ‘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’.²⁷¹ The phrase ‘continued and sustained efforts’ gives certain discretion for the parties in relation to the timeframe for ratifying those Conventions. The vague wording may potentially undermine the strength of this provision in practice.²⁷² As will be seen below, this is the reason that Korea’s delay in ratifying those Conventions became more controversial, since the provision only requires

²⁶⁸ *ibid* art 13.4.3.

²⁶⁹ *ibid* art 13.4.3.

²⁷⁰ *Pacta sunt servanda* means that agreements must be carried out in good faith. See II Lukashuk, ‘The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law’ (1989) 83 AJIL 513.

²⁷¹ EU-Korea Trade Agreement, art 13.4.3 (emphasis added).

²⁷² See J Harrison et al, ‘Governing Labour Standards Through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters’ (2019) JCMS 260, 262; J Orbie, ‘EU Trade Policy Meets Geopolitics: What About Trade Justice?’ (2021) 26 EFAR 197, 199. See also JS Han, ‘The EU-Korea Labour Dispute: A Critical Analysis of the EU’s Approach’ (2021) 26 EFAR 531, 543.

Korea to make ‘continued and sustained efforts’, without imposing a concrete timeframe.

Institutionally, there are different specialised committees established under the EU-Korea Trade Agreement. The implementation of the TSD Chapter is monitored by the Committee on Trade and Sustainable Development (CTSD), comprising of senior officials from the administrations of each Party.²⁷³ The Domestic Advisory Group (DAG) is also established under Article 13.12.4. The DAG is comprised of civil society groups and other relevant stake holders,²⁷⁴ and they are tasked with advising the CTSD and holding dialogue at the annual Civil Society Forum (CSF), where they discuss issues of sustainable development arising under the TSD Chapter.²⁷⁵ The establishment of the DAG can be seen as a positive development, as it adds an inclusive and participative dimension to the TSD Chapter.²⁷⁶

Besides these institutional machineries, the TSD Chapter further provides for a two-staged process of resolving disputes arising under the chapter. As will be seen in Section 4 below, the process has already been initiated by the EU in relation to Korea’s labour rights issues. The first stage of the process concerns

²⁷³ EU-Korea Trade Agreement, art 13.12.2-3.

²⁷⁴ *ibid* art 13.12.5.

²⁷⁵ *ibid* art 13.13.

²⁷⁶ G Gruni, ‘Labour Standards in the EU-South Korea Free Trade Agreement: Pushing Labor Standards into Global Trade Law?’ (2017) 6 *KJICL* 100, 110-111.

government consultation,²⁷⁷ and, if the government consultation fails, the second stage involves the convening of the Panel of Experts.²⁷⁸ The Panel is comprised of independent experts selected by the parties in accordance with Article 13.15.3.

One may question the enforceability of the dispute settlement mechanism under the TSD Chapter. The Panel of Experts can only issue recommendations or advice, rather than legally binding decisions. The parties are only required to ‘make their best effort to accommodate’ those recommendations.²⁷⁹ It is notable that the TSD Chapter is excluded from the general interstate dispute settlement in Article 14 of the EU-Korea Trade Agreement, which provides for a stronger enforcement mechanism through an arbitration procedure. This is why the EU’s new generation trade agreements have been criticised for ‘providing weaker enforcement to [labour] rights when compared to trade norms or economic regulation’.²⁸⁰ However, as will be seen in Section 4, the fact that Korea ratified three ILO Conventions²⁸¹ and amended Trade Union and Labour Relations Adjustment Act (TULRAA),²⁸² as a result of the EU-Korea labour dispute,

²⁷⁷ EU-Korea Trade Agreement, art 13.14.

²⁷⁸ *ibid* art 13.15.

²⁷⁹ *ibid* art 13.15.2.

²⁸⁰ Gruni (n 113) 114.

²⁸¹ Forced Labour Convention, C29 (adopted 28 June 1930, entered into force 1 May 1932); Freedom of Association and Protection of the Right to Organise Convention, C87 (adopted 9 July 1948, entered into force 4 July 1950); Right to Organise and Collective Bargaining Convention, C98 (adopted 1 July 1949, entered into force 18 July 1951).

²⁸² Trade Union and Labour Relations Adjustment Act (TULRAA) (13 March 1997), Act No 5310.

suggests that the dispute settlement mechanism still gives teeth to the TSD Chapter.²⁸³

The importance of the TSD Chapter for the purpose of promoting ESR is that it complements the HRC to strengthen the parties' obligations relating to ESR. The main focus of the TSD chapter is particularly on labour rights and environmental standards, but the preamble of the EU-Korea Trade Agreement makes clear that the parties' conceptualisation of 'sustainable development' refers to all its 'economic, social and environmental dimensions', including poverty reduction. Therefore, the parties' obligations to contribute to sustainable development through trade under Articles 13.1 must be interpreted as covering sustainable development in all its dimensions, which in essence promotes ESR as discussed in Chapter Four. Furthermore, the above weakness in the wording of the provisions in the TSD Chapter can be rectified through the HRC. For example, when read in light of the HRC, the obligation to make 'continued and sustained efforts' to ratify and implement the ILO Conventions can be interpreted as a means by which the parties respect ESR in line with the HRC.²⁸⁴ Recalling the wording of the essential element clause which refers to 'other relevant international human rights instruments', it can be argued that those ILO Conventions also fall within the scope of the essential element clause. The value of the TSD Chapter therefore lies in reinforcing ESR within the scope of HRC.

²⁸³ Han (n 109) 535, 544.

²⁸⁴ See Han (n 109) 541.

4. The EU's promotion of economic and social rights through the human rights clause in practice

4.1. Bilateral dialogue and civil society consultations

Human rights dialogue is one of the main positive functions of HRC. The EU and Korea have been holding human rights dialogue at various levels on the basis of HRC, in accordance with Article 3(3) of the EU-Korea Framework Agreement.²⁸⁵ These dialogues provide opportunities for the parties' bilateral discussion on the issues of ESR. When inquired about what ESR issues were discussed during the parties' human rights consultations, the Delegation of the EU to Korea responded that the contents of the parties' human rights consultations remain 'confidential'.²⁸⁶ However, the Delegation confirmed that human rights consultations take place annually, after consulting civil society organisations. Similarly, when the minutes from the Joint Committee meetings were requested for the purposes of this research, on the basis of Regulation 1049/2001 which concerns public access to EU documents,²⁸⁷ the European External Action Service (EEAS) responded by stating that those meetings are conducted 'under the umbrella of confidentiality' and that disclosure of the information 'could seriously undermine the EU's international relations with

²⁸⁵ Art 3(3) requires political dialogue to be held at various levels, including 'summit meetings at leaders' level', 'annual consultations at ministerial level', 'briefings ... at senior officials' level', and 'exchanges of delegation'.

²⁸⁶ Email from Delegation of the European Union to Republic of Korea to the author (5 February 2021).

²⁸⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

Korea’.²⁸⁸ Although the author was therefore unable to obtain the contents of these human rights consultations at leaders and ministerial levels, some of the main discussions that took place during the EU-Korea Summits and Joint Committee meetings could be analysed through press releases. As for dialogues at the level of specialised committees established under the EU-Korea Trade Agreement, the minutes were readily available for the analyses below.

4.1.1. EU-Korea Summit and Joint Committee Meetings

The EU-Korea Summit is the main forum where the parties discuss the areas of their mutual interest, including trade and human rights.²⁸⁹ In light of their various commitments under the EU-Korea Framework Agreement and the Trade Agreement, the parties have been holding the summits regularly since 2010,²⁹⁰ the latest being the 10th Summit in May 2023.²⁹¹ The HRC informs their dialogue by virtue of Article 3(2) of the EU-Korea Framework Agreement, which states that their dialogue will aim to, *inter alia*, ‘underline the Parties’ commitment to democracy and respect of rights and fundamental freedoms’.

²⁸⁸ Email from European External Action Service (EEAS) to the author (29 June 2021).

²⁸⁹ ‘Action Document EU – Republic of Korea Policy Dialogue Support Facility’, annexed to Commission, ‘Commission Implementing Decision on the financing of the 2019 Partnership Instrument Annual Action Programme for cooperation with third countries to be financed from the general budget of the European Union’ C(2019) 3277 final, 2. See also EU-Korea Framework Agreement, art 3(3)(a).

²⁹⁰ Council of the European Union, ‘EU-Republic of Korea’ (2023) <<https://newsroom.consilium.europa.eu/collections/eu-republic-of-korea>> accessed 7 July 2023.

²⁹¹ Council of the European Union, ‘EU-Republic of Korea summit, 22 May 2023’ (2023) <<https://www.consilium.europa.eu/en/meetings/international-summit/2023/05/22/>> accessed 7 July 2023.

As mentioned above, the precise content of their human rights dialogue remains confidential. From the summary of their discussions found in press releases, it is evident that the parties in practice discuss a broad range of political and economic areas, but the issues of ESR were discussed on a limited number of occasions, notably on the right to health and labour rights. For example, during their summits in 2020 and 2023, the parties discussed the negative impact of the COVID-19 pandemic on healthcare and welfare systems, and shared their own experiences in dealing with the pandemic, while agreeing to collaborate on tackling cross-border health issues.²⁹² However, these discussions in relation to public health only seem to have come to the centre of the parties' attention because of the dire situation of the pandemic in 2019-2021.

As for labour rights, the parties have reiterated the importance of implementing their Trade Agreement in full and their commitment to sustainable development, including the commitment to make 'continuous and sustained efforts' to ratify the fundamental ILO Conventions.²⁹³ As discussed in Section 3.2, Article 13.4.3 of the Trade Agreement obliges the parties to make 'continued and sustained efforts towards ratifying the fundamental ILO Conventions' and to respect,

²⁹² Council of the European Union, 'Republic of Korea-EU leaders' video conference meeting, 30 June 2020' (2020) <<https://www.consilium.europa.eu/en/meetings/international-summit/2020/06/30/>> accessed 7 July 2023; Commission, 'Joint statement European Union – Republic of Korea Summit 2023' (2023) <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2863> accessed 7 July 2023, paras 41-42.

²⁹³ Council of the European Union, 'Republic of Korea-EU leaders' video conference meeting' (n 129); Commission, 'Joint statement European Union – Republic of Korea Summit 2023' (n 129) para 24.

promote and realise the principles concerning four fundamental rights. Those four fundamental rights are actually embodied in the eight fundamental ILO Conventions:

- a) C87²⁹⁴ and C98²⁹⁵ endorse freedom of association and the right to collective bargaining;
- b) C29²⁹⁶ and C105²⁹⁷ endorse the elimination of forced or compulsory labour;
- c) C138²⁹⁸ and C182²⁹⁹ endorse the abolition of child labour;
- d) C100³⁰⁰ and C111³⁰¹ endorse prohibition of discrimination in employment and occupation.

After joining the ILO in 1991, Korea ratified all the four Conventions in (c) and (d) above. However, until 2021 it did not ratify the other four Conventions in (a) and (b) above, which became a source of great tension between the EU and

²⁹⁴ Freedom of Association and Protection of the Right to Organise Convention, C87 (adopted 9 July 1948, entered into force 4 July 1950).

²⁹⁵ Right to Organise and Collective Bargaining Convention, C98 (adopted 1 July 1949, entered into force 18 July 1951).

²⁹⁶ Forced Labour Convention, C29 (adopted 28 June 1930, entered into force 1 May 1932).

²⁹⁷ Abolition of Forced Labour Convention, C105 (adopted 25 June 1957, entered into force 17 January 1959).

²⁹⁸ Minimum Wage Convention, C138 (adopted 26 June 1973, entered into force 19 June 1976).

²⁹⁹ Worst Forms of Child Labour Convention, C182 (adopted 17 June 1999, entered into force 19 November 2000).

³⁰⁰ Equal Remuneration Convention, C100 (adopted 29 June 1951, entered into force 23 May 1953).

³⁰¹ Discrimination (Employment and Occupation) Convention, C111 (adopted 25 June 1958, entered into force 15 June 1960).

Korea, as will be seen in Section 4.3 below. Korea ratified C87, C98 and C29 in 2021, but to date still has not ratified C105.

With the exception of labour rights and the right to health, it appears that no other ESR were discussed during the summits. Nevertheless, when the parties held the 10th Summit in 2023, they commemorated the 75th anniversary of the UDHR and agreed to strengthen their cooperation through human rights consultations.³⁰² Therefore, more issues of ESR may have been discussed during the parties' human rights consultations behind closed doors, but it is difficult to speculate the extent to which ESR are promoted through such consultations, since they take place under the principle of confidentiality.³⁰³

Similar to the EU-Korea Summit, the EU-Korea Joint Committee meetings provide a forum where the parties can hold bilateral dialogue regarding trade, human rights and other areas of mutual interest under the Framework Agreement and the Trade Agreement.³⁰⁴ As explained in Section 3.1 above, the Joint Committee is the main institution that oversees the implementation of the Framework Agreement. It is also tasked with overseeing the implementation of any other agreements between the parties, including the Trade Agreement.³⁰⁵ As

³⁰² Commission, 'Joint statement European Union – Republic of Korea Summit 2023' (n 129) para 17.

³⁰³ Email from the Delegation of the European Union to Republic of Korea to the author (5 February 2021).

³⁰⁴ See EU-Korea Framework Agreement, art 3(3)(b).

³⁰⁵ EU-Korea Framework, art 44(3)(c); EU-Korea Trade Agreement, art 15.1(5).

with the EU-Korea Summit, the HRC informs the parties' dialogue at the Joint Committee meetings, by virtue of Article 3(2) of the Framework Agreement.

As mentioned above, the precise contents of the Joint Committee meetings remain confidential. However, from the press releases, it can be observed that they largely reflect discussions held at the EU-Korea Summit. For example, in the 17th Joint Committee meeting held in 2021, both sides shared their experience in managing Covid-19 pandemic and agreed to cooperate in post-COVID-19 economic recovery strategies that are socially inclusive.³⁰⁶ As for the issue of labour rights, the EU side consistently urged Korea to make progress in ratifying the fundamental ILO Conventions.³⁰⁷

Again, apart from the issue of public health in light of the COVID-19 pandemic and the issue of labour rights under the TSD Chapter, no other ESR have been discussed in the Joint Committee meetings, in so far these press releases are concerned. This is unfortunate, as other ESR issues such as the right to just and favourable working conditions and the right to non-discrimination have been

³⁰⁶ EEAS, 'EU-Republic of Korea: 17th Joint Committee' (2021) <https://www.eeas.europa.eu/eeas/eu-republic-korea-17th-joint-committee_en> accessed 7 July 2023.

³⁰⁷ EEAS, 'European Union and the Republic of Korea hold an annual Joint Committee meeting' (2018) <https://www.eeas.europa.eu/node/55608_en> accessed 7 July 2023; EEAS, 'EU-Republic of Korea: 17th Joint Committee' (n 143); EEAS, 'The European Union and the Republic of Korea advance their strategic partnership at annual Joint Committee meeting' (2022) <https://www.eeas.europa.eu/delegations/south-korea/european-union-and-republic-korea-advance-their-strategic-partnership_en?s=179> accessed 7 July 2023; EEAS, 'Republic of Korea: 19th Joint Committee with the European Union takes place in Brussels' (2023) <https://www.eeas.europa.eu/eeas/republic-korea-19th-joint-committee-european-union-takes-place-brussels_en> accessed 7 July 2023.

identified during the civil society engagement, and in the ex-post evaluation of the Trade Agreement, as will be seen in Sections 4.1.2 and 4.2 below. Since the Framework Agreement envisages that political dialogue is the main means through which the HRC will be implemented,³⁰⁸ it is rather disappointing that issues of ESR are not discussed further in the summits or in the Joint Committee meetings. This may be due to the fact that those issues are discussed behind closed doors, as mentioned above. As far as labour rights are concerned, the EU's follow up on Korea's progress regarding its commitment under the TSD Chapter could be seen in positive light, as it holds Korea accountable and gives opportunity for the parties to review the effectiveness of such progress. This also helps the EU to decide whether or not to initiate the dispute settlement mechanism under the TSD Chapter. As will be seen in Section 4.3 below, unsatisfied with Korea's efforts, the EU initiated the dispute settlement mechanism in 2019.

4.1.2. Committee Meetings and the Domestic Advisory Group (DAG)

The Trade Committee, which is comprised of representatives from the EU and Korea, is the main institution established under the EU-Korea Trade Agreement.³⁰⁹ The Trade Committee is tasked with ensuring proper operation of the Trade Agreement.³¹⁰ There are also a number of specialised committees established under the Trade Agreement, whose tasks are to complement the

³⁰⁸ EU-Korea Framework Agreement, arts 1(7), 2(2)(a), 3(2)(a).

³⁰⁹ EU-Korea Trade Agreement, art 15.1.

³¹⁰ *ibid* art 15.1.3.

Trade Committee to oversee the implementation of different parts of the agreement.³¹¹ The meetings within these committees further provide a dialogue forum for the parties to cooperate in the area of human rights on the basis of the HRC.³¹²

Among these committees, the only committee which so far has engaged explicitly with issues of ESR, particularly labour rights, is the Committee on Trade and Sustainable Development (CTSD), established under the TSD Chapter.³¹³ The CTSD meets annually or biannually to discuss any issues arising under the TSD Chapter, and their meetings are complemented by the discussions of the DAG at the Civil Society Forum (CSF).³¹⁴ In 2013, the DAG published its ‘Opinion’, which did not shy away from addressing various issues of ESR in Korea.³¹⁵ Some examples of those issues include: Korea’s failure to ratify C87, C98, C29, and C105, as well as 56 up-to-date ILO Conventions, in

³¹¹ *ibid* art 15.1.3(c). For the list of specialised committees, see EU-Korea Trade Agreement, art 15.2.

³¹² This was confirmed by the email from the Delegation of the European Union to Republic of Korea to the author (5 February 2021), which stated: ‘EU-Republic of Korea cooperation in the area of human rights is also included in the agenda of other dialogue forums, notably ... instruments such as the bilateral dialogue on the Trade and Sustainable Development chapter of the FTA.’

³¹³ EU-Korea Trade Agreement, art 13.12.2.

³¹⁴ *ibid* art 13.13.3. See paragraph 1 of the document titled ‘Rules of procedure of the EU Domestic Advisory Group created pursuant to Chapter 13 (Article 13.12) of the EU-Korea Free Trade Agreement’, which is attached in the EESC website: EESC, ‘The EU-Republic of Korea Domestic Advisory Group’ (2023) <<https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-republic-korea-domestic-advisory-group>> accessed 7 July 2023.

³¹⁵ EESC, ‘Opinion on the Fundamental Rights at Work in the Republic of Korea, Identification of Areas for Action’ (2013) <<https://www.eesc.europa.eu/en/documents/opinion-fundamental-rights-work-republic-korea-identification-areas-action>> accessed 7 July 2023.

accordance with its obligations under the TSD Chapter³¹⁶; shortcomings in Korea's legislation regarding freedom of association³¹⁷; gender wage gap and discrimination against women in employment³¹⁸; discrimination against migrant workers and non-regular workers.³¹⁹ Since then, both the DAG and the CTSD have constantly followed up particularly on Korea's progress as regards the ratification of the ILO fundamental Conventions.³²⁰

Initially, the CTSD was softer in its approach to discussing the labour rights issues in Korea, by simply encouraging Korea to co-operate with the ILO, with a view to ratifying the outstanding ILO Conventions.³²¹ However, from 2015

³¹⁶ *ibid* para 2.1.

³¹⁷ EESC, 'Opinion on the Fundamental Rights at Work in the Republic of Korea' (n 152) paras 3 – 3.1.8.1.9.

³¹⁸ *ibid* para 3.3.1.

³¹⁹ *ibid* paras 3.3.2-3.3.5, 4-4.3.3.1.

³²⁰ EESC, 'Conclusions of the 2nd meeting of the EU-Korea Civil Society Forum under the EU-Korea Free Trade Agreement' (2013) <<https://www.eesc.europa.eu/en/documents/conclusions/conclusions-2nd-meeting-eu-korea-civil-society-forum-under-eu-korea-free-trade-agreement>> accessed 7 July 2023, 2; EESC, 'Joint Statement of the 2nd Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA' (2013) <<https://www.eesc.europa.eu/en/documents/joint-declaration/joint-statement-2nd-meeting-eu-korea-civil-society-forum-under-eu-korea-free-trade-agreement>> accessed 7 July 2023, 3; EESC, 'Conclusions of the 3rd Meeting of the EU-Korea Civil Society Forum under the EU-Korea Free Trade Agreement' (2014) <<https://www.eesc.europa.eu/en/documents/conclusions/conclusions-3rd-meeting-eu-korea-civil-society-forum-under-eu-korea-free-trade-agreement>> accessed 7 July 2023, 2; EESC, 'Joint Statement of the 4th Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA' (2015) <<https://www.eesc.europa.eu/en/documents/joint-declaration/joint-statement-4th-meeting-eu-korea-civil-society-forum-under-eu-korea-free-trade-agreement>> accessed 7 July 2023, 2; EESC, 'EU-Korea Civil Society Forum Conclusions – 5th Meeting of the EU-Korea Civil Society Forum' (2017) <<https://www.eesc.europa.eu/en/documents/conclusions/eu-korea-civil-society-forum-conclusions-5th-meeting-eu-korea-civil-society-forum>> accessed 7 July 2023, paras 12-14.

³²¹ EESC, 'Joint Statement of the 2nd Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA' (n 157) 3; EESC, 'Joint Statement of the 3rd Meeting of the Committee on Trade and Sustainable development under the Korea-EU FTA' (2014)

onwards, both the CTSD and the DAG began to be more insistence in their language. For example, in 2015, the EU side asked Korea to ‘speed up’ its efforts regarding ratification,³²² and, in 2017, the DAG called out Korea for failing to prepare a concrete plan towards ratification of the ILO Conventions.³²³ The Korean side responded to these demands by explaining that research was underway to identify any inconsistencies between the domestic laws and the unratified ILO Conventions.³²⁴

As will be seen in Section 4.3 below, in December 2018, the EU decided to invoke the dispute settlement process under the TSD Chapter,³²⁵ reflecting its dissatisfaction with Korea’s efforts.³²⁶ In this regard, the dialogues held at the CTSD and the DAG meetings have the value of evidencing the EU’s constant demands to Korea regarding labour rights issues. They have also assisted the EU in deciding to invoke the dispute settlement process, which eventually facilitated Korea’s ratification of C87, C98 and C29 in 2021,³²⁷ as well as reform of its domestic laws concerning freedom of association.³²⁸ The CTSD is

<<https://www.eesc.europa.eu/en/documents/joint-declaration/joint-statement-3rd-meeting-eu-korea-civil-society-forum-under-eu-korea-free-trade-agreement>> accessed 7 July 2023, 3-4.

³²² EESC, ‘Joint Statement of the 4th Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA’ (n 157) 2.

³²³ EESC, ‘EU-Korea Civil Society Forum Conclusions – 5th Meeting of the EU-Korea Civil Society Forum’ (n 157) paras 13-14.

³²⁴ EESC, ‘Joint Statement of the 4th Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA’ (n 157) 2.

³²⁵ European Union (n 59) 1-2.

³²⁶ Han (n 109) 536.

³²⁷ *ibid* 544.

³²⁸ Trade Union and Labour Relations Adjustment Act, Act No 17864 (5 May 2021)

currently following up on the effectiveness of Korea's revised domestic laws and Korea's effort to ratify C105,³²⁹ and it is still to be seen whether Korea makes satisfactory progress this time, without the dispute settlement process having to be initiated.

In addition to facilitating discussion on labour rights issues in Korea, the CTSD meetings have allowed the parties to share good practices in relation to ESR. For example, in 2013, the EU side shared its policy regarding health and safety at work during the CTSD meeting,³³⁰ and, in 2022, the DAG recognised that Korea was also actively promoting occupational safety and health.³³¹ In 2015, the Korean side shared its policy which seeks to achieve an employment rate of 70% and, in 2018, presented with a 'policy road map for job creation'.³³² The EU side also shared its Pillar of Social Rights, which seeks to improve

(TULRAA as amended).

³²⁹ Commission, '7th Committee on Trade and Sustainable Development Joint Minutes' (2021) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/2e6ac3df-18ba-4328-9571-4225c7f86468/details>> accessed 7 July 2023, 2; Commission, 'Ad-hoc Interim Meeting of the Committee on Trade and Sustainable Development' (2021) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/66c1a1b1-8f27-4d1c-afb0-736d1f3c0e81/details>> accessed 7 July 2023, 2.

³³⁰ EESC, 'Joint Statement of the 2nd Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA' (n 157) 3.

³³¹ EESC, 'Joint Conclusion of the Korea DAG and the EU DAG' (2022) <<https://www.eesc.europa.eu/en/documents/conclusions/joint-conclusions>> accessed 7 July 2023, para 12.

³³² EESC, 'Joint Statement of the 4th Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA' (n 157) 3; Commission, 'Summary of Discussions of the 6th Committee on Trade and Sustainable Development under the Korea-EU FTA' (2018) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/80f29e03-3ddd-4e9b-b26b-d13553d8dcc3/details>> accessed 7 July 2023, 3.

protection of workers in light of new developments in workplaces.³³³ In this regard, the CTSD meetings create opportunities for the parties learn from each other's policies regarding ESR and to receive feedback from each other. Furthermore, the DAG meeting in 2022 suggests that the parties would be holding a Workshop on Platform Work and other Non-Standard Forms of Work, which would be a useful opportunity for the DAG to address the issue of widespread non-regular employment in Korea.³³⁴

4.2. Ex-post evaluation

Human rights analyses in ex-post evaluations of trade agreements are another main positive function of HRC. They allow detailed reviews of implementation of trade agreements, in light of HRC. So far, only one ex-post evaluation was carried out in relation to the EU-Korea Trade Agreement, and its final report was published in 2018.³³⁵ The report refers to the HRC in the EU-Korea Framework Agreement, and emphasises that the Trade Agreement is linked to the Framework Agreement. This implies that the HRC in the Framework Agreement equally applies to the Trade Agreement.³³⁶ The report explicitly recognises that the Trade Agreement 'forms the basis of the Parties' engagement on human rights and labour rights'.³³⁷ The human rights analysis is based on

³³³ Commission, 'Summary of Discussions of the 6th Committee on Trade and Sustainable Development under the Korea-EU FTA' (n 169) 3.

³³⁴ EESC, 'Joint Conclusion of the Korea DAG and the EU DAG' (n 168) para 15.

³³⁵ Commission, 'Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea' (n 61).

³³⁶ *ibid* 209-210.

³³⁷ *ibid* 209.

literature review, including the review of international organisations' reports and documents from the DAG meetings, as well as consultations with civil society organisations (CSOs) and with other relevant stakeholders.³³⁸

The human rights analysis is presented in section 8 of the report, which recalls the parties' commitments under the TSD Chapter and the HRC.³³⁹ The scope of the analysis is limited in the sense that it only focuses on human rights which are most likely to be affected by the Trade Agreement. For that purpose, it has gone through a screening process in order to decide which rights should be analysed for an in-depth review.³⁴⁰ This is understandable as the main focus of the ex-post evaluation concerns the effects of the implementation of the trade agreement itself. The rights which have been chosen through the screening process are: a) freedom from discrimination; b) the right to peaceful assembly and association and the right to join trade unions; c) the right to just and favourable conditions of work and the right to rest and leisure; and d) the right to food.³⁴¹ The analysis makes reference to different international instruments, including the UDHR, the ICCPR, the ICESCR, the CEDAW, and the ILO Conventions, as the sources of the parties' obligations to respect these rights.³⁴² The fact that the ICESCR is referred to in the human rights analysis may further suggest the rights in the ICESCR fall within the scope of HRC.

³³⁸ *ibid* 187.

³³⁹ *ibid* 209.

³⁴⁰ *ibid* 211-217.

³⁴¹ *ibid* 211, 217.

³⁴² *ibid* 213-216.

As for freedom from discrimination, the report reiterates the findings of the OECD that Korea has the highest level of gender wage gap among the OECD countries, and that non-regular workers tend to be discriminated in terms of ‘wages, benefits and working conditions’, with women being overrepresented in non-regular employment.³⁴³ It also called out on Korea’s employment permit system for migrant workers, which places restrictions on the number of their employment changes, while subjecting their employment change to the authorisation of employers.³⁴⁴ These findings reflect the concerns of the DAG expressed in its Opinion, as seen in Section 4.1.2 above. The report found that neither significant improvement nor hindrance of these rights incurred since the provisional application of the Trade Agreement in 2011.³⁴⁵ It explicitly referred to one of the interviewees’ view that the ILO Conventions on elimination of discrimination³⁴⁶ ‘did not appear to be fully implemented’ in Korea,³⁴⁷ even though Korea ratified those Conventions in 1997 and 1998.³⁴⁸ Given the findings of this report and the Opinion of the DAG noted in Section 4.1.2 above, it is questionable that the issue of non-discrimination was not given attention

³⁴³ *ibid* 219, 221.

³⁴⁴ *ibid* 223-224.

³⁴⁵ *ibid* 224-225.

³⁴⁶ Equal Remuneration Convention, C100 (adopted 29 June 1951, entered into force 23 May 1953); Discrimination (Employment and Occupation) Convention, C111 (adopted 25 June 1958, entered into force 15 June 1960).

³⁴⁷ Commission, ‘Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea’ (n 61) 223.

³⁴⁸ ILO, ‘Ratifications for Republic of Korea’ (2023) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103123> accessed 6 July 2023.

when the EU initiated the dispute settlement procedure under the TSD Chapter,³⁴⁹ even though Korea has an obligation to effectively implement C100 and C111 under the TSD Chapter.³⁵⁰

As for the right to peaceful assembly and association and the right to join trade unions, the report found shortcomings of Korea's domestic laws concerning freedom of association. For example, under the Korean Constitution, the right to association and collective bargaining is not guaranteed for public officials and workers of important defence industries, unless provided for by legislation.³⁵¹ Under the Trade Union and Labour Relations Adjustment Act (TULRAA),³⁵² full-time trade union officials cannot receive wages, and unemployed workers cannot retain their union membership.³⁵³ It also referred to OECD findings in relation to imprisonment of trade union leaders and members and criminalisation of their strikes based on 'obstruction of business'.³⁵⁴ These issues were also identified by the DAG, as seen in Section 4.1.2 above. The report found that those issues did not improve since the provisional application of the EU-Korea Trade Agreement, and that, according

³⁴⁹ See Section 4.3 of this chapter.

³⁵⁰ EU-Korea Trade Agreement, art 13.4.3.

³⁵¹ Commission, 'Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea' (n 61) 225-226.

³⁵² Trade Union and Labour Relations Adjustment Act (TULRAA) (13 March 1997), Act No 5310.

³⁵³ Commission, 'Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea' (n 61) 226.

³⁵⁴ *ibid* 226.

to the interviewees, the situation had become worse.³⁵⁵ As will be seen in Section 4.3 below, these issues together with the issue of Korea's non-ratification of outstanding fundamental ILO Conventions became the ground upon which the EU initiated dispute settlement proceedings under the TSD Chapter in December 2018.

As for the right to just and favourable conditions of work and the right to rest and leisure, the report was mainly concerned with the high number of non-regular workers in Korea, as they receive lower wages compared to regular workers, even though they perform similar duties.³⁵⁶ It noted that non-regular workers do not have access to benefits, including unemployment insurance, which places them at particular vulnerability and economic insecurity.³⁵⁷ Again, these concerns reflect the DAG's Opinion, which is seen in Section 4.1.2 above. However, not enough emphasis on the issue of non-regular workers has been made during the parties' dialogue at the summits or the Joint Committee meetings. This may be partly due to the fact that, although the number of non-regular workers still remain high in Korea, it is in a downward trend, and the Korean government has taken steps to deal with the issue since the provisional application of the Trade Agreement, such as requiring 'non-regular workers in public sector to be given open-ended contracts'.³⁵⁸

³⁵⁵ *ibid* 234.

³⁵⁶ *ibid* 236.

³⁵⁷ *ibid* 236.

³⁵⁸ *ibid* 236.

As for the right to food, this is the only area where the report found positive improvement, albeit to a very small extent.³⁵⁹ This is because the Trade Agreement had increased the number of imported agrifood products in Korea, while slightly reducing the price of food due to imports.³⁶⁰ However, it must be noted that Korea has had a relatively good track record as regards the right to food.³⁶¹ As the report itself recognised, the right to food is ‘not a serious problem in modern Korea’,³⁶² and it is not mentioned as an issue for Korea in the reports of the Committee on Economic, Social and Cultural Rights.

This is not to say that the right to food should not be subjected to human rights analysis. Realisation of ESR indeed requires constant monitoring and reviewing of laws, policies and practices. However, given that the human rights analysis only focuses on a small number of human rights through the screening process, it would be more helpful, for the purpose of promoting human rights, to choose rights which are considered as serious issues by international organisations. Furthermore, it is recommended that future ex-post evaluations should incorporate a list of recommendations in relation to ESR obligations, so that ESR can be promoted more effectively based on HRC.

³⁵⁹ *ibid* 244.

³⁶⁰ *ibid* 244.

³⁶¹ *ibid* 240-241. See Economist, ‘Global Food Security Index’ (2023) <<https://impact.economist.com/sustainability/project/food-security-index/>> accessed 7 July 2023.

³⁶² Commission, ‘Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea’ (n 61) 244.

4.3. EU-Korea labour rights dispute

As mentioned in Chapter 4 and Section 3.2 above, TSD Chapters are a novel feature of new generation trade agreements. Prior to the introduction of new generation trade agreements, the dispute settlement mechanism under the TSD Chapter therefore did not exist, and logically was not envisaged by HRC. However, with the introduction of the TSD Chapter in the EU-Korea Trade Agreement, the parties' obligation to 'respect, promote and realise' principles concerning freedom of association and collective bargaining, non-discrimination at work, and prohibition of child labour and forced labour, must all be understood through the lens of HRC. Those principles fall within the scope of ESR, and the parties have a legally binding commitment to respect, promote and realise those principles in light of HRC, which informs the interpretation of the TSD Chapter. Therefore, the dispute settlement mechanism under the TSD Chapter also falls within the positive function of HRC.

As noted in Sections 4.1 and 4.2 above, the issue of labour rights in Korea has become an ongoing subject of discussion between the parties, since the application of their Trade Agreement. Seeing that Korea neither ratified the outstanding fundamental ILO Conventions nor made legislative changes to bring domestic law in line with the ILO jurisprudence, the EU invoked Article 13.4.3 of the EU-Korea Trade Agreement to initiate the first stage of the dispute

settlement procedure, on 17 December 2018.³⁶³ According to the EU's letter requesting government consultations, the main grounds for initiating the procedure were: a) Korea's Trade Union and Labour Relations Adjustment Act (TULRAA) excludes self-employed persons, and dismissed or unemployed persons are unable to join trade unions; b) the TULRAA does not recognise an organisation as a 'trade union', where it lets persons who do not satisfy the definition of 'worker' join the organisation; c) the TULRAA requires trade union officials to 'only be elected only from among the members of the trade union'; e) the establishment of trade unions is subject to 'a discretionary certification procedure' under the TULRAA; f) under the TULRAA, collective agreements must be reported to the Labour Administration, which can 'request changes in collective agreements; and g) the Korean police and public prosecutor's office have applied the Korean Criminal Code to criminalise peaceful strike actions on the basis of 'obstruction of business'.³⁶⁴ In addition, Korea's failure to make continued and sustained efforts to ratify the outstanding fundamental ILO Conventions constituted a separate ground.³⁶⁵

The consultation took place on 21 January 2019, where the EU insisted that Korea takes 'prompt' and 'urgent' steps to meet its commitments under the TSD Chapter.³⁶⁶ Following the consultation, the then EU Commissioner Malmström

³⁶³ European Union (n 59).

³⁶⁴ European Union (n 59) 1.

³⁶⁵ *ibid* 2.

³⁶⁶ Commission, 'Letter from Commissioner Malmström to Korean Ministers on the ongoing government consultations under TSD Chapter of Eu-Korean FTA' (2019) <<https://www.europarl.europa.eu/delegations/et/letter-from-commissioner-malmstrom-on->

sent a letter to Korea on 4 March 2019, making clear that the EU is willing to take the issue to the level of Panel of Experts, if Korea fails to make substantive progress.³⁶⁷ On 4 July 2019, the EU formally invoked Article 13.15 of the EU-Korea Trade Agreement to convene a Panel of Experts.³⁶⁸ However, it must be noted that, two months before the EU requested a Panel of Experts to be convened, the Korean government actually launched a formal process for ratifying C87, C98 and C29.³⁶⁹ The process required amendment to Korea's domestic laws, which means that the Korean government needed to go through a number of procedural steps first, before completing the ratification.³⁷⁰ Therefore, the EU's invocation of Article 13.15 could be seen as a 'rather hasty' move,³⁷¹ given that Korea launched the formal process for ratification soon after Commissioner Malmström's warning on 4 March 2019.³⁷²

ts/product-details/20200403DPU25071> accessed 7 July 2023.

³⁶⁷ *ibid.*

³⁶⁸ Commission, 'Request: Republic of Korea' (n 59).

³⁶⁹ S Yoon, 'The main contents of the ILO core Convention ratification'(2019) <<http://www.mediaus.co.kr/news/articleView.html?idxno=153462>> accessed 7 July 2023 (translated by the author); Ministry of Employment and Labour, 'The Minister of Employment and Labour, Lee Jae Gab, introduces plans for ratification of the core ILO Conventions during his speech at the meeting celebrating the 100th anniversary of the ILO'(2019) <https://blog.naver.com/molab_suda/221561312556> accessed 7 July 2023 (translated by the author).

³⁷⁰ Han (n 109) 537. See also Korea Legislation Research Institute, 'Korean Law: Legislative Procedures' (2023) <https://elaw.klri.re.kr/eng_service/step.do> accessed 7 July 2023.

³⁷¹ Han (n 109) 537.

³⁷² Commission, 'Letter from Commissioner Malmström to Korean Ministers on the ongoing government consultations under TSD Chapter of Eu-Korean FTA' (n 203).

The Panel of Experts was convened on 30 December 2019,³⁷³ but, due to COVID-19 pandemic, the hearings were delayed and the final report was issued on 20 January 2021.³⁷⁴ Korea was found to be in breach of the principle of freedom of association,³⁷⁵ and the Panel recommended Korea to amend the TULRAA so that ‘all workers, including self-employed, dismissed and unemployed’, can exercise their freedom of association, and that trade unions can permit self-employed, dismissed and unemployed persons as their members.³⁷⁶ The Panel also recommended Korea to remove the requirement that ‘the union officials must be selected amongst members of the union’.³⁷⁷ However, as for the certification procedure for establishing trade unions, it found that the ILO Committee of Freedom of Association recognises that such requirements can be consistent with the principle of freedom of association.³⁷⁸

As for Korea’s non-ratification of the outstanding fundamental ILO Conventions, the Panel interpreted the parties’ obligation to make ‘continued and sustained efforts towards ratifying the fundamental ILO Conventions’, as an obligation of ‘best endeavours’, rather than as an obligation of ‘result’.³⁷⁹ It

³⁷³ Commission, ‘Report of the Panel of Experts’ (2021) <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d4276b0f-4ba5-4aac-b86a-d8f65157c38e/details>> accessed 7 July 2023, para 9.

³⁷⁴ *ibid* paras 21-22.

³⁷⁵ *ibid* paras 196, 208, 227.

³⁷⁶ *ibid* 200.

³⁷⁷ *ibid* para 228.

³⁷⁸ *ibid* para 257.

³⁷⁹ *ibid* 288.

was interpreted as an ‘on-going obligation’, which affords flexibility for the parties to make efforts without necessarily committing to a specific timeframe.³⁸⁰ In that regard, the Panel noted Korea’s effort in the past three years, including the bill that was submitted to the National Assembly for ratification of the ILO Conventions.³⁸¹ Although Korea’s effort was ‘less than optimal’, the Panel concluded that such effort did not ‘fall below the legal standard set out in the last sentence of Article 13.4.3’.³⁸²

The decision of the Panel of Experts has been described as a ‘Pyrrhic victory’ for the EU, due to the Panel’s decision regarding the issue of ratification of the ILO Conventions above.³⁸³ However, when looking at the events following the decision, the dispute as a whole can be seen as a success for the EU. Korea completed ratification of C87, C98 and C29 on 20 April 2021,³⁸⁴ and the TULRAA was amended in line with international standards, to be effective on 6 July 2021.³⁸⁵ However, there are a few issues which remain.

³⁸⁰ *ibid* para 278.

³⁸¹ *ibid* para 286.

³⁸² *ibid* paras 291-292.

³⁸³ Orbie (n 109) 199.

³⁸⁴ Ministry of Foreign Affairs Republic of Korea, ‘Ratification of Three Fundamental ILO Conventions Marked in Virtual Ceremony with ILO’ (2021) <https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=321641> accessed 7 July 2023.

³⁸⁵ The text of the amended TULRAA can be found here: Korea Ministry of Government Legislation, ‘Trade Union and Labour Relations Adjustment Act’ (2021) <<https://www.law.go.kr/LSW/lsInfoP.do?efYd=20210706&lsiSeq=228175#0000>> accessed 7 July 2023 (translated by the author).

It must be noted that the draft bill amending the TULRAA was actually promulgated on 5 January 2021, which is just a few weeks before the Panel gave its decision.³⁸⁶ This means that the bill was passed without adequately reflecting the Panel's decision.³⁸⁷ For example, while it allows dismissed and unemployed persons to join trade unions, self-employed persons are still excluded from the definition of 'worker'. The amended TULRAA also maintains the provision which requires trade union officials to be elected from union members. Furthermore, Korea still has not yet ratified C105. These issues currently constitute the subject of ongoing dialogue between the parties.³⁸⁸ Given that the EU's recent Trade Policy Review requires the EU to '[s]tep up engagement with trade partners in a cooperative process to foster compliance with international labour and environmental standards', it is expected that the EU will continue to follow up on Korea's progress closely.³⁸⁹

Overall, the EU-Korea labour dispute confirms that the TSD Chapter serves to strengthen the place of ESR within the scope of HRC. However, HRC was not explicitly mentioned either in the EU's submissions to the Panel of Experts or in the Panel's decision. Given that one of the arguments submitted by Korea

³⁸⁶ See Korea Ministry of Government Legislation, 'Trade Union and Labour Relations Adjustment Act' (2021) <<https://www.law.go.kr/LSW/lsInfoP.do?efYd=20210706&lsiSeq=228175#0000>> accessed 7 July 2023 (translated by the author).

³⁸⁷ Han (n 109) 542.

³⁸⁸ Commission, '7th Committee on Trade and Sustainable Development Joint Minutes' (n 166) 2; Commission, 'Ad-hoc Interim Meeting of the Committee on Trade and Sustainable Development' (n 166) 2.

³⁸⁹ Commission, 'The power of trade partnerships: together for green and just economic growth' (Communication) COM(2022) 409 final, para 3.1.

during the dispute was that the obligation to respect, promote and realise the principle of freedom of association was not a legally binding commitment, with which the Panel of Experts disagreed,³⁹⁰ it is recommended that the EU should make explicit reference to HRC in the future in relation to Korea's obligations under the TSD Chapter. This would help ensure that HRC remains a living instrument in the parties' trade relations.

5. Conclusion

The above discussions confirm that the EU has been actively promoting ESR through the positive function of HRC, in its trade relations with Korea. Most of the issues identified by international organisations and discussed in Section 2.2 above have been addressed by the EU through the positive function of HRC, which includes dialogue, civil society consultation, ex-post evaluation and the initiation of the dispute settlement procedure. Among those issues, principles of freedom of association and collective bargaining have been at the forefront of the EU's promotion of ESR under the EU-Korea Trade Agreement. This is particularly reflected in the parties' continuous dialogue, civil society participation and the EU's initiation of the dispute settlement procedure under the TSD Chapter. The effectiveness of the EU's effort is demonstrated by Korea's amendment to the TULRAA and ratification of three of the four outstanding fundamental ILO Conventions in 2021. As mentioned in Section 4.3 above, the EU continues to follow up on the remaining issues regarding the implementation of the amended TULRAA and Korea's effort towards ratifying

³⁹⁰ Commission, 'Report of the Panel of Experts' (n 210) paras 38-39.

C105. This supports the proposition made in Chapter 5 that the TSD Chapter serves to strengthen the place of ESR, particularly labour rights, within the scope of the parties' commitments under HRC. Therefore, the introduction of the TSD Chapter in new-generation trade agreements should be seen as a positive development for HRC.

The above discussions further demonstrate that various measures taken by the EU within the positive function of HRC are not independent from one another. For example, the civil society participation in the DAG helps to inform the discussions at the CTSD meetings, and the discussions at the CTSD meetings help the EU to reach an understanding with Korea on issues of ESR and to determine whether the dispute settlement procedure needs to be initiated. The results of the dispute settlement also constitute the subject of ongoing dialogue between the parties.

However, there are several recommendations which need to be made to help strengthen the EU's promotion of ESR through HRC in the EU-Korea Trade Agreement. First, the EU should ensure more coherence between different positive measures taken on the basis of HRC. Although the issue of principles of freedom of association and collective bargaining has been addressed constantly by the EU through various positive measures, the same cannot be said in relation to other ESR. The issues regarding non-regular employment, discrimination and income inequality were not given as much attention in the parties' dialogue, even though the DAG's Opinion and the ex-post evaluation

suggested that those were prevailing issues in Korea. Even though the principle of non-discrimination and the effective implementation of C100 and C111 are one of the obligations under the TSD Chapter,³⁹¹ Korea's shortcoming in this regard was not addressed in the EU's request for government consultations. Secondly, making the parties' annual human rights consultations public, rather than confidential, would enhance transparency of the EU's promotion of ESR. Thirdly, more explicit reference to HRC should be made in the various positive measures taken by the EU, particularly in enforcing obligations under the TSD Chapter. Although HRC was explicitly referenced in the ex-post evaluation, it was not explicitly referenced in the EU's request for government consultation, in its submissions to the Panel of Experts, and in the Panel's decision. Explicit reference to HRC in these measures will help to interpret the parties' obligations under the TSD Chapter through the lens of HRC, emphasising the 'essential' nature of the obligation to respect fundamental labour rights and other ESR. It will also help to ensure that HRC remains a living instrument in the parties' Trade Agreement.

³⁹¹ EU-Trade Agreement, art 13.4.3.

Chapter Seven: EU's Promotion of Economic and Social Rights through the Human Rights Clause in EU-Korea Trade Agreement

1. Introduction

As with Chapter Six, this chapter contains a case study to assess the extent to which the EU usefully promotes economic and social rights (ESR) through human rights clauses (HRC) in its trade agreements. The countries chosen for the second case study are Colombia and Peru, which are joint parties to the EU-Colombia/Peru Trade Agreement.¹

As explained in Chapter One, Colombia and Peru have been chosen for the second case study because of their unique similarities and differences with Korea. These similarities and differences make them ideal subjects to be examined in comparison with Korea, in the context of the EU's promotion of ESR. As with Korea, Colombia and Peru are important regional players for the EU, being the members of the Andean Community,² with which the EU had sought to negotiate an interregional trade agreement in the past.³ Due to the failure of the negotiation, the EU had turned to trilateral negotiations instead,

¹ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3 (EU-Colombia/Peru Trade Agreement).

² The current members of the Andean Community are: Colombia, Peru, Ecuador and Bolivia.

³ See discussion in Section 3 of this chapter.

with Colombia and Peru.⁴ The EU-Colombia/Peru Trade Agreement therefore became the first new generation trade agreement that the EU successfully negotiated with Latin American countries. This Trade Agreement thus provides opportunities for the EU to gradually expand its trade liberalisation in the region, as will be seen in Section 3 below.

However, the political and economic dimensions of the EU-Colombia/Peru relations are rather different from that of EU-Korea relations. As will be seen in Section 2 below, Colombia and Peru demonstrate relatively modest economic development and political instability, compared to Korea. The EU is the largest donor of development aid to Colombia and Peru,⁵ and has involved itself more politically than it has in Korea, particularly in relation to the peace-building project in Colombia.⁶ As a result, there is greater power asymmetry in the EU's relations with Colombia and Peru. One may therefore speculate that this power asymmetry would give the EU more leverage when promoting its values, including ESR, under the Trade Agreement. Furthermore, unlike the EU-Korea Trade Agreement, the ratification of the EU-Colombia/Peru Trade Agreement was much more controversial, due to the concerns of the European Parliament regarding human rights situations in those countries.⁷ As will be seen in Section

⁴ I Szegedy-Maszak, 'Association / Free Trade Agreement – Bi-regional Partnership between European Union and Andean Community' (2009) 32 *Revista de Derecho* 218, 220, 237-238; R Dominguez, *EU Foreign Policy Towards Latin America* (2015 Palgrave Macmillan) 138-139.

⁵ Szegedy-Maszak (n 4) 233; Dominguez (n 4) 4, 22-24.

⁶ See N Beaumont et al, 'The Challenges of Cooperation: The European Union's Engagement in Human Rights in Colombia: 2012 to 2019' (2019) <<https://www.ucl.ac.uk/americas/file/2687>> accessed 31 July 2023, 18-31.

⁷ See European Parliament, 'EU trade agreement with Colombia and Peru (debate)' (2012) <https://www.europarl.europa.eu/doceo/document/CRE-7-2012-05-22-ITM-014_EN.html>

3 below, the Commission as a result put much emphasis on the role of HRC in the EU-Colombia/Peru Trade Agreement, which imposes binding commitments on the parties to respect human rights.⁸ Again, one could therefore expect that the EU would be more active in promoting ESR through the positive function of HRC in the EU-Colombia/Peru Agreement. It is thus necessary to examine whether these expectations are met in practice.

Section 2 will first begin by giving an overview of Colombia and Peru. It will examine their socio-economic status and their relations with the international community. The discussion will help understand how the dynamic of EU-Colombia/Peru relations is different from that of EU-Korea, and why there is greater power asymmetry in the EU-Colombia/Peru relations. It will also discuss various issues of ESR shared by Colombia and Peru, by reference to the reports of international organisations. This will contribute to the analysis in Section 4, which will examine the positive measures taken by the EU to promote ESR through HRC, in response to those issues prevailing in Colombia and Peru.

Section 3 will analyse the EU-Colombia/Peru Trade Agreement and the scope of HRC therein. The EU-Colombia/Peru Trade Agreement is the main instrument governing the trade relations between the EU and Colombia/Peru. It contains the standard HRC and as a new generation trade agreement contains a

accessed 31 July 2023.

⁸ See argument presented by Karel De Gucht in: European Parliament, ‘EU trade agreement with Colombia and Peru (debate)’ (n 7).

Trade and Sustainable Development (TSD) Chapter. The discussion will help understand that the HRC, complemented by the TSD Chapter, provides a legal basis for the EU to usefully promote ESR in its trade relations with Colombia and Peru. Whether the EU is in practice usefully promoting ESR through the positive function of HRC will be assessed in Section 4.

Section 4 will examine different positive measures that the EU has taken to promote ESR through HRC in the EU-Colombia/Peru Trade Agreement. This directly addresses the main question of the thesis by illustrating, through a case example, the extent to which the EU usefully promotes ESR through HRC in practice. The findings of this case study will be compared with the findings of the first case study from Chapter Six, which will together be evaluated in Chapter Eight. This chapter will conclude by making recommendations for the future so that the EU continues to utilise the opportunities provided by HRC to promote ESR.

2. Colombia and Peru

2.1. Country Profiles

Colombia and Peru are neighbouring countries, located in the western parts of South America. They share Spanish as one of their official languages, reflecting their history of coming under Spanish colonisation between 1500s – 1800s. Today, both Colombia and Peru are democratic republics and are members of

the Andean Community, which is one of the two main trade blocs in South America.⁹

Colombia has a population of 51.9 million¹⁰ and has GDP per capita of 6,630.3 USD.¹¹ Exports of goods and services constitute 20.5% of GDP.¹² Although it demonstrates relatively modest economic development compared to Korea from the first case study, Colombia is classified as an ‘upper-middle income’ country by the World Bank.¹³ Colombia benefitted from the EU’s Standard Generalised System of Preferences (GSP) scheme,¹⁴ but ceased to be a beneficiary from 1 January 2016 as a result of its economic growth.¹⁵ Colombia’s current political climate is still affected by the longstanding violence generated by guerrilla

⁹ The other main trade bloc in South America is the Mercosur, constituting of Brazil, Argentina, Uruguay and Paraguay.

¹⁰ World Bank, ‘Population, total’ (2023)
<<https://data.worldbank.org/indicator/SP.POP.TOTL>> accessed 31 July 2023.

¹¹ World Bank, ‘GDP per capita (current US\$)’ (2023)
<<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD>> accessed 6 July 2023.

¹² World Bank, ‘Exports of goods and services (% of GDP)’ (2023)
<<https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS>> accessed 6 July 2023.

¹³ World Bank, ‘World Bank Country and Lending Groups’ (2023)
<<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>> accessed 6 July 2023.

¹⁴ The Standard GSP scheme provides duty reduction for 66% of the EU tariff lines. See 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 [2012] OJ L 303/1 (GSP Regulation), annex I; Commission, ‘Generalised Scheme of Preferences’ (2023) <https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en> accessed 31 July 2023.

¹⁵ Commission Delegated Regulation (EU) No 1015/2014 of 22 July 2014 amending Annexes II and III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preference, and repealing Commission Delegated Regulation (EU) No 154.2013 [2014] OJ L 283/20.

insurgencies, drug trafficking, and paramilitaries.¹⁶ In 2012, the then president Juan Manuel Santos' government sought peace negotiations with one of Colombia's oldest guerrilla groups, the Colombia Revolutionary Armed Forces (FARC), to bring an end to the internal conflict and violence.¹⁷ This was strongly supported by the EU, which played an important role as an observer during these negotiations.¹⁸ The Peace Agreement was signed in 2016, and the EU continues to assist Colombia financially, in the implementation of the Peace Agreement.¹⁹

Peru has a population of 34.0 million²⁰ and GDP per capita of 7,125.8 USD.²¹ Exports of goods and services constitute 29.3% of GDP.²² As with Colombia, it is classified as a 'high-income country' by the World Bank.²³ Peru benefitted from the EU's GSP Plus Scheme,²⁴ but ceased to be a beneficiary from 1

¹⁶ See G Hoskin, 'Belief Systems of Colombia Political Party Activists' (1979) 21 JISWA 481, 484; M Palacios, *Between Legitimacy and Violence: A History of Colombia, 1875 – 2002* (R Stoller tr, DUP 2006) chs 4-5; L Reales, 'Ethnic Minorities and Human Rights Violations in the Afro-Colombian Case' (2011) 22 *Revista Latinoamericana de Derechos Humanos* 153, 171.

¹⁷ See A Narino, 'Prospects for Peace: Negotiations with FARC' (2014) 68 JIA 221; J Bustamante-Reyes, 'Colombia's path to peace' (2017) 42 NZIR 14, 14.

¹⁸ Beaumont et al (n 6) 4; J Amaya-Panche, 'Implementing the Peace Agreement in Colombia: Challenges for peacebuilding and reconciliation' (2021) <<https://www.iss.europa.eu/content/implementing-peace-agreement-colombia>> accessed 31 July 2023, 5.

¹⁹ Beaumont et al (n 6) 4, 22; Amaya-Panche (n 18) 5.

²⁰ World Bank, 'Population, total' (n 10).

²¹ World Bank, 'GDP per capita (current US\$)' (n 11).

²² World Bank, 'Exports of goods and services (% of GDP)' (n 12).

²³ World Bank, 'World Bank Country and Lending Groups' (n 13).

²⁴ The GSP Plus scheme provides zero duties for 66% of the EU tariff lines, in return for ratification and effective implementation of 27 international conventions. See Commission Delegated Regulation (EU) No 155/2013 of 18 December 2012 establishing rules related to

January 2016 as a result of its economic growth.²⁵ Similar to Colombia, Peru's history is marked by a high degree of political instability and violence, including military juntas, Fujimori's authoritarian-like presidency throughout the 1990s, drug trafficking, and guerrilla insurgencies that were mainly led by the Shining Path and the Tupac Amaru Revolutionary Movement (TARM).²⁶ Although the scale of Peru's guerrilla movements was not as large as that of Colombia,²⁷ their activities are still carried out in small scale even today.²⁸

As members of the Andean Community, both Colombia and Peru maintain close regional economic cooperation. They were original members of the Andean Group, which was established in 1969 to promote regional economic integration.²⁹ Inspired by the European integration, the Andean Group created

the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences [2013] OJ L 48/5; Commission, 'Generalised Scheme of Preferences' (n 14).

²⁵ Commission Delegated Regulation (EU) No 1015/2014 of 22 July 2014 amending Annexes II and III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preference, and repealing Commission Delegated Regulation (EU) No 154.2013 [2014] OJ L 283/20.

²⁶ C McClintock, 'The War on Drugs: The Peruvian Case' (1988) 30 JISWA 127, 128, 136-138; DS Palmer, 'Peru, the Drug Business and Shining Path: Between Scylla and Charybdis?' (1992) 34 JISWA 65, 66-69; J Crabtree, 'The Collapse of Fujimorismo: Authoritarianism and its Limits' (2001) 20 Bulletin of Latin American Research 287, 293-297; C Hunefeldt, *Brief History of Peru* (2nd edn, Facts on File 2010) 214-230, 235-236.

²⁷ HA Holley, 'Latin America in the 1960s' (1971) 13 BSLAS 36, 45.

²⁸ For example, see BBC, 'Peru's Shining Path kills 16, including children, ahead of polls' (2021) <<https://www.bbc.co.uk/news/world-latin-america-57239680>> accessed 31 July 2023; VAO, 'At Least 6 Die in Peru Clash With Shining Path' (2023) <<https://www.voanews.com/a/at-least-6-die-in-peru-clash-with-shining-path/7011720.html>> accessed 31 July 2023; C Newton, 'Shining Path on the Offensive in Peru, Again' (2023) <<https://insightcrime.org/news/shining-path-offensive-peru-again/>> accessed 31 July 2023.

²⁹ The other original members were Bolivia, Chile and Ecuador, with Venezuela later joining the group in 1973. Chile withdrew from the Andean Group in 1976. After the Andean Group renamed itself as the Andean Community in 1996, Venezuela also withdrew in 2006. See

the Andean Free Trade Area in 1993 and renamed itself as the ‘Andean Community’ in 1996, reflecting its aim to ‘promote greater economic, commercial and political integration’.³⁰ The Andean Community, together with the other main trade bloc in South America, the Mercosur, cooperate politically with the EU through the Euro-Latin American Parliamentary Assembly (EuroLat), which provides a forum for dialogue between the European Parliament and different regional parliaments of Latin America.³¹ This suggests that Colombia and Peru enjoy closer political cooperation with EU Member States, partly resulting from their historical ties, compared to Korea. In terms of trade, the EU is the third largest trading partner for Colombia and Peru.³² Agricultural products constitute the largest part of EU’s imports from Colombia and Peru, while manufactured goods and chemical products constitute the largest part of EU’s exports to these countries.³³

2.2. Economic and Social Rights (ESR) in Colombia and Peru

Holley (n 27) 39; WP Avery, ‘The Politics of Crisis and Cooperation in the Andean Group’ (1983) 17 JDA 155, 158-161.

³⁰ N Heath-Brown, ‘Andean Community’ in N Heath-Brown (ed), *The Statesman’s Yearbook 2016* (Palgrave Macmillan 2015) 63; Dominguez (n 4) 137.

³¹ BT Luciano, ‘Inter-parliamentary European Union-Latin American Caribbean relations and the increasing political convergence among Latin American regional parliaments (2006 – 15)’ (2007) 37 *Parliaments, Estates and Representation* 318, 319.

³² EEAS, ‘The European Union and Colombia’ (2021) <https://www.eeas.europa.eu/colombia/european-union-and-colombia_en?s=160> accessed 31 July 2023; EEAS, ‘The European Union and Peru’ (2021) <https://www.eeas.europa.eu/peru/european-union-and-peru_en?s=162> accessed 31 July 2023.

³³ Commission, ‘EU-Colombia-Peru-Ecuador Trade Agreement’ (2023) <<https://trade.ec.europa.eu/access-to-markets/en/content/eu-colombia-peru-ecuador-trade-agreement>> accessed 31 July 2023.

Colombia and Peru are parties to various international human rights instruments which seek to protect ESR, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),³⁴ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),³⁵ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),³⁶ the Convention on the Protection of the Rights of All Migrant Workers,³⁷ the Convention on the Rights of Persons with Disabilities (CRPD),³⁸ and the Convention on the Rights of the Child (CRC).³⁹ Both have ratified all the fundamental ILO Conventions, apart from C155 Occupational Safety and Health Convention⁴⁰ and C187 Promotional Framework for Occupational Safety and Health Convention.⁴¹

³⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1978) 993 UNTS 3 (ICESCR).

³⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

³⁶ Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

³⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) UN Doc A/RES/45/158.

³⁸ Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) UN Doc A/RES/61/106 (CRPD).

³⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

⁴⁰ Occupational Safety and Health Convention, C155 (adopted 22 June 1981, entered into force 11 August 1983).

⁴¹ Promotional Framework for Occupational Safety and Health Convention, C187 (adopted 15 June 2006, entered into force 20 February 2009).

As members of the Andean Community, they are also signatories to the Andean Charter for the Promotion and Protection of Human Rights (Andean Charter), which was adopted by the Andean Community in 2002.⁴² Although the Andean Charter is not a legally binding instrument, ESR that are included in the Andean Charter are given constitutional recognition in Colombia and Peru.⁴³ Examples of such rights include the right to just and satisfactory working conditions,⁴⁴ the right to form and join trade unions and to enjoy other labour rights,⁴⁵ the right to an adequate standard of living,⁴⁶ and the right to the highest attainable standard of physical and mental health.⁴⁷

In addition, Colombia and Peru are members of the Organisation of American States (OAS), which was created in 1948 to promote peace and stability and to protect sovereignty, territorial integrity and independence of American countries, following the end of the WWII.⁴⁸ The OAS adopted the American Declaration of the Rights and Duties of Man on 2 May 1948, which is the first regional human rights instrument that sought to protect civil and political rights

⁴² Andean Charter for the Promotion and Protection of Human Rights (signed 26 July 2002) (Andean Charter).

⁴³ Constitution of Colombia (1991) arts 37-39, 49-55; Constitution of Peru (1993) arts 7-11, 24-29.

⁴⁴ Andean Charter, art 24(2).

⁴⁵ *ibid* art 24(3).

⁴⁶ *ibid* art 24(6).

⁴⁷ *ibid* art 24(7).

⁴⁸ Charter of the Organisation of American States (signed 30 April 1948, entered into force 13 December 1951) (OAS Charter), preamble.

(CPR) and ESR.⁴⁹ Examples of ESR in the Declaration include, *inter alia*, the right to work,⁵⁰ the right to fair remuneration,⁵¹ the right to social security,⁵² the right to preservation of health and well-being,⁵³ and the right to leisure time.⁵⁴ Colombia and Peru are also signatories of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, which was adopted by the OAS in 2013.⁵⁵

In the last two years, Colombia and Peru have shown remarkable recovery from COVID-19 pandemic, owing to their monetary policies and cash transfers.⁵⁶ Although the unemployment rate in Colombia currently stands high at 10.7% of the labour force,⁵⁷ this is a significant decline from the peak of COVID-19 pandemic, where the figure was around 20%.⁵⁸ In Peru, the unemployment rate currently stands at 3.7%, which is lower than the average rate of EU Member

⁴⁹ American Declaration of the Rights and Duties of Man (adopted 2 May 1948). See RK Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 HRQ 856, 859.

⁵⁰ American Declaration of the Rights and Duties of Man (adopted 2 May 1948), art XV.

⁵¹ *ibid* art XV.

⁵² *ibid* art XVI.

⁵³ *ibid* art XI.

⁵⁴ *ibid* art XV.

⁵⁵ Inter-American Convention against racism, racial discrimination and related forms of intolerance (signed 5 Jun 2013, entered into force 11 November 2017).

⁵⁶ OECD, *OECD Economic Surveys: Colombia 2022* (OECD 2022) 10; World Bank, 'The World Bank in Peru' (2023) <<https://www.worldbank.org/en/country/peru/overview#1>> accessed 31 July 2023.

⁵⁷ World Bank, 'Unemployment, total (% of total labour force) (modeled ILO estimate)' (2023) <<https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS>> accessed 6 July 2023.

⁵⁸ OECD, *OECD Economic Surveys: Colombia 2022* (n 56) 21.

States (6.1%).⁵⁹ However, the labour markets in Colombia and Peru are still permeated by high labour informality.⁶⁰

Labour informality is typically characterised by economic activities which are carried outside formal arrangements and regulatory supervision.⁶¹ Examples include sweatshops, street vending, domestic workers and waste collectors. Labour informality in Colombia constitutes around 60% of the workforce,⁶² while it constitutes around 73% in Peru.⁶³ Although it has the benefit of providing opportunities for individuals to engage in economic activities even when they cannot find formal employment,⁶⁴ labour informality is closely

⁵⁹ World Bank, 'Unemployment, total' (n 57).

⁶⁰ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the sixth periodic report of Colombia' (2017) UN Doc E/C.12/COL/CO/6, para 30; OECD, *OECD Reviews of Pension Systems: Peru* (OECD 2019) 44, 74, 78; ILO, 'Lima's Gamarra market: The benefits of moving to formal economy' (2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_723278/lang--en/index.htm> accessed 31 July 2023; OHCHR, 'Situation of human rights in Colombia' (2022) UN Doc A/HRC/49/19, para 7; OECD, *OECD Economic Surveys: Colombia 2022* (n 56) 11; OECD, *Gender Equality in Peru: Towards a Better Sharing of Paid and Unpaid Work* (OECD 2022) 20.

⁶¹ ILO, 'Recommendation No. 204 concerning the Transition from the Informal to the Formal Economy' (2015) <https://www.ilo.org/ilc/ILCSessions/previous-sessions/104/texts-adopted/WCMS_377774/lang--en/index.htm> accessed 31 July 2023, para 2. See also BJ Miller, 'Living Outside the Law: How the Informal Economy Frustrates Enforcement of the Human Rights Regime for Billions of the World's Most Marginalized Citizens' (2007) 5 *NJIHR* 127, 128.

⁶² OECD, 'Tackling informality in Colombia with the social and solidarity economy' (2022) <<https://www.oecd.org/cfe/leed/social-economy/tackling-informality-in-colombia-with-the-social-and-solidarity-economy.htm>> accessed 31 July 2023.

⁶³ ILO, 'Lima's Gamarra market: The benefits of moving to formal economy' (n 60); M Silva-Penaherrera et al, 'Informal Employment, Working Conditions, and Self-Perceived Health in 3098 Peruvian Urban Workers' (2022) 19 *IJERPH* 6105, 6106.

⁶⁴ Miller (n 61) 147; IMF, 'The Informal Economy and Inclusive Growth' (2019) <<https://www.imf.org/en/News/Articles/2019/11/14/sp111419-the-informal-economy-and-inclusive-growth>> accessed 31 July 2023.

linked to low incomes, limited access to welfare benefits, and a lack of protection as regards safe and favourable working conditions.⁶⁵ It thus directly affects the right to just and favourable conditions of work, the right to social security, and the right to an adequate standard of living. Therefore, when more than half of a country's workforce are in informal labour with inadequate social protection, it can become major hindrance to ESR.

In addition to labour informality, Colombia and Peru continue to face high levels of inequality.⁶⁶ In Colombia, the rate of labour force participation in men is 76%,⁶⁷ whereas the figure is only 51% for women.⁶⁸ Women are overrepresented in informal labour,⁶⁹ and those in informal labour have limited

⁶⁵ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the sixth periodic report of Colombia' (n 60) para 30; Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding observations on the ninth periodic report of Colombia' (2019) UN Doc CEDAW/C/COL/CO/9, para 39; OECD, *OECD Reviews of Pension Systems: Peru* (n 60) 44, 74; OECD, *Gender Equality in Peru* (n 60) 8. See also BJ Miller (n 61) 133, 140-145.

⁶⁶ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the sixth periodic report of Colombia' (n 60) paras 19-20, 25, 47-48; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru' (2018) UN Doc CERD/C/PER/CO/22-23, para 13; Working Group of Experts on People of African Descent, 'Visit to Peru' (2020) UN Doc A/HRC/45/44/Add.2, para 100; OHCHR, 'Situation of human rights in Colombia' (n 60), paras 3, 6-7; OECD, *OECD Economic Surveys: Colombia 2022* (n 56) 11, 17, 95, 98.

⁶⁷ World Bank, 'Labor force participation rate, male (% of male population ages 15+) (modeled ILO estimate)' (2023) <<https://data.worldbank.org/indicator/SL.TLF.CACT.MA.ZS>> accessed 31 July 2023.

⁶⁸ World Bank, 'Labor force participation rate, female (% of female population ages 15+) (modeled ILO estimate)' (2023) <<https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS>> accessed 31 July 2023.

⁶⁹ Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding observations on the ninth periodic report of Colombia' (n 65) para 35; OECD, *OECD Economic Surveys: Colombia 2022* (n 56) 83.

access to social security, such as maternity protection.⁷⁰ According to the World Bank, women in Colombia ‘spend 1.7 times as much time on unpaid domestic and care work than men’,⁷¹ reflecting disproportionate assumption of care responsibilities.⁷² Colombia lacks legislation which targets the structural inequalities faced by women particularly belonging to vulnerable groups, including those from Afro-Colombian, indigenous, and rural communities.⁷³ In addition to gender inequality, the protection of asylum seekers in Colombia is weak, as their right to work and access to social assistance is not recognised by Colombia’s asylum regulations.⁷⁴

In Peru, the rate of labour force participation in men is 78%,⁷⁵ whereas the figure is 66% for women.⁷⁶ As with the case of Colombia, women are less likely to engage in paid labour and full-time labour, while assuming disproportionate

⁷⁰ Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the sixth periodic report of Colombia’ (n 60) para 30; Committee on the Elimination of All Forms of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Colombia’ (n 65) para 39.

⁷¹ World Bank, ‘Colombia’ (2023) <<https://genderdata.worldbank.org/countries/colombia/>> accessed 31 July 2023.

⁷² Committee on the Elimination of All Forms of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Colombia’ (n 65) para 39.

⁷³ Committee on the Elimination of All Forms of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Colombia’ (n 65) paras 11, 12(b). See also Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the sixth periodic report of Colombia’ (n 60) paras 23-26; Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined seventeenth to nineteenth periodic reports of Colombia’ (2020) UN Doc CERD/C/COL/CO/17-19, paras 6,7, 16, 24-25.

⁷⁴ Committee on the Elimination of All Forms of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Colombia’ (n 65) para 45.

⁷⁵ World Bank, ‘Labor force participation rate, male’ (n 67).

⁷⁶ World Bank, ‘Labor force participation rate, female’ (n 68).

share of domestic responsibilities.⁷⁷ According to OECD, women in Peru ‘spend 24 more hours per week on unpaid tasks than men do’.⁷⁸ In addition, Peru lacks comprehensive anti-discrimination legislation which tackles discrimination on grounds of race.⁷⁹ Migrants, refugees and asylum seekers continue to face structural inequalities, reflected by difficulties in accessing public services, such as healthcare and quality education.⁸⁰

Discrimination is also stark in relation to indigenous communities, Afro-Colombian communities and Afro-Peruvian communities.⁸¹ One demographic feature which distinguishes Colombia and Peru from Korea is that indigenous

⁷⁷ Working Group on the issue of discrimination against women in law and practice, ‘Mission to Peru’ (2015) UN Doc A/HRC/29/40/Add.2, paras 44, 46; OECD, *Gender Equality in Peru* (n 60) 8, 25. See also Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Peru’ (2022) UN Doc CEDAW/C/PER/CO/9, para 35(b).

⁷⁸ OECD, *Gender Equality in Peru* (n 60) 8.

⁷⁹ Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru’ (n 66) para 8. See also Working Group of Experts on People of African Descent, ‘Visit to Peru’ (n 66) para 104.

⁸⁰ Committee on the Rights of the Child, ‘Concluding observations on the combined fourth and fifth periodic reports of Peru’ (2016) UN Doc CRC/C/PER/CO/4-5, para 63; Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru’ (n 66) para 36; Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Peru’ (n 77) para 45.

⁸¹ Committee on the Rights of the Child, ‘Concluding observations on the combined fourth and fifth periodic reports of Peru’ (n 80) para 27(b); Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the sixth periodic report of Colombia’ (n 60) para 17; Committee on the Elimination of All Forms of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Colombia’ (n 65) paras 33(b), 41; Working Group of Experts on People of African Descent, ‘Visit to Peru’ (n 66) paras 21-39; Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Peru’ (n 77) paras 33(a), 35(a), 39; Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined seventeenth to nineteenth periodic reports of Colombia’ (n 73) para 18.

peoples and African descendants constitute a minority of their populations.⁸² These people were historically mistreated by Europeans, notably as regards the annexation of indigenous people's land during the colonial era, as well as slavery which lasted until the 1800s. Their struggles are still reflected today, as they are subjected to systematic discrimination and a lack of protection vis-à-vis their land rights.⁸³

Although the general right to land is not explicitly recognised by international human rights treaties, it is a fundamental component of protecting ESR, particularly the right to adequate standards of living, as recognised by the UN High Commissioner for Human Rights.⁸⁴ The Congress of Colombia passed the Victims and Land Restitution Law in 2011 to address the issue of land rights and internally displaced persons, but civil society organisations (CSOs) have

⁸² In Colombia, approximately 4.4% of the population are indigenous people and 10% are Afro-Colombians. In Peru, the figures are 25.8% and 4% respectively. See Andina, 'Peru: 30% of citizens identify as Indigenous or African Peruvian' (2018) <<https://andina.pe/ingles/noticia-peru-30-of-citizens-identify-as-indigenous-or-african-peruvian-724935.aspx>> accessed 31 July 2023; IWGIA, 'Indigenous World 2020: Colombia' (2020) <<https://www.iwgia.org/en/colombia/3618-iw-2020-colombia.html>> accessed 31 July 2023; Minority Rights, 'Colombia: Afro-Colombians' (2023) <<https://minorityrights.org/minorities/afro-colombians/>> accessed 31 July 2023.

⁸³ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the sixth periodic report of Colombia' (n 60) para 17; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru' (n 66) para 16; Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding observations on the ninth periodic report of Colombia' (n 65) para 41; Working Group of Experts on People of African Descent, 'Visit to Peru' (n 66) paras 21-39; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined seventeenth to nineteenth periodic reports of Colombia' (n 73) para 18.

⁸⁴ OHCHR, 'Reports of the United Nations High Commissioner for Human Rights' (2014) UN Doc E/2014/86, paras 10-12.

argued that the implementation have been very weak.⁸⁵ The Peace Agreement, signed by Colombia and FARC, consists of six agendas, the first of which is rural reform.⁸⁶ It seeks to address the structural inequalities in the access to land by facilitating land titling, reinstating the rights of victims of displacement, promoting fair land distribution, and improving the well-being of rural communities, including indigenous peoples. However, again, research suggests that the overall implementation of these provisions is rather slow, with a lack of political commitment from the Colombian government, as well as ‘continuous lobby by landowners and agribusiness unions’.⁸⁷ In Peru, the exploitation of natural resources by private companies, and the lack of prior consultation have negatively affected indigenous peoples and Afro-Peruvians’ enjoyment of their right to land, as well as their right to safe drinking water through pollution.⁸⁸ The lack of formal procedures for recognising ownership and land titling for indigenous peoples and Afro-Peruvians further hinders their right to adequate standard of living.⁸⁹

⁸⁵ Human Rights Watch, ‘Colombia: Events of 2018’ (2019) <<https://www.hrw.org/world-report/2019/country-chapters/colombia>> accessed 31 July 2023; La Via Campesina, ‘Colombia: The Long Road to Land Restitution’ (2022) <<https://viacampesina.org/en/colombia-the-long-road-to-land-restitution/>> accessed 31 July 2023.

⁸⁶ Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (signed 24 November 2016) (Peace Agreement), ch 1.

⁸⁷ N Beaumont et al (n 6) 9. See also Human Rights Watch, ‘Colombia: Events of 2018’ (n 85).

⁸⁸ Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru’ (n 66) paras 16, 20; Working Group of Experts on People of African Descent, ‘Visit to Peru’ (n 66) para 25.

⁸⁹ Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru’ (n 66) para 16; Working Group of Experts on People of African Descent, ‘Visit to Peru’ (n 66) paras 21, 61.

Finally, one of the issues of ESR that alarmed the European Parliament when the Commission was negotiating the EU-Colombia/Peru Trade Agreement concerns the rights of trade unions.⁹⁰ In Colombia, union members are frequently subjected to intimidation, torture, kidnapping and murder.⁹¹ It is found that more than 3,200 unionists were murdered between 1971 to 2018,⁹² and 22 unionists were murdered between March 2020 and April 2021.⁹³ In Peru, a ‘strong anti-union climate’,⁹⁴ which limits freedom of association in law and in practice, can be observed. In particular, the special legal regimes for the non-traditional export sectors allow indefinite renewal of short-term contracts, which hinder the right to freedom of association.⁹⁵ Furthermore, among the former workers, only 6% are unionised in the private sector, while only 13% are unionised in the public sector.⁹⁶ This is reported to be due to dismissals of and

⁹⁰ European Parliament, ‘EU trade agreement with Colombia and Peru (debate)’ (n 7).

⁹¹ Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the sixth periodic report of Colombia’ (n 60) para 39; Inter-American Commission on Human Rights, ‘Human Rights Defenders and Social Leaders in Colombia’ <<https://www.oas.org/en/iachr/reports/pdfs/colombiadefenders.pdf>> accessed 10 August 2023, ch 6.

⁹² Justice for Colombia, ‘Colombia again deadliest country for trade unionists in 2023: ITUC’ (2023) <<https://justiceforcolombia.org/news/colombia-again-deadliest-country-for-trade-unionists-in-2023-ituc/>> accessed 10 August 2023.

⁹³ Justice for Colombia, ‘With 22 murders, Colombia is again the world’s deadliest country for trade unionists’ (2021) <<https://justiceforcolombia.org/news/with-22-murders-colombia-is-again-worlds-deadliest-country-for-trade-unionists/>> accessed 10 August 2023.

⁹⁴ J Orbie, L van den Putte and D Martens, ‘The Impact of Labour Rights Commitments in the EU Trade Agreements: The Case of Peru’ (2017) 6 PG 6, 10.

⁹⁵ OHCHR, ‘Statement at the end of visit to Peru by the United Nations Working Group on Business and Human Rights’ (2017) <<https://www.ohchr.org/en/statements/2017/07/statement-end-visit-peru-united-nations-working-group-business-and-human-rights>> accessed 31 July 2023; OHCHR, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru’ (2018) A/HRC/38/48/Add.2, para 53.

⁹⁶ OHCHR, ‘Statement at the end of visit to Peru by the United Nations Working Group on

discrimination against trade unionists, suggesting the lack of legal protection for the rights to join trade unions.⁹⁷ As will be seen in Section 4 below, these issues were already the subject of heated debate among the Member of European Parliaments (MEPs) prior to the final adoption of the EU-Colombia/Peru Trade Agreement.

3. Human Rights Clause in EU-Colombia/Peru Trade Agreement

Before the signing of the EU-Colombia/Peru Trade Agreement, the EU's relations with Colombia and Peru was largely underpinned by the EU's inter-regionalist approach.⁹⁸ The EU-Andean Framework Cooperation Agreement, signed in 1993, provides the overall architecture for the interregional relations between the EU and the Andean Community.⁹⁹ It lays down the basis for cooperation between the two regions in various areas, such as trade, investment, services, finance, technology and intellectual property, with the Andean integration being one of the main objectives of the their economic cooperation.¹⁰⁰ The EU and the Andean Community further signed a Political

Business and Human Rights' (n 95); OHCHR, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru' (n 95).

⁹⁷ OHCHR, 'Statement at the end of visit to Peru by the United Nations Working Group on Business and Human Rights' (n 95); OHCHR, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru' (n 95).

⁹⁸ See Szegedy-Maszak (n 4) 220, 229-230, 234-235.

⁹⁹ Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its member countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela [1998] OJ L 127/11 (EU-Andean Framework Cooperation Agreement).

¹⁰⁰ EU-Andean Framework Cooperation Agreement, preamble, art 3(1)(h). See also AW Tizon, 'Relations between the Andean Community and European Union' (2005) 58 *Studia*

Dialogue and Co-operation Agreement in 2003,¹⁰¹ which envisages that the parties would negotiate a bi-regional association agreement, which would also incorporate a bi-regional trade agreement.¹⁰² The negotiations began after the EU-Latin America Summit of 2006,¹⁰³ but, due to the difficulty in reaching a common position within the Andean Community, it became clear that the conclusion of the agreement would be infeasible.¹⁰⁴

As a result, Colombia and Peru requested for bilateral trade negotiations with the EU, and the first round of negotiations took place on 13 February 2009.¹⁰⁵ Ecuador initially joined the negotiations until the fifth round in 2009 but suspended its participation thereafter, claiming it needed to review the impact of the trade agreement on its new constitution.¹⁰⁶ Therefore, the final agreement was signed by the EU on the one hand, and Colombia and Peru on the other, on 26 June 2012. However, the parties envisaged that the rest of the Andean members would accede to the agreement in the future,¹⁰⁷ and in fact Ecuador

Diplomatica 61, 62.

¹⁰¹ Proposal for a Council Decision on the conclusion of a Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its member countries, the Republics of Bolivia, Colombia, Ecuador, Peru and the Bolivarian Republic of Venezuela, of the other part (Proposal) COM(2003) 695 final.

¹⁰² *ibid* art 2(2).

¹⁰³ EU-LAC, 'IV EU-LAC Summit, Vienna Declaration, Vienna 12 May 2006' (2006) <<https://intranet.eulacfoundation.org/en/content/iv-eu-lac-summit-vienna-declaration-vienna-12-may-2006>> accessed 31 July 2023, para 31.

¹⁰⁴ Szegedy-Maszak (n 4) 237-238; Dominguez (n 4) 138-139.

¹⁰⁵ Szegedy-Maszak (n 4) 220; Dominguez (n 4) 139.

¹⁰⁶ See Szegedy-Maszak (n 4) 238-239; Dominguez (n 4) 139.

¹⁰⁷ Commission, 'Andean Community' (2023) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/andean-community_en> accessed 31

acceded to the EU-Colombia/Peru Trade Agreement in November 2016.¹⁰⁸ As with the EU-Korea Trade Agreement, the EU-Colombia/Peru Trade Agreement is a new generation trade agreement, covering not only trade in goods and services, but also investment, intellectual property rights, competition and procurement. It was signed by the EU on the basis of Articles 91 and 100(2) TFEU concerning transport, as well as Article 207(4) TFEU concerning the common commercial policy. Like the EU-Korea Trade Agreement, it is a mixed agreement, meaning that both the EU and the Member States are joint parties.

Unlike the EU-Korea Trade Agreement, the ratification of the EU-Colombia/Peru Trade Agreement was very controversial, particularly within the European Parliament. On the one hand, some MEPs were of the view that approving the Trade Agreement would mean turning a ‘blind eye’ to the human rights situations in Colombia and Peru,¹⁰⁹ and argued that there should be a stronger monitoring mechanism to ensure that the Trade Agreement could positively contribute towards the advancement of human rights.¹¹⁰ Concerns were particularly raised in relation to the countries’ informal economy, the living

July 2023.

¹⁰⁸ Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession to Ecuador [2016] OJ L 356/3.

¹⁰⁹ S Keller, ‘EU Free Trade Agreement: Proposed roadmap fails to resolve human rights issues with Colombia and Peru trade deal’ (2012) <<https://www.greens-efa.eu/en/article/press/eu-free-trade-agreement>> accessed 31 July 2023.

¹¹⁰ See arguments presented by Bernd Lange, Willy Meyer, Gay Mitchell, Evelyn Regner, and Ana Miranda in: European Parliament, ‘EU trade agreement with Colombia and Peru (debate)’ (n 7).

conditions of the populations, and the attacks on trade unions.¹¹¹ On the other hand, other MEPs and the Commission argued that the economic benefits of the Trade Agreement could positively contribute to the human rights situations in Colombia and Peru.¹¹² The Commission particularly relied on the HRC as a mechanism that ensures human rights are respected under the Trade Agreement.¹¹³ Thus, following a heated debate, the European Parliament resolution of 13 June 2012 required Colombia and Peru to provide roadmaps on safeguarding human rights,¹¹⁴ and, after both countries submitted their institutional and legislative plans of action,¹¹⁵ the European Parliament gave its consent to the Trade Agreement on 11 December 2012.¹¹⁶

The EU-Colombia/Peru Trade Agreement contains the standard HRC, which is largely modelled on the 1995 Commission Communication.¹¹⁷ The HRC

¹¹¹ European Parliament, ‘EU trade agreement with Colombia and Peru (debate)’ (n 7).

¹¹² See arguments presented by Godelieve Quisthoudt-Rowohl, Izaskun Bilbao Barandica, and Pablo Zalba Bidegain in: European Parliament, ‘EU trade agreement with Colombia and Peru (debate)’ (n 7).

¹¹³ See argument presented by Karel De Gucht in: European Parliament, ‘EU trade agreement with Colombia and Peru (debate)’ (n 7).

¹¹⁴ European Parliament, ‘EU trade agreement with Colombia and Peru’ (res) P7_TA(2012)0249, para 15.

¹¹⁵ European Parliament, ‘EU trade relations with Latin America: Results and challenges in implementing the EU-Colombia/Peru Trade Agreement’ (2016) <[https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU\(2016\)534992](https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2016)534992)> accessed 31 July 2023, 39.

¹¹⁶ European Parliament, ‘EU/Colombia and Peru Trade Agreement’ (2012) <<https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1239160&t=e&l=en>> accessed 31 July 2023.

¹¹⁷ Commission, ‘On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’ (Communication) COM(95) 216 final, 12-13.

consists of: preambular reference, an essential clause, and a non-execution clause, which also contains an interpretive provision in itself. Firstly, the preamble reaffirms the parties' commitment to the UN Charter¹¹⁸ and the Universal Declaration of Human Rights (UDHR),¹¹⁹ and refers to 'respect of labour rights' as one of the objectives of implementing the Trade Agreement.

Secondly, the essential clause is found in Article 1:

Respect for democratic principles and fundamental human rights, as laid down in the [UDHR] and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement.

In terms of what constitutes 'essential elements', it is clear that democratic principles, human rights and the rule of law all constitute essential elements. However, similar to the EU-Korea Framework Agreement, there is in fact another essential element which is not mentioned in Article 1 but is instead mentioned in Article 2: the countering of proliferation of weapons of mass destruction (WMD). As mentioned in Chapter Six, the EU has been increasingly incorporating the countering of the proliferation of WMD as an essential element in its trade agreements since 2003, as a result of the European Security Strategy.¹²⁰

¹¹⁸ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

¹¹⁹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

¹²⁰ Council of the European Union, 'A Secure Europe in a Better World: European Security Strategy' (2003) 15895/03, 5. See F Martines, 'Human Rights Clauses in EU Agreements' in S

In terms of the normative basis for the essential elements, the UDHR is the only instrument referred to by the essential element clause. While the UDHR suggests that ESR are included within the scope of HRC, it is questionable why the clause makes no reference to other instruments. It may be because the agreement envisages future accession of the other Andean countries, which renders it necessary to avoid making reference to specific instruments that those member countries would not have ratified at the time. However, although the omission of *specific* instruments is understandable, it is difficult to see why the clause does not include the phrase, ‘other relevant human rights instruments’. As seen in Chapter Six, this phrase was included in the essential element clause of the EU-Korea Framework Agreement,¹²¹ and it has the benefit of allowing the HRC to incorporate a broader normative scope, leaving room open for future ratification of other instruments by the parties. Therefore, this omission can be seen as a lack of coherence in the EU’s formulation of HRC with different countries.

Thirdly, the non-execution clause is found in Article 8(3), which states:

Without prejudice to the existing mechanisms for political dialogue between the Parties, any Party may immediately adopt appropriate measures in

Poli (ed), *Protecting Human Rights in the European Union’s External Relations* (ASSER Institute 2016) CLEER Papers 2016/5, <<https://www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20165-poli-ed/>> accessed 7 July 2023, 42.

¹²¹ Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [2013] OJ L 20/2 (EU-Korea Framework Agreement), art 1(1).

accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement. The latter Party may ask for an urgent meeting to be called to bring the Parties concerned together within 15 days for a thorough examination of the situation with a view to seeking an acceptable solution. The measures will be proportional to the violation. Priority will be given those which least disturb the functioning of this Agreement. These measures shall be revoked as soon as the reasons for their adoption have ceased to exist.

Unlike the EU-Korea Trade Agreement, the EU-Colombia/Peru Trade Agreement does not contain an Interpretative Declaration which links the non-execution clause to the essential element clause.¹²² This is because Article 8(3) makes clear that any violations of the essential elements can immediately trigger appropriate measures. The appropriate measures which the parties may take are subject to similar limitations as those under the EU-Korea Framework Agreement. They must be ‘in accordance with international law’, proportionate to the violations, and priority must be given to ‘those which least disturb the functioning of this Agreement’.¹²³ Therefore, suspension of the agreement would be the last resort and, as mentioned in Chapters Five and Six, the EU rarely invokes non-execution clauses to suspend its agreements with third countries.

¹²² See Joint Interpretative Declaration Concerning Articles 45 and 46, annexed to EU-Korea Framework Agreement.

¹²³ EU-Colombia/Peru Trade Agreement, art 8(3).

As in the case of EU-Korea Trade Agreement, the HRC in the EU-Colombia/Peru Trade Agreement is complemented by the TSD Chapter to strengthen protection of ESR.¹²⁴ Although its substantive provisions focus only on labour and environmental standards, the TSD Chapter opens by referring to the parties' general commitment to sustainable development under various international instruments, which encompass the concept of sustainable development in all its economic, social and environmental dimensions.¹²⁵

For the purpose of protection of ESR, the relevant provisions in the TSD Chapter concern labour standards. The main substantive obligation is provided in Article 269(3), which requires the parties to promote and effectively implement, in their laws and practice, the core labour standards as laid down by the fundamental ILO Conventions. These standards are the same as the ones that have been observed in the EU-Korea Trade Agreement, 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'.¹²⁶ Therefore, as with the EU-Korea Trade Agreement, the eight fundamental ILO Conventions¹²⁷ constitute the main reference points for the parties' obligations regarding labour standards.

¹²⁴ *ibid* Title IX.

¹²⁵ *ibid* art 267(1).

¹²⁶ *ibid* art 269(3).

¹²⁷ Forced Labour Convention, C29 (adopted 28 June 1930, entered into force 1 May 1932); Freedom of Association and Protection of the Right to Organise Convention, C87 (adopted 9 July 1948, entered into force 4 July 1950); Right to Organise and Collective Bargaining

However, as seen in Chapter Six, the EU-Korea Trade Agreement divides the obligations into three categories: to respect fundamental principles of core labour rights, to effectively implement the ILO Conventions which the parties have ratified, and to make continued and sustained efforts towards ratifying the fundamental ILO Conventions.¹²⁸ In contrast, the EU-Colombia/Peru Trade Agreement does not divide the obligations into such categories. This can be attributed to the fact that, unlike Korea, both Colombia and Peru have already ratified all the eight fundamental ILO Conventions. Therefore, the main focus is on promotion and the effective implementation of their obligations under those Conventions. However, whereas Korea is also obliged to make continuous and sustained efforts towards ratifying ‘up-to-date’ ILO Conventions,¹²⁹ the EU-Colombia/Peru Trade Agreement does not explicitly require such efforts to be made. Instead, the parties are simply required to ‘exchange information and respective situation as regards the ratification’ of the up-to-date ILO Conventions.¹³⁰ In light of this watered down obligation, it is difficult to expect

Convention, C98 (adopted 1 July 1949, entered into force 18 July 1951); Equal Remuneration Convention, C100 (adopted 29 June 1951, entered into force 23 May 1953); Abolition of Forced Labour Convention, C105 (adopted 25 June 1957, entered into force 17 January 1959); Discrimination (Employment and Occupation) Convention, C111 (adopted 25 June 1958, entered into force 15 June 1960); Minimum Wage Convention, C138 (adopted 26 June 1973, entered into force 19 June 1976); Worst Forms of Child Labour Convention, C182 (adopted 17 June 1999, entered into force 19 November 2000).

¹²⁸ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6 (EU-Korea Trade Agreement), art 13.4.3.

¹²⁹ *ibid* art 13.4.3.

¹³⁰ EU-Colombia/Peru Trade Agreement, art 269(4).

that the issue of ratification of the up-to-date ILO Conventions would ever constitute a subject of formal dispute settlement under the TSD Chapter.

Institutionally, the Sub-committee on TSD (TSD Sub-committee), comprising ‘high level representatives from the administrations of each Party’, has been established to oversee the implementation of the TSD Chapter.¹³¹ The EU-Colombia/Peru/Ecuador Domestic Advisory Group (DAG), comprising of civil society groups from each party, is also established to complement the work of the TSD Sub-committee, by submitting opinions and participating in the civil society dialogue.¹³²

As with the EU-Korea Trade Agreement, disputes arising under the TSD Chapter are excluded from the general dispute settlement in Title XII,¹³³ which establishes an arbitration procedure.¹³⁴ Instead, Articles 283-285 provide a separate two-staged mechanism for resolving disputes arising under the TSD Chapter. The first stage involves government consultations, whereby the Parties ‘shall make every attempt to arrive at a mutually satisfactory resolution of the matter through dialogue and consultations’.¹³⁵ If the first stage fails, the parties may move onto the next stage, which involves the convening of the Group of

¹³¹ *ibid* art 280(2).

¹³² *ibid* arts 281-282.

¹³³ *ibid* art 285(5).

¹³⁴ *ibid* art 302.

¹³⁵ *ibid* art 283(1)-(2).

Experts.¹³⁶ After hearing the Parties' submissions, the Group of Experts are to present a report, containing its recommendations, in accordance with Article 285. The implementation of these recommendations would be monitored by the TSD Sub-committee.¹³⁷ However, these recommendations are not legally binding, and the party concerned only has an obligation to inform the TSD Sub-committee of 'its *intentions* as regards the recommendations'.¹³⁸ In other words, it can be argued that the party concerned may feel insufficient pressure to implement these recommendations in the absence of stronger provisions for enforcement.

However, it is submitted that the Group of Experts' recommendations would still ensure a level of enforceability in practice, since the failure to comply with their recommendations may negatively affect the parties' relations and draw international attention, thereby placing the party's international reputation at stake.¹³⁹ Moreover, the obligations under the TSD Chapter must be read in light of HRC. Insofar core labour rights fall within the scope of ESR, duly taking into account the Group of Experts' recommendations could signify the parties' compliance with their obligations under HRC.

¹³⁶ *ibid* art 284.

¹³⁷ *ibid* art 285(4).

¹³⁸ *ibid* art 285(4) (emphasis added).

¹³⁹ See JS Han, 'The EU-Korea Labour Dispute: A Critical Analysis of the EU's Approach' (2021) 26 *EFAR* 531, 535.

4. The EU's promotion of economic and social rights through the human rights clause in practice

4.1. Committee meetings and civil society participation

As mentioned in Chapter Six, human rights dialogue is one of the main positive functions of HRC. Unlike in the case of EU-Korea relations where the EU and Korea hold human rights dialogue within the framework of the EU-Korea Framework Agreement, there is no established human rights consultation mechanism set for all the parties of the EU-Colombia/Peru Trade Agreement. Instead, the EU has been holding human rights consultations with Colombia alone separately,¹⁴⁰ and, for Peru, human rights issues are discussed during the EU-Peru bilateral consultations.¹⁴¹ However, within the framework of the EU-Colombia/Peru Trade Agreement, the parties have been holding tripartite dialogue on issues of ESR through the institutions established under the Trade Agreement. The HRC informs the meetings of these institutions by virtue of Article 1 of the EU-Colombia/Peru Trade Agreement.

The Trade Committee is the main institution established under the EU-Colombia/Peru Trade Agreement to oversee the implementation of the

¹⁴⁰ See EEAS, 'The European Union and Colombia' (2021) <https://www.eeas.europa.eu/colombia/european-union-and-colombia_en?s=160> accessed 31 July 2023; EEAS, 'Colombia: Joint Press Statement on the 14th EU-Colombia Human Rights Dialogue' (2023) <https://www.eeas.europa.eu/eeas/colombia-joint-press-statement-14th-eu-colombia-human-rights-dialogue_en> accessed 31 July 2023.

¹⁴¹ See EEAS, 'EU and Peru hold high level bilateral consultations' (2019) <https://www.eeas.europa.eu/node/65204_en> accessed 31 July 2023; EEAS, 'The European Union and Peru' (2021) <https://www.eeas.europa.eu/peru/european-union-and-peru_en?s=162> accessed 31 July 2023.

Agreement.¹⁴² It is comprised of representatives from each party and meets annually to discuss the progress of the implementation.¹⁴³ Issues of labour rights have consistently featured in these meetings of the Trade Committee. For example, in relation to Colombia, the EU has consistently raised concerns regarding the widespread murders of trade unionists and violence against them.¹⁴⁴ In relation to Peru, concerns were particularly raised regarding child labour,¹⁴⁵ although the EU recognised Peru's effort in relation to labour informality and labour inspection.¹⁴⁶ However, apart from labour rights and labour informality, no other ESR have been explicitly discussed in the meetings of the Trade Committee. Given that the Trade Committee is the main institution overseeing the implementation of the EU-Colombia/Peru Trade Agreement, it is recommended that broader issues of ESR should be discussed more explicitly on the basis of HRC.

¹⁴² EU-Colombia/Peru Trade Agreement, arts 12-13.

¹⁴³ *ibid* art 12(1).

¹⁴⁴ Commission, 'Sixth meeting of the Colombia-Ecuador-Peru/EU Trade Committee' (2019) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/fea475e6-8d26-4ea1-b7a9-31c37be8167e?p=2&n=10&sort=modified_DESC> accessed 31 July 2023, 5; Commission, 'Seventh meeting of the Colombia-Ecuador-Peru/EU Trade Committee' (2020) https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/fea475e6-8d26-4ea1-b7a9-31c37be8167e?p=1&n=10&sort=modified_DESC> accessed 31 July 2023, 4-5; Commission, '8th Meeting of the Trade Committee: Trade Agreement Colombia-Ecuador-Peru/EU' (2021) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/fea475e6-8d26-4ea1-b7a9-31c37be8167e?p=1&n=10&sort=modified_DESC> accessed 31 July 2023, 8.

¹⁴⁵ Commission, '8th Meeting of the Trade Committee' (n 144) 8.

¹⁴⁶ *ibid*.

In addition to the Trade Committee, there are various sub-committees established under the EU-Colombia/Peru Trade Agreement, whose tasks are to monitor the implementation of different parts of the Trade Agreement.¹⁴⁷ Among these sub-committees, the TSD Sub-committee is the only sub-committee that has so far explicitly engaged with discussing ESR. Although Article 280(4) only requires it to meet ‘as necessary’ after the first year of the Trade Agreement entering into force, in practice the TSD Sub-committee has been holding meetings annually since 2014 to present their progresses made regarding labour rights and environmental protection.¹⁴⁸

When examining the minutes from each of those meetings, it is evident that both Colombia and Peru have taken a number of actions in order to promote labour rights in their countries each year. Examples of actions taken by Colombia include: National Policy for Decent Work 2018-2030 which focuses on tackling unemployment and labour informality¹⁴⁹; strengthening labour inspections, the number of which increased by 113% from 2010 to 2018¹⁵⁰; tackling violence

¹⁴⁷ EU-Colombia/Peru Trade Agreement, art 15.

¹⁴⁸ See EEAS, ‘The EU-Colombia/Peru/ Ecuador Domestic Advisory Group – Related Events’ (2023) <<https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-colombia-and-peru-fta/events>> accessed 31 July 2023.

¹⁴⁹ EESC, ‘Joint statement – 2nd meeting Sub-Committee on Trade and Sustainable Development’ (2015) <<https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-colombia-and-peru-fta/documents>> accessed 31 July 2023, 1; Commission, ‘Minutes of the Sub-Committee on Trade and Sustainable Development’ (2018) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/13387f3e-ebf0-4750-9781-6d7dbaf54d67?p=2&n=10&sort=modified_DESC> accessed 31 July 2023 (translated by the author), 6.

¹⁵⁰ EESC, ‘Joint statement – 2nd meeting Sub-Committee on Trade and Sustainable Development’ (n 149) 2; Commission, ‘Minutes of the Sub-Committee on Trade and

against trade unionists, which resulted in the decrease in the number of murder of trade unionists by 18% from 2019 to 2020¹⁵¹; and reduction of labour informality by 79.4% from 2017 to 2021.¹⁵² While recognising these efforts, the EU nevertheless recommended Colombia to continue its efforts regarding labour informality, labour inspection, elimination of child labour, and discrimination against women and indigenous peoples.¹⁵³ It has also encouraged Colombia to take further measures to combat violence against trade unionists, during the TSD-Sub-committee meetings in 2018, 2019, 2020 and 2021.¹⁵⁴ The EU's persistent encouragement in this regard can be seen as largely the result of complaints received from the European Parliament and civil society groups,

Sustainable Development' (n 149) 7.

¹⁵¹ EESC, 'Joint statement – 2nd meeting Sub-Committee on Trade and Sustainable Development' (n 149) 2; Commission, '8th Meeting of the Subcommittee on Trade and Sustainable Development between the European Union (EU) of the one part and Colombia, Ecuador and Peru, of the other part' (2021) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/13387f3e-ebf0-4750-9781-6d7dbaf54d67?p=1&n=10&sort=modified_DESC> accessed 31 July 2023, 3.

¹⁵² Commission, '8th Meeting of the Subcommittee on Trade and Sustainable Development' (n 151) 4.

¹⁵³ Commission, 'Minutes of the Sub-Committee on Trade and Sustainable Development' (n 149) 7; Commission, '6th Meeting of Colombia-Ecuador-Peru/EU Trade Agreement Sub-Committee on Trade and Sustainable Development' (2019) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/13387f3e-ebf0-4750-9781-6d7dbaf54d67?p=2&n=10&sort=modified_DESC> accessed 31 July 2023 (translated by the author), 3.

¹⁵⁴ Commission, 'Minutes of the Sub-Committee on Trade and Sustainable Development' (n 149) 7; Commission, '6th Meeting of Colombia-Ecuador-Peru/EU Trade Agreement Sub-Committee on Trade and Sustainable Development' (n 153) 3; Commission, '7th Meeting of the Subcommittee on Trade and Sustainable Development of the Trade Agreement between the European Union (EU), on the one part, and Colombia, Ecuador, and Peru, on the other part' (2020) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/13387f3e-ebf0-4750-9781-6d7dbaf54d67?p=1&n=10&sort=modified_DESC> accessed 31 July 2023 (translated by the author), 8; Commission, '8th Meeting of the Subcommittee on Trade and Sustainable Development' (n 151) 3.

which will be discussed in Section 4.3 below. Additionally, the EU indicated its plan to finance the project to strengthen labour inspection in the agricultural sector of Colombia's rural areas, in collaboration with the ILO.¹⁵⁵ Such finance assistance further demonstrates the EU's proactive measures within the scope of HRC.

Examples of actions taken by Peru include: the creation of the National Superintendency for Labour Inspection (SUNAFIL), which contributed to strengthening of labour inspection and formalisation¹⁵⁶; the creation of incentives for employers who meet the standards regarding prevention and eradication of child labour¹⁵⁷; the adoption of National Strategy for the Prevention & Eradication of Child Labour (ENPETI 2012-2021), which decreased the number of child labour by 5.6%¹⁵⁸; the adoption of a regulation for equal opportunities for persons with disabilities.¹⁵⁹ Again, while recognising these efforts, the EU raised concerns regarding persistent high levels of child labour and the need to include vulnerable sections of population in social

¹⁵⁵ Commission, 'Minutes of the Sub-Committee on Trade and Sustainable Development' (n 149) 7.

¹⁵⁶ EESC, 'Joint statement – 2nd meeting Sub-Committee on Trade and Sustainable Development' (n 149) 2; Commission, '6th Meeting of Colombia-Ecuador-Peru/EU Trade Agreement Sub-Committee on Trade and Sustainable Development' (n 153) 6.

¹⁵⁷ Commission, '6th Meeting of Colombia-Ecuador-Peru/EU Trade Agreement Sub-Committee on Trade and Sustainable Development' (n 153) 7.

¹⁵⁸ Commission, 'Minutes of the Sub-Committee on Trade and Sustainable Development' (n 149) 5; Commission, '6th Meeting of Colombia-Ecuador-Peru/EU Trade Agreement Sub-Committee on Trade and Sustainable Development' (n 153), 7.

¹⁵⁹ EESC, 'Joint statement – 1st meeting Sub-Committee on Trade and Sustainable Development' (2015) <<https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-colombia-and-peru-fta/documents>> accessed 31 July 2023, 3.

dialogue.¹⁶⁰ It further indicated its willingness to collaborate with Peru for the new survey on child labour and to organise a workshop on labour informality, thereby again demonstrating its active engagement to promote ESR in its partner countries.¹⁶¹

In addition to its annual meetings, the TSD Sub-committee also convenes a dialogue session with civil society groups each year, where the DAG participates in the discussion.¹⁶² The DAG explicitly recognises that the HRC underlies their activity and has been actively raising concerns regarding ESR during these sessions.¹⁶³ Examples of issues raised by the DAG include: the lack of effective implementation of the ILO Convention C169 on Indigenous and Tribal Peoples¹⁶⁴; the lack of titling for indigenous peoples' land¹⁶⁵; the Peruvian laws which promote investment at the cost of indigenous peoples' right relating to their land¹⁶⁶; the lack of protection regarding occupational health and safety¹⁶⁷; and freedom of association and the murders of trade union activists in

¹⁶⁰ Commission, '6th Meeting of Colombia-Ecuador-Peru/EU Trade Agreement Sub-Committee on Trade and Sustainable Development' (n 153) 8; Commission, '8th Meeting of the Subcommittee on Trade and Sustainable Development' (n 151) 9.

¹⁶¹ Commission, 'Minutes of the Sub-Committee on Trade and Sustainable Development' (n 149) 5.

¹⁶² EU-Colombia/Peru Trade Agreement, art 282.

¹⁶³ EESC, 'Joint declaration of the 2nd joint meeting of the EU, Colombia and Peru Domestic Advisory Groups and open session' (2016) <<https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-colombia-and-peru-fta/documents>> accessed 31 July 2023, 2.

¹⁶⁴ *ibid*, 2.

¹⁶⁵ *ibid* 2.

¹⁶⁶ *ibid* 1-2.

¹⁶⁷ EESC, 'Declaration of the EU Domestic Advisory Group under the EU Trade Agreement with Colombia, Ecuador and Peru ahead of the 2021 Joint Meetings' (2021) <<https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-colombia-and-peru->

Colombia.¹⁶⁸ As seen above, these issues raised by the DAG have been duly taken into account by the TSD Sub-committee during their meetings, thereby ensuring coherence between the work of civil society groups and the work of the TSD Sub-committee.

The TSD Sub-committee meetings therefore have the value of evidencing the parties' concrete efforts towards protecting ESR in light of the concerns of the DAG, as well as the EU's proactive engagement to assist the parties, by financing projects and organising workshops. The list of parties' efforts presented in these meetings are much more detailed and cover a wider range of rights, when compared to the meetings of the TSD Committee of the EU-Korea Trade Agreement. This may be partly due to the fact that there are more diverse issues of ESR in Colombia and Peru which have generated concerns in the EU institutions, including the European Parliament, and also partly due to the fact that the signing of the EU-Colombia/Peru Trade Agreement was controversial due to human rights issues, as mentioned in Section 3. By enabling parties to present their progress towards protecting labour rights in a detailed manner, the TSD Sub-committee meetings also allow the parties to share good practices. Therefore, the TSD Sub-committee meetings can be seen as a useful forum that incorporates the positive function of HRC.

fta/documents> accessed 31 July 2023, 1; EESC, 'Declaration of the EYU Domestic Advisory Group under the EU Trade Agreement with Colombia, Ecuador and Peru' (2022) <<https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-colombia-and-peru-fta/documents>> accessed 31 July 2023, 1.

¹⁶⁸ *ibid.*

4.2. Ex-post evaluation

As mentioned in Chapter Six, human rights analyses in the ex-post evaluations of EU trade agreements are one of the main functions of HRC. As in the case of EU-Korea Trade Agreement, there has been so far one ex-post evaluation that has been carried out in relation to the EU-Colombia/Peru Trade Agreement, and its final report was published in 2022.¹⁶⁹

The human rights analysis is presented in section 9 of the report, and this is complemented by the social analysis in section 7. The analysis is carried out based on literature review, the Computable General Equilibrium (CGE) results, and consultations with civil society organisations (CSOs) and other relevant stakeholders.¹⁷⁰ It begins by making reference to the parties' commitments under the HRC and the TSD Chapter, and reaffirms that the HRC establishes a binding legal obligation to respect human rights.¹⁷¹ However, it is unfortunate that the report states: 'Although this does not mean that the EU needs to enforce human rights obligations of other countries, the EU must ensure that it does not contribute to human rights violations in other countries'.¹⁷² This sentence gives

¹⁶⁹ Commission, 'Ex post evaluation of the implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador: Final Report – Vol.I: Main Report' (2022) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/42a7b37a-d21e-415e-8d28-7baf95f39a3e?p=1&n=10&sort=modified_DESC> accessed 31 July 2023.

¹⁷⁰ *ibid* 161.

¹⁷¹ *ibid* 162-163.

¹⁷² *ibid* 162-163.

the incorrect impression that the EU only has a negative obligation under the HRC not to violate human rights, rather than a positive obligation to promote human rights. Although it is true that the EU does not need to ‘enforce’ human rights obligations (it does not have competence to do so), the HRC sets the framework for the positive promotion of human rights, as discussed in Chapter Five. This interpretation is also consistent with the EU’s obligation to promote human rights in its external relations, under Articles 3(5) and 21 TEU. Therefore, it is recommended that the Commission refers to this positive obligation when referring to the HRC in its ex-post evaluations in the future.

As in the case of EU-Korea Trade Agreement, the range of human rights assessed in this report is limited in the sense that only a few rights have been chosen through a screening process for an in-depth review.¹⁷³ The purpose of the screening process is to determine which rights are most likely to be affected by the EU-Colombia/Peru Trade Agreement.¹⁷⁴ All the rights chosen for the analysis fall within the scope of ESR, which are: a) freedom of assembly and association; b) the rights of the child; and c) the right to water.¹⁷⁵ The analysis makes reference to various international instruments which the parties ratified, such as the ICSECR, the CEDAW, the CRC and the ILO Conventions, as the basis for the parties’ obligations to respect these rights.¹⁷⁶ Although these instruments are not explicitly referred to by the HRC as discussed in Section 3

¹⁷³ *ibid* 163-164.

¹⁷⁴ *ibid* 163-164.

¹⁷⁵ *ibid* 163.

¹⁷⁶ *ibid* 164-167.

above, the analysis explicitly states that the HRC covers standards ‘interpreted in accordance with the international human rights treaties binding on the Parties’.¹⁷⁷ This suggests that, from EU’s perspective, those treaties fall within the scope of the HRC. In this regard, it needs to be reiterated that the EU should have ensured more coherence in the wording of the HRC, as discussed in Section 3 above: Article 1 of the EU-Colombia/Peru Trade Agreement should have incorporated the phrase ‘other relevant human rights instruments’, with a view to leave room for instruments other than the UDHR to lay the normative basis for the parties’ obligations.

As for freedom of assembly and association, the report reflects the concerns already expressed in the meetings of the Trade Committee, the TSD Subcommittee and the DAG, discussed in Section 4.1 above, by pointing to the high number of murders and attacks against trade unionists in Colombia, although it recognises that the number has decreased.¹⁷⁸ Furthermore, it raises concerns regarding the practice of negotiating collective agreements with non-unionised workers, which can have negative impact on joining and operating trade unions.¹⁷⁹ It recognises that, even though the Trade Agreement could have had negative impact by exposing industrial sectors ‘to more competitive pressure to cut costs’, such impact is assessed to be small.¹⁸⁰ On the contrary, it points to the impact of the EU’s proactive measures, including assistance projects,

¹⁷⁷ *ibid* 162.

¹⁷⁸ *ibid* 129, 164.

¹⁷⁹ *ibid* 129, 164.

¹⁸⁰ *ibid* 164.

capacity building, the TSD Sub-committee meetings and civil society engagement, suggesting that the EU's positive promotion of labour rights has contributed to Colombia's progress in relation to freedom of assembly and association.¹⁸¹ These findings may help understand why, unlike in the case of EU-Korea labour dispute, the EU has not yet invoked the dispute settlement mechanism under the TSD Chapter, despite its persistent concerns regarding violence against trade unionists.

In relation to Peru, the report points to the challenges faced by trade unions, particularly regarding the widespread practice of hiring workers on temporary contracts in agricultural sectors, as well as in other non-traditional export sectors.¹⁸² Such practice is seen to be hindering workers from establishing and joining trade unions.¹⁸³ As will be seen in Section 4.3 below, this issue was already raised in the complaints made to the EU by civil society groups. Although Peru has made legislative changes in 2019-2020 to address this issue,¹⁸⁴ as the report recognises, it is still to be seen whether such changes have any meaningful impact on tackling the issue of temporary contracts.¹⁸⁵ As far as stakeholder interviews are concerned, it is reported that the Trade Agreement has increased competition which led to the increased the number of temporary

¹⁸¹ *ibid* 164.

¹⁸² *ibid* 114, 129, 165.

¹⁸³ *ibid* 114, 129, 165.

¹⁸⁴ *ibid* 119, 129, 165.

¹⁸⁵ *ibid* 165.

contracts.¹⁸⁶ According to the economic analysis of the report, the Trade Agreement contributed to the growth in Peru's agricultural sectors, which appears to have contributed to the increase in the number of temporary contracts.¹⁸⁷ Therefore, within the positive function of HRC, it can be expected that the EU will follow up on the issue of temporary contracts and the effective implementation of the legislative changes of 2019-2020.

As for the rights of the child, the analysis is mainly focused on child labour. For Colombia, the report notes a decrease in the share of child labour from 13% in 2011 to 4.9% in 2020.¹⁸⁸ However, it still points out to a high share of child labour, particularly in the agricultural sector, which stood at 44.1% in 2020.¹⁸⁹ For Peru, the issue of child labour has been the subject of ongoing dialogue within the TSD Sub-committee meetings as seen in Section 4.1 above. However, although it points to the high level of child labour in Peru, the report recognises that the proportion of child labour decreased from 14.8% in 2012 to 12% in 2020, and that the proportion of children 'engaged in hazardous work decreased from 6.3% in 2012 to 4.2% in 2020'.¹⁹⁰ This can be attributed to the various measures taken by Peru, and some of these measures were explained by Peru during the TSD Sub-committee meetings, as seen in Section 4.1 above. The report confirms that the parties have taken many measures to combat child

¹⁸⁶ *ibid* 164-165.

¹⁸⁷ *ibid* 165.

¹⁸⁸ *ibid* 103.

¹⁸⁹ *ibid* 103.

¹⁹⁰ *ibid* 104.

labour and concludes that the Trade Agreement may have had positive impact in this regard, by ‘creating job opportunities for adults, mainly in agriculture, but also in textiles, garment, and mining sectors’.¹⁹¹

As for the right to water, the report recognises that this right is important for protecting the right to health, the right to an adequate standard of living, and individuals’ access to ‘full enjoyment of life and all human rights’.¹⁹² The report recognises various measures taken by Colombia to improve access to safe drinking water since the provisional application of the Trade Agreement, including the National Development Plan 2018-2022 and Programa Guajira Azul, which led to improvement in access to safe drinking water in 131 communities.¹⁹³ 711 projects have been carried out between 2010 and 2018 to improve access to safe drinking water, suggesting the continuous effort made by Colombia in this regard.¹⁹⁴ Although the report recognises that there has been improvement, there still remains disparity between access to water by rural and urban areas, while the indigenous peoples are particularly affected by the pollution of water by the activities of energy and mining sectors.¹⁹⁵ However, it concludes that the Trade Agreement did not have any significant impact on the right to water in Colombia, although it points out that it is possible that the Trade

¹⁹¹ *ibid* 104, 107, 166.

¹⁹² *ibid* 166.

¹⁹³ *ibid* 167-168.

¹⁹⁴ *ibid* 168.

¹⁹⁵ *ibid* 168.

Agreement ‘played a minor role in affecting the water of local communities’ as a result of water pollution caused by business activities.¹⁹⁶

Similarly, the report recognises various measures taken by Peru to improve access to safe drinking water since the provisional application of the Trade Agreement, including the 2015-2035 National Water Plan, the introduction of environmental quality standards, and projects carried out by the National Human Rights Institution of Peru.¹⁹⁷ As in the case of Colombia, the report notes a positive trend in access to safe drinking water, although it notes that there still remains disparity between access to water by rural and urban communities.¹⁹⁸ Overall, it concludes that the Trade Agreement did not have significant impact on the right to water in Peru, although it could have ‘played a minor role in affecting the right to water of local communities’ in the same way as Colombia.¹⁹⁹

In addition to the three ESR analysed above, the social analysis of the ex-post evaluation assesses the effect of the Trade Agreement on labour informality.²⁰⁰ The analysis is largely focused on the improvement made by the Andean countries. It notes that the level of labour informality in Colombia ‘decreased

¹⁹⁶ *ibid* 171.

¹⁹⁷ *ibid* 171-172.

¹⁹⁸ *ibid* 172.

¹⁹⁹ *ibid* 174.

²⁰⁰ *ibid* s 7.2.

from 68.5% in 2010 to 59.9% in 2020', while in Peru it decreased from '80% in 2007 to 72.7% in 2019'.²⁰¹ In particular, it recognises the role of the SUNAFIL in facilitating formalisation in Peru.²⁰² The analysis concludes that the Trade Agreement may have had positive impact on formalisation, due to the increase in employment, particularly in the vegetables, fruit and nuts sector, which has a high level of formal jobs.²⁰³

One positive development in the ex-post evaluation of the EU-Colombia/Peru Trade Agreement, when compared to that of EU-Korea Trade Agreement, is that it lists a number of recommendations for the EU to strengthen its promotion of ESR.²⁰⁴ Some of these recommendations include: monitoring the regional impact of the Trade Agreement on the right to water; making use of the European Instrument for Democracy and Human Rights (EIDHR) for the implementation of labour obligations under the TSD Chapter; creating an action plan on human rights for each party, setting 'clear time-bound targets'; and carrying out 'targeted' human rights impact assessment every three years.²⁰⁵ The incorporation of these recommendations is to be welcomed, as it demonstrates that the human rights analysis is not an end in itself but a reference point from which the EU seeks to plan its future actions within the positive function of HRC.

²⁰¹ *ibid* 94.

²⁰² *ibid* 95.

²⁰³ *ibid* 94.

²⁰⁴ *ibid* 178-179.

²⁰⁵ *ibid* 178-179.

Overall, the examination of the above human rights analysis suggests that the ex-post evaluation of the EU-Colombia/Peru Trade Agreement is largely focused on recognising the positive progress that Colombia and Peru have made in relation to ESR. It is clear from the evaluation, as well as from the meetings of the TSD Sub-committee, seen in Section 4.1 above, that Colombia and Peru have been making continuous efforts to promote ESR and that their efforts have yielded some notable improvements. In this regard, the value of the human rights analysis in the ex-post evaluation lies in confirming the effects of those measures taken by Colombia and Peru, thereby ensuring that the commitments to respect human rights under the HRC are complied with.

4.3. Responses to complaints

Since the signing of the EU-Colombia/Peru Trade Agreement, the Commission has received a number of complaints, regarding violations of ESR in Colombia and Peru. The importance of these complaints is that they reinforce the EU's commitments under the HRC. The first of these complaints come from one of the institutions of the EU itself, namely the European Parliament, whose views are complemented by the concerns of civil society groups.

4.3.1. European Parliament and civil society groups

As noted in Section 3 above, the ratification of the EU-Colombia/Peru Trade Agreement was controversial, particularly within the European Parliament.

Prior to the ratification, the European Parliament was well aware of various issues of ESR in Colombia and Peru from its engagement with civil society. For example, the European Trade Union Confederation (ETUC), the Trade Union Confederation of the Americas (CSA/TUCA), the International Trade Union Confederation (ITUC) and the Global Unions submitted a joint letter to the European Parliament in their opposition to the ratification of the Trade Agreement.²⁰⁶ The letter made clear that trade unionists in Colombia were subjected to widespread violence, while trade unions in Peru similarly faced hurdles in exercising their right to organise and collective bargaining. Therefore, it is not surprising that the European Parliament has continued to assess the human rights situation in these countries even after giving consent to the Trade Agreement.

In 2016, it published a working paper which assesses the implementation of the EU-Colombia/Peru Trade Agreement in light of the social, labour, human rights and environmental situations in Colombia and Peru.²⁰⁷ The report points to a number of issues in both Colombia and Peru that need improvement. For example, it criticised the Colombian government for its failure to implement the roadmap in relation to the rights of trade unions, which continue to face a high

²⁰⁶ ETUC, 'ETUC letter on the proposed European Union Free Trade Agreement with Colombia and Peru' (2012) <<https://www.etuc.org/en/pressrelease/european-trade-unions-condemn-signing-eu-colombiaperu-free-trade-agreement>> accessed 10 August 2023.

²⁰⁷ European Parliament, 'Trade agreement between the European Union and Colombia and Peru: European Implementation Assessment' (2018) <<https://op.europa.eu/en/publication-detail/-/publication/2e5823e2-ba23-11e8-99ec-01aa75ed71a1/language-en>> accessed 10 August 2023.

level of violence.²⁰⁸ Concerns were also raised in relation to the rights of indigenous peoples and African descendants²⁰⁹: the report gives an example of El Cerrejon coal mine in Colombia, where the government failed to consult ‘the indigenous and black communities directly affected by the plans to extend the mine’, even though it would mean that the water in the area had to be privatised, contributing to the problem of water shortage. In that regard, the European Parliament questioned whether the Trade Agreement was actually intended to promote sustainable development, since it promotes investment in the mining and other extracting sectors.²¹⁰ The issue of labour informality was also addressed in this report,²¹¹ although it notes that, when the European Parliament Committee on International Trade (INTA) visited Lima to meet with business owners and economic analyst, they indicated positive effects of the Trade Agreement on creation of ‘formal decent jobs’.²¹² This finding serves to confirm one of the conclusions of the ex-post evaluation that the Trade Agreement may have contributed positively to the issue of labour informality, by increasing formal employment.²¹³

As seen in Sections 4.1 and 4.2 above, these issues of ESR indicated by the European Parliament have been the subject of ongoing dialogue, particularly

²⁰⁸ *ibid* 74, 77.

²⁰⁹ *ibid* 66-68, 91.

²¹⁰ *ibid* 68.

²¹¹ *ibid* 28, 79-80.

²¹² *ibid* 80.

²¹³ Commission, ‘Ex post evaluation of the implementation of the Trade Agreement’ (n 169) 94.

within the TSD Sub-committee, and they have also been pointed out by the ex-post evaluation. In this regard, while the EU acknowledges that there is still more work to be done, it has placed emphasis on the progresses made by Colombia and Peru. As seen in Section 4.2 above, the ex-post evaluation has also made a list of recommendations so that the EU can assist the parties to make further progress in those areas. Therefore, it is still to be seen whether the EU effectively implements those recommendations in the future.

4.3.2. Letter from Plataforma Europa Perú (PEP)

The second set of complaints particularly concerns Peru, and it came from a group of civil society organisations, led by a network of non-governmental organisations called the Plataforma Europa Perú (PEP).²¹⁴ They submitted a formal complaint letter to the Commission, alleging Peru's failure to comply with labour, environmental and human rights obligations under the Trade Agreement, making explicit reference to the parties' obligations under the HRC.²¹⁵ Examples of ESR issues raised by the complaint include: the high level of labour informality; the lack of Labour Code; the special regimes for the clothing, textiles and agricultural sectors which do not enjoy the same level of protection as other sectors falling within the general labour regime; the

²¹⁴ Plataforma Europa Perú, 'Complaint against the Peruvian government for failure to comply with its labour and environmental commitments, as outlined in the Trade Agreement between Peru and the European Union' (2017) <<https://www.europaperu.org/la-pep-presenta-una-queja-a-la-comision-europea-sobre-los-incumplimientos-del-peru-al-acuerdo-comercial-en-materia-ambiental-y-laboral/>> accessed 10 August 2023 (translated by the author).

²¹⁵ *ibid* 6.

disproportionate number of temporary contracts in the export sectors; discrimination against trade unions; promotion of investment at the cost of the rights of indigenous' peoples.²¹⁶

During the fourth meeting of the TSD Sub-committee, the EU drew Peru's attention to the above complaints.²¹⁷ Initially, there was no strong demand from EU on any concrete actions to be taken by Peru. Instead, the Commission was of the view that more time was needed to assess the facts, while pointing to the positive measures taken by the EU to assist Peru, such as technical assistance projects for labour inspection and a workshop on labour conflicts resolution, financed by the EU's Technical Assistance and Information Exchange Instrument (TAIEX).²¹⁸ Taking on board the complaints made by PEP, the Commission nevertheless continued to hold consultations with the relevant stakeholders, including the Peruvian authorities, civil society groups and the ILO.²¹⁹

²¹⁶ *ibid* s 2.

²¹⁷ Commission, 'Individual reports and info sheets on implementation of EU Free Trade Agreements' SWD(2018) 545 final, 49-50.

²¹⁸ *ibid* 49-50.

²¹⁹ European Parliament, 'Answer given by Ms Malmström on behalf of the European Commission' (2019) <https://www.europarl.europa.eu/doceo/document/E-8-2018-006261-ASW_EN.html> accessed 10 August 2023; RedGE Peru, 'Submission filed with the European Commission on 25 October 2018 regarding alleged non-compliance by Peru with labour, environmental and civil society consultation commitments under the Trade Agreement with the European Union' (2019) <http://www.redge.org.pe/sites/default/files/Ares%282019%292108453_Tuininga.pdf> accessed 10 August 2023, 1.

In addition, the Commissioner Cecilia Malmström sent a letter to Peru's Minister of Foreign Trade Rogers Valencia on 30 July 2018, raising issues which mirrored the complaints made by PEP.²²⁰ In particular, she urged Peru to make necessary efforts 'to achieve substantial progress' with a 'well-defined and time-bound' action plan.²²¹ The language of the letter certainly demonstrates stronger insistence from the EU and that the EU is willing to follow up closely on Peru's progress in relation to those issues. In response, the Peruvian government identified relevant policy initiatives and recognised that further steps were necessary.²²² The Commission further undertook a technical mission to Lima in October 2018 to engage with the relevant stakeholders and to collect necessary information on the situation of labour rights in Peru.²²³ The Commission believed that these efforts were sufficiently positive and pointed to the intensive engagement between Peru and the EU, as well as their mutual understanding of existing challenges, which it believed to have paved 'a good path to improvement' in the implementation of the TSD Chapter.²²⁴ Therefore, while

²²⁰ Plataforma Europa Perú, 'Response to the PEP to the letter from Commissioner Malmström to the Minister of Tourism and Foreign Trade – Chapter IX Sustainable Development, Trade Agreement' (2018) <<http://www.europaperu.org/reaccion-de-la-pep-ante-carta-de-la-comisaria-malstrom-al-ministro-de-turismo-y-comercio-exterior-capitulo-ix-desarrollo-sostenible-acuerdo-comercial/>> 31 July 2023 (translated by the author); Commission, 'Individual reports and info sheets on implementation of EU Free Trade Agreements' SWD(2019) 370 final, 54; RedGE Peru, 'Submission filed with the European Commission on 25 October 2018 regarding alleged non-compliance by Peru with labour, environmental and civil society consultation commitments under the Trade Agreement with the European Union' (n 219) 1.

²²¹ Plataforma Europa Perú, 'Response to the PEP to the letter from Commissioner Malmström to the Minister of Tourism and Foreign Trade' (n 220).

²²² European Parliament, 'Answer given by Ms Malmström on behalf of the European Commission' (n 219).

²²³ Commission, 'Individual reports and info sheets on implementation of EU Free Trade Agreements' (n 220) 54; RedGE Peru, 'Submission filed with the European Commission' (n 219) 2.

²²⁴ RedGE Peru, 'Submission filed with the European Commission' (n 219) 2-3. See also

promising to continue to monitor progress made by Peru,²²⁵ the Commission in its letter of 26 March 2019 requested the civil society organisations to engage constructively with the Peruvian government in good faith.²²⁶

What the above demonstrates is that the EU has taken a number of measures in response to the complaints regarding violations of ESR in Colombia and Peru, through dialogue, financial and technical assistance, and consultations with civil society, technical missions, and sending letters to the Peruvian government. As reiterated in Section 4.3.1 above, the EU has also made a list of recommendations in the ex-post evaluation in relation to these areas. However, so far, the EU has not shown any intention to invoke the dispute settlement mechanism in response to those violations of ESR. This is likely to be due to the fact that, as mentioned in Sections 4.1 and 4.2 above, both Colombia and Peru have taken various measures to tackle these issues and progresses have been made in this regard.

Conclusion

The above discussions confirm that the EU has been actively promoting ESR through the positive function HRC, in its relations with Colombia and Peru. Within the positive function of HRC, the EU has taken a number of measures

Commission, 'Individual reports and info sheets on implementation of EU Free Trade Agreements' (n 220) 54.

²²⁵ European Parliament, 'Answer given by Ms Malmström on behalf of the European Commission' (n 219).

²²⁶ RedGE Peru, 'Submission filed with the European Commission' (n 219) 2-3.

to address issues of ESR, including dialogue, ex-post evaluation, financial and technical assistance, civil society engagement, a technical mission, and workshops. The issues raised by civil society complaints have been addressed through these measures, although the EU has not invoked any dispute settlement procedures. This is largely due to the fact that both Colombia and Peru have been making continuous effort to address issues of ESR, and that there is evidence of progress in both countries, although more needs to be done.

Similar to the first case study, the second case study confirms that the measures taken by the EU within the positive function of HRC are not independent from one another. For example, the complaints made by civil society groups have been addressed through the dialogue at the TSD Sub-Committee meetings, workshops and technical and financial assistance. This then contributed to the human rights analysis in the ex-post evaluation, which made a list of recommendations for further progress in Colombia and Peru. In relation to the particular complaints made by PEP, the TSD Sub-committee meeting provided the opportunity for the EU to draw Peru's attention to those complaints and to confirm the EU's willingness to follow-up on those issues. This then led to the civil society consultations and the technical mission to Lima, as well as Malmström's letter to the Peruvian authorities. Given the EU's active engagement with these countries in the area of ESR so far, it can be expected that the EU will follow up closely with the recommendations made in the ex-post evaluation and continue to monitor the progress in Colombia and Peru. It is also expected that those issues will continue to feature in the dialogue of the TSD Sub-Committee.

There are several recommendations which need to be made for strengthening the EU's promotion of ESR through HRC in the EU-Colombia/Peru Trade Agreement. Firstly, a broader range of issues of human rights, including ESR, should be discussed in the meetings of the Trade Committee. The HRC not only forms part of the Trade Agreement, but it serves to ensure that respect for human rights is an essential element of the Trade Agreement. Given that the Trade Committee the main institution that is tasked with overseeing the implementation of the Trade Agreement, it must also oversee the parties' commitments under the HRC. Alternatively, establishing regular human rights consultations with all the parties of the Trade Agreement can be another way of monitoring their commitments under the HRC. Finally, the EU should follow up on its own recommendations made in the ex-post evaluation of 2022. This will help ensure that the EU continues to usefully promote ESR in practice, through the positive function of HRC.

Chapter Eight: Conclusion

The purpose of this thesis was set out in Chapter One: it was to evaluate the extent to which the EU usefully promotes economic and social rights (ESR) through human rights clauses (HRC) in its trade agreements. This question leads to consideration of the scope of HRC in EU trade agreements, the measures that the EU has taken within the scope of HRC, and whether those measures usefully promote ESR.

Chapter Two set out the concept of ESR under international law. It highlighted that the concept of ESR under international law tends to be more controversial than civil and political rights (CPR) due to their nature and process of implementation. It argued that such distinction has the potential to undermine the indivisibility and interdependence of all human rights, by placing ESR secondary to CPR. It thus raised concerns in relation to the danger whereby the EU puts less emphasis on ESR in its external promotion of human rights. Given that Chapter Three confirms that the EU's concept of human rights endorses the principle of indivisibility, it demonstrated the need to examine the extent to which the EU usefully promotes ESR in practice, through tools such as HRC in trade agreements.

Chapter Three introduced the EU's concept of ESR and analysed the EU's obligation to promote ESR in its external relations. It demonstrated that EU human rights law has developed in a manner that strengthened the status of ESR both internally and externally. It highlighted the importance of the EU Charter of Fundamental Rights (EU Charter)¹ as a source of EU's own conceptualisation of human rights, seeking to give equal status for CPR and ESR. It argued that, in light of the Treaty obligations, the norms of the EU Charter must be observed in all areas of EU's external action. This means that the EU must promote ESR, as much as CPR, through HRC in its trade agreements.

Building on this argument, Chapter Four discussed why it is particularly necessary for the EU to promote ESR in its trade relations, and why trade agreements are a useful instrument in that regard. It argued that, in light of the convergence between the objective of international trade and the objective of ESR, the EU must use the opportunity rendered by its market power to promote ESR in its trade relations. It further argued that trade agreements have the benefit of enabling the EU to negotiate provisions, such as HRC, which legally bind its trade partners to observe the norms of ESR. Chapter Four also demonstrated that Trade and Sustainable Development (TSD) Chapters in the EU's new generation trade agreements can be seen as a positive development, as they complement HRC to strengthen the EU's promotion of ESR.

¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EU Charter).

Chapter Five then introduced what HRC exactly are and how they contribute to the EU's promotion of ESR in its trade agreements. It explained that the standard version of HRC, which is included in most of EU's trade agreements concluded from 1995 onwards, is modelled on the 1995 Commission Communication.² The standard HRC consists of a preambular reference, an essential element clause, and a non-execution clause, which is followed by an interpretative declaration. Chapter Five argued that ESR are covered by HRC, but the precise standards of obligations depend on what instruments are referred to in essential element clauses. The list of instruments referred to in essential element clauses differ from agreement to agreement, although the Universal Declaration of Human Rights (UDHR)³ is the most commonly referred to instrument. Chapter Five further argued that, although the negative function of HRC is rarely used in practice, the positive function of HRC can provide a more useful basis for the EU's promotion of ESR. The positive function of HRC include human rights dialogue, ex-post evaluation, financial and technical assistance, civil society consultations, and other positive measures that the parties can take within the framework of their agreements.

With the development of EU's new generation trade agreements, it was argued that there are more opportunities for the EU to promote ESR through HRC,

² Commission, 'On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries' (Communication) COM(95) 216 final, 12-13.

³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

particularly with the introduction of TSD Chapters. It must be reminded that HRC apply horizontally throughout the whole agreements, informing all the other provisions of agreements. This means that all the provisions of trade agreements, including TSD Chapters, must be interpreted in light of HRC. Accordingly, to the extent that labour rights contained in TSD Chapters fall within the scope of ESR, respect for these rights is an 'essential element' of the parties' agreements. Therefore, the obligation to respect the principles of fundamental labour rights under TSD Chapters must be construed as a legally binding obligation through the lens of HRC, in so far those rights constitute ESR. The legally binding nature of this obligation was confirmed by the Panel of Experts during the EU-Korea labour dispute, as seen in Chapter Six, although it is unfortunate that the Panel did not explicitly link this obligation to HRC.

Similarly, when read in light of HRC, the obligation to make 'continued and sustained effort' towards ratification of fundamental ILO Conventions and the obligations to effectively implement those Conventions can be seen as a means to demonstrate the parties' commitment to respect human rights under HRC. In particular, it must be noted that the HRC in the EU-Korea Trade Agreement makes reference to the Universal Declaration of Human Rights (UDHR) and 'other relevant international human rights instruments' as the normative basis for the parties' obligations, as seen in Chapter Six. As argued in Chapter Six, the inclusion of the phrase, 'other relevant international human rights instruments', can be seen as not only including the human rights treaties that the parties have ratified but also leaving the scope open for other instruments that the parties ratify in the future. Therefore, the fundamental ILO Conventions not

only provide legal reference points for the parties' obligations under the TSD Chapter but also under the HRC in the EU-Korea Trade Agreement.

Taking this approach, a party's failure to comply with the above obligations under the TSD Chapter should serve as an alert that the party may be falling short of its obligations under the HRC. In this respect, although the Panel of Experts' recommendations have a non-legally binding status under international law, failure to follow those recommendations may signal potential failure to comply with its obligations to respect human rights. The EU would then be able to use this as evidence of its partner country's breach of HRC, and in principle can invoke the non-execution clause. Therefore, even though the TSD Chapter is excluded from the general dispute settlement mechanism involving arbitration, the decision of which is binding, as far as the human rights dimensions in the TSD chapter are concerned, these can be enforced through the legally binding mechanism of HRC.

What the above discussions illustrate is that there exists clear potential for the EU to usefully promote ESR through HRC in its trade agreements. However, whether such potential exists is one question and whether the EU is in fact realising such potential is another. The latter requires examination of case studies. Therefore, Chapters Six and Seven provided two case studies, which illustrate whether the EU is in practice promoting ESR through HRC in its trade agreements. The first case study (Chapter Six) was specifically focused the EU-

Korea Trade Agreement,⁴ which must be read together with the EU-Korea Framework Agreement. The second case study (Chapter Seven) was specifically focused on the EU-Colombia/Peru Trade Agreement.⁵ Chapter One already explained that Korea, Colombia and Peru have been chosen for the case studies, because they are the first countries to sign new generation trade agreements with the EU in their respective regions. TSD Chapters in new generation trade agreements complement HRC to provide more opportunities for the EU to promote ESR. The countries chosen for the case studies also enjoy different dynamics of relations with the EU, and therefore they provide useful subjects to be studied in comparison with each other, in the context of the EU's promotion of ESR.

Before moving onto comparing the two case studies, it is first important to note that, when referring to the HRC in the EU-Korea Trade Agreement, which takes the form of a *passerelle* clause,⁶ it is essentially referring to the HRC in the EU-Korea Framework Agreement.⁷ As explained in Chapter Six, the role of the *passerelle* clause is to link the EU-Korea Trade Agreement to the EU-Korea

⁴ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6 (EU-Korea Trade Agreement).

⁵ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3 (EU-Colombia/Peru Trade Agreement).

⁶ EU-Korea Trade Agreement, art 15.14.2.

⁷ Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [2013] OJ L 20/2 (EU-Korea Framework Agreement).

Framework Agreement, meaning that the HRC in the EU-Korea Framework Agreement applies equally throughout the EU-Korea Trade Agreement.

In terms of the scope of HRC in the EU-Korea Trade Agreement and in the EU-Colombia/Peru Trade Agreement, they are broadly similar, albeit with a few notable differences. They begin with preambular references to the parties' commitment to respect human rights, particularly under the UDHR. The HRC in both agreements share four 'essential elements', which are: respect for human rights, democratic principles, the rule of law, and the countering of proliferation of weapons of mass destruction (WMD).⁸ A breach of any of these elements can trigger the non-execution clauses, which allow the parties to take 'appropriate measures'.⁹ Such appropriate measures may include suspension of the agreements, although suspension is envisaged as a last resort. As argued in Chapters 5 – 7, such negative function of HRC is rarely used in practice, and it has not been used in relation to either the EU-Korea Trade Agreement or the EU-Colombia/Peru Trade Agreement.

Whereas the HRC in the EU-Korea Framework Agreement refers to the UDHR and 'other relevant international human rights instruments' for its normative basis, the HRC in the EU-Colombia/Peru Trade Agreement refers to the UDHR only. This is an unfortunate omission, because the phrase 'other relevant

⁸ EU-Korea Framework Agreement, arts 1(1), 4(2); EU-Colombia/Peru Trade Agreement, arts 1, 2.

⁹ EU-Korea Framework Agreement, art 45(3); EU-Colombia/Peru Trade Agreement, art 8(3).

international human rights instruments' is a positive contribution to the HRC, incorporating a broader scope of instruments that the parties have ratified, while leaving room for instruments that the parties would ratify in the future. In this regard, it is recommended that the EU seeks to ensure more coherence in the wording of HRC in its future agreements.

What the case studies have revealed is that the EU has been usefully promoting ESR through HRC in the EU-Korea Trade Agreement and in the EU-Colombia/Peru Trade Agreement. In both cases, the EU was actively addressing concerns of ESR in its partner countries through the positive function of HRC. The measures taken by the EU in both cases include: dialogue within the institutions established under the Trade and Sustainable Development (TSD) Chapters, civil society consultations, ex-post evaluation, workshops, and letters from the then EU Commissioner Malmström. The types of ESR addressed through these measures in relation to Korea include: Freedom of assembly and association, the right to an adequate standard of living, the right to just and favourable conditions of work (particularly in relation to non-regular workers), ratification of fundamental ILO Conventions, discrimination against women and gender wage gap, and the right to health. The types of ESR addressed in relation to Colombia and Peru include: freedom of assembly and association, labour informality and labour inspection, child labour, the rights of indigenous peoples, discrimination against women, the right to water, and the lack of legal protection for workers in the non-traditional export sectors in Peru.

However, it is notable that it was only in relation to Korea that the EU invoked the dispute settlement mechanism under the TSD Chapter. As explained in Chapter Six, with the introduction of TSD Chapters in new generation trade agreements, the parties' obligations regarding fundamental labour rights must be read through the lens of HRC, and the dispute settlement mechanism under the TSD Chapter falls within the positive function of HRC. Despite the ongoing issues of ESR in Colombia and Peru for which EU has expressed its concerns, the EU has not invoked the dispute settlement procedure under the TSD Chapter in that Agreement, unlike in the case of Korea. This is largely due to the fact that, despite the persistent issues of ESR, Colombia and Peru have been taking various measures to tackle those issues, and improvements are underway as a result. Those measures and improvements have been discussed during the TSD Sub-committee meetings and have been recognised in the ex-post evaluation of the EU-Colombia/Peru Trade Agreement. Therefore, the fact that Colombia and Peru have been engaging with the EU's concerns and making visible progress appears to be the main reason for not invoking the dispute settlement procedure, in contrast in the case of Korea where the EU did not find such progress regarding freedom of association and ratification of fundamental ILO Conventions. However, it may also be due to the fact that, unlike in the case of EU-Korea Trade Agreement, there are altogether four parties to the EU-Colombia/Peru Trade Agreement, after Ecuador's accession. Given that there are several parties to the EU-Colombia/Peru Trade Agreement, the EU may have been more cautious as regards whether to invoke the dispute settlement procedure, as it may require consideration of whether to invoke the procedure against all the other parties or only some (or one) of them.

Despite the fact that the EU did not invoke the dispute settlement procedure in relation to Colombia and Peru, the case studies suggest that overall the EU tends to be more thorough and robust in its promotion of ESR in the case of Colombia and Peru, than in the case of Korea. For example, in the case of Korea, Korea's obligations regarding freedom of association and assembly tended to be at the forefront of the EU's promotion of ESR through HRC, whereas more diverse issues of ESR were given equal attention by the EU in the case of Colombia and Peru. In particular, during the TSD Sub-committee meetings under the EU-Colombia/Peru Trade Agreement, each party made a thorough presentation on the precise steps that they have taken to address various issues of ESR and the results thereof. In comparison, the TSD Committee (CTSD) meetings under the EU-Korea Trade Agreement tended to focus mainly on Korea's obligation to ratify the fundamental ILO Conventions, while giving less attention to other ESR issues. The comparison of these meetings of the institutions also makes clear that the EU has been providing more technical and financial assistance for Colombia and Peru, demonstrating its willingness to proactively assist the parties in addressing issues of labour rights. The EU's deeper engagement with Colombia and Peru may be partly due to the fact that there tend to be more diverse issues of ESR of concern in those countries, and that ratification of the EU-Colombia/Peru Trade Agreement was much more controversial than the ratification of the EU-Korea Trade Agreement, due to the human rights situations in Colombia and Peru. The greater power asymmetry in the EU's relations with Colombia and Peru may also have contributed to the notable

progresses made by Colombia and Peru, and their visible effort to tackle the issues of ESR, in response to the concerns raised by the EU.

However, in terms of the ex-post evaluations, it is notable that only three human rights have been screened for the human rights analysis of the EU-Colombia/Peru Trade Agreement, whereas four human rights were screened in relation to the EU-Korea Trade Agreement. This may be due to the fact that, for the EU-Colombia/Peru Trade Agreement, the Commission had to carry out the human rights analysis for three countries (Colombia, Peru and now Ecuador), which for the scope of the evaluation render it necessary to limit the number of human rights being screened. What is notable about the ex-post evaluations in both cases is that the human rights which have been screened all fall within the scope of ESR. It must also be noted that the rights which were discussed in the institutional meetings in both cases also mostly revolved around ESR. This suggests that: a) the EU's promotion of ESR through HRC is not secondary to its promotion of CPR; and b) the TSD Chapter has strengthened the EU's promotion of ESR, given that most of the ESR that are being promoted concern labour rights falling under the TSD Chapter.

Based on the findings above, the research question can be revisited: *To what extent does the EU usefully promote ESR through HRC in its trade agreements?*

The final answer can be framed as follows: the EU usefully promotes ESR through HRC in its trade agreements to the extent that its trade partners make continuous effort and progress, in relation to the issues of ESR identified by the

EU, through human rights analyses, civil society consultations and literature review. Once those issues are identified, the EU continues to monitor the progress made by its trade partners and seeks to assist them in making improvements, by using the positive function of HRC. Where it considers that no visible progress is being made, the EU is determined to resort to a more adversarial measure, such as the dispute settlement mechanism, as exemplified by the first case study concerning Korea. It must be noted that, as discussed in Chapter Two, realisation of ESR tends to be progressive in nature, and therefore it is right that the EU's promotion of ESR needs to focus on the 'progress' rather than immediate results. In that regard, the measures that the EU has taken within the scope of HRC in its trade agreements can be seen as a 'useful' promotion of ESR that contributes to progressive realisation through 'inquisitorial justiciability', a term which was discussed in Chapter Two.

However, there are several recommendations which need to be made in order to ensure that the EU continues to usefully promote ESR through HRC in its trade agreements in the future:

1. Issues of ESR should be discussed more broadly based on HRC within the institutions established under the trade agreements. In both case studies, the committees established under the TSD Chapters were the only institutions that explicitly engaged with issues of ESR.
2. HRC should be explicitly mentioned in the EU's promotion of ESR under the trade agreements. In both case studies, although the ex-post evaluations explicitly referred to HRC for human rights analyses, there

was a lack of explicit reference to HRC in the other measures taken by the EU, even though those measures fall within the positive function of HRC. Given that respect for human rights is an ‘essential element’ of the parties’ agreements, the EU should emphasise the parties’ obligations under HRC when it seeks to promote ESR through those measures.

3. Building on the previous point, TSD Chapters should make express reference to HRC for the purpose of establishing the link between the two, reiterating the legally binding nature of HRC. This will contribute to ensuring that the interpretation of TSD Chapters takes place through the lens of HRC.
4. The EU’s positive obligation under the HRC should be mentioned in the ex-post evaluations. As seen in Chapter Seven, the ex-post evaluation of the EU-Colombia/Peru Trade Agreement only referred to the EU’s negative obligation not to violate human rights. This risks giving a false impression that the main role of HRC is to prevent the EU from violating human rights. Such an interpretation is inconsistent with the purpose of HRC discussed in Chapter Five, as well as with the EU’s positive obligations to promote human rights under Articles 3(5) and 21 TEU.
5. It was noted above that the issue of freedom of association and Korea’s ratification of fundamental ILO Conventions has been at the forefront of the EU’s promotion of ESR through HRC in the EU-Korea Trade Agreement. The EU should ensure that equal attention is being given to other issues of ESR that have been identified as areas of concern, like in the case of Colombia/Peru. This will help achieve more coherence in the EU’s promotion of different ESR through HRC, as well as more

coherence in the EU's approach to promoting ESR in its trade relations with different countries.

6. It was noted in Chapter Six that the ex-post evaluation of the EU-Korea Trade Agreement lacks a list of recommendations in relation to the parties' ESR obligations under HRC. While the EU-Colombia/Peru Trade Agreement contains a list of recommendations, it is still to be seen whether the EU follows up on those recommendations. Therefore, it is recommended that: a) in all its future ex-post evaluations of trade agreements, the EU incorporates a list of recommendations for the purpose of promoting ESR on the basis of HRC; and b) the EU follows up on the recommendations to ensure that ESR are being usefully promoted through HRC.

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