Trade agreements and labor rights: comparing EU and Us approaches with Vietnam as a case study[1]

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[1] Tesi vincitrice del Premio Jo Cox 2025 per la migliore tesi di laurea su argomenti concernenti le istituzioni o le politiche dell'Unione Europea.
[2] Università Commerciale Luigi Bocconi. Tesi di Laurea Magistrale in Politics and Policy Analysis. Relatore: Professore Claudio Dordi. Anno accademico 2024-2025.

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1. INTRODUCTION

Labor rights are the hidden currency of global trade - protected, compromised, and negotiated within every agreement. But how do the world's largest economic powers, the United States and the European Union, safeguard these rights in their foreign trade policy choices? Worker protection concerns have long defined the agenda of global regulators when discussing foreign trade. However, this was not sufficient to generate transnational coordination in codifying a common approach to foreign trade and labor rights. The issue thus slowly shifted from the international plane to the domestic realm, where states and supranational entities have decided to take the matter into their own hands. Moved by concerns of unfair competition and aiming at constituting a level-playing field for international trade, the main Western powers have integrated labor rights within their own bilateral and regional trade frameworks. This has led to one inevitable conclusion: that each party has developed their own approach, which gives rise to unique and case-specific consequences. These approaches deserve to be studied closely, as the

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ripple effects they generate affect not only the global economy, but also human rights and working conditions worldwide. The two main actors that have shaped trade agreements on the international plane through the inclusion of labor rights are the US and the EU. These two global powers, however, have adopted opposite stances on how worker protection should make its way into international trade, and overtime they have developed a large body of international instruments and institutional documents describing such diverging methods. In fact, while the US has chosen a sanction-driven approach that focuses on enforcement of national labor frameworks, the EU has opted for a promotional approach stressing adherence with international labor law doctrine. The two powers also diverge on other aspects of the trade-labor linkage, namely on to what extent civil society should be included in the monitoring and implementation of trade agreements, on how to formulate labor-related provisions, and on whether to mandate ratification of international trade law instruments. Such numerous differences give rise to two diverging regimes that handle the same matter, i.e., the trade-labor nexus, from opposite standpoints, without feeling the need for reconciliation. At the core of these frictions stands the trade-labor linkage itself, which is still nowadays an unresolved issue in the international law realm as the international community has not come to a close as to what organization should have ownership of the matter and as to what rationale wholly justifies the inclusion of labor rights in commercial matters. The intrinsic hybridity of this topic makes global differences irreconcilable. This thesis thus aims at answering a number of questions. How do the EU and the US articulate their labor chapters within trade agreements? What are the practical implications that arise as a consequence of these differences in formulations? What are the pros and cons of each approach, and what policy reforms could redress the loopholes generated by the cons? This work overcomes a merely descriptive approach by integrating a case study on Vietnam, which allows for a more deep and practical comparison on how the EU and US tackle

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the inclusion of labor rights within trade agreements, drawing from the theoretical conclusions learnt in the qualitative analysis. The case study does not only stem from the literature on the topic, but it is mainly based on an interview carried out *ad hoc* for this work.

The main body of this thesis will proceed as follows. First, the trade-labor linkage at large will be examined. This analysis is aimed at providing an historical overview of the phenomenon and it lays the grounds for the theoretical rationales that support the inclusion of labor rights within trade frameworks. Second, the EU perspective is studied. Third, the US method is reviewed. These two chapters are at the core of the work, and they are structured symmetrically, presenting a common scaffolding filled with information tailored to the entity under analysis. The structure of these two core chapters first analyzes the history and evolution of the two approaches to the trade-labor nexus: then it studies the scope and wording of labor chapters in trade agreements; afterwards, it describes the institutional structure entailed in these provisions and the enforceability issues that may arise from the latter; finally, both chapters contain a final section on the policies proposed to improve the two systems based on the gaps identified in previous paragraphs. After this theoretical review of the EU and US approaches to trade and labor rights which compares and contrasts the two, a hands-on case study is brought to attention. This constitutes the last chapter of the thesis, which is an analysis on how the EU and US perspectives have shaped their relative trade relationships with Vietnam. As a common trading partner to both the EU and the US, Vietnam constitutes the perfect benchmark for evaluating whether their preferences in terms of labor rights inclusion in trade agreements are materially reflected when negotiating an agreement. This case study is a novel approach to the literature on trade-labor linkages, and it allows the field to overcome a merely theoretical approach and to see real-life consequences of international law choices. While the scope of this work is certainly too limited to answer the

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unsolved questions generated by the EU and US approaches to the trade-labor nexus, it still it aims to shed light on key distinctions and challenges, laying the groundwork for future research that can more fully address the complexities and impacts of these differing stances on global labor standards. In a world where trade shapes human lives as much as economies, the path forward demands not only a choice between enforcement and cooperation, but also a deep commitment to truly prioritizing the rights and dignity of workers beyond borders. Only a clearer understanding of this challenge can enable the implementation of an effective strategy that elevates working standards globally and tackles the challenges of a rapidly evolving trade landscape.

1.1 Literature Review

The interrelation between trade and labor rights has been a much-studied topic for a long time in legal doctrine. Given the longstanding discourse on trade agreements and worker protection, indeed, a substantial body of literature has emerged addressing various perspectives and implications of this topic. Because this subject matter stands at the intersection of many fields, such as law, economics and political science, many scholars from different disciplines have analyzed it under several points of view. Authors studying the trade-labor linkage range from Jagdish Bhagwati, winner of the Nobel prize for Economics who extensively studied the impact of trade agreements on labor rights and economic development, to Robert Baldwin, who worked on the political economy of trade agreements during their early days, to Dani Rodik, the economist who explored the trilemma between globalization, democracy, and sovereignty. However, this thesis focuses on the more legal aspects of the inclusion of labor rights within trade agreements, with a particular focus on the different approaches adopted by the EU and the US. This literature review analyzes the main bodies of work of the authors considered for this purpose, who are only a sub-range of the ones cited in

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the bibliography, but they have nevertheless constituted the grounds for building this thesis.

James Harrison has extensively analyzed the interplay between trade agreements and labor rights. His research critically examines the effectiveness of labor provisions in free trade agreements, particularly those of the EU. Harrison argues that, despite the EU's commitment to integrating labor standards into its trade policies, these provisions often fall short in practice. He identifies several key issues. First, implementation and enforcement: Harrison contends that labor provisions in FTAs frequently lack robust enforcement mechanisms, rendering them *de facto* ineffective in safeguarding workers' rights. He emphasizes the need for stronger institutional frameworks to ensure compliance. Second, engagement with civil society: Harrison highlights how the limited involvement of civil society organizations in monitoring and implementing labor standards within trade agreements leads to higher likelihood of failure. Harrison advocates for enhanced participation of these groups to improve transparency and accountability. Third, which is outside the scope of this thesis, global value chains: in his work, Harrison explores how global value chains influence labor rights, noting that FTAs often fail to address the complexities of labor conditions. Overall, Harrison calls for a reevaluation of current trade-labor linkages, advocating for more effective and enforceable labor standards in trade agreements to genuinely protect and promote workers' rights globally. Another prominent scholar in this field is Kevin Kolben, a recognized expert on transnational labor regulation and labor governance in supply chains. His research critically examines the integration of labor rights into trade agreements, focusing on the effectiveness of these provisions in promoting workers' rights globally. Kolben argues that traditional, sanctions-based approaches to labor provisions in trade agreements often fall short in achieving meaningful labor rights improvements. He advocates for a development-oriented framework that emphasizes capacity building,

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cooperation, and the creation of institutions that support labor rights within trade agreements. Kolben's work highlights the need for innovative regulatory approaches that combine public and private efforts to effectively address labor rights issues in the context of global trade. The stances of Kolben and Harrison on the trade-labor nexus thus deeply diverge: while the former embraces the typical EU promotional approach, the latter roots for a more enforceability-driven standpoint. This thesis will analyze both methods, evaluating the pros and cons that arise from them in concrete applications of the EU and the US. Two other foundational authors for these topics are Jan Orbie and Lore Van den Putte, who have extensively examined the integration of labor rights into EU trade agreements. They observe that, despite the EU's commitment to promoting labor standards through trade, the actual impact of these provisions is often limited, hence adopting a position closer to Harrison’s. Their research highlights several key issues, such as scarce enforceability, policy coherence and civil society involvement. In the EU context, another author whose work greatly inspired ours is Samantha Velluti, whose book The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations examines the EU's strategies for integrating human rights and labor standards into its trade agreements. This critical assessment of the EU's strategies for integrating human rights and labor standards into its trade agreements highlight challenges such as inconsistent enforcement and the need for greater coherence between the EU's internal policies and its external actions. To formulate this work, not only the EU perspective was necessary, but an analysis of the US method was essential too to complete the comparison. To do so, we have extensively relied on the work of Jeffrey Vogt, who has extensively examined the intersection of trade agreements and labor rights, especially in the US context. Vogt argues that while pre-ratification leverage has led to legislative reforms in partner countries, post-ratification enforcement of labor commitments remains weak. He emphasizes the

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need for stronger enforcement mechanisms and meaningful engagement with civil society to ensure that labor rights are genuinely protected and promoted through trade policies. Vogt's work calls for a reevaluation of current trade-labor linkages to enhance their impact on workers' rights globally. In the US context, the work of Kathleen Claussen was also essential for this thesis. In her article Reimagining Trade-Plus Compliance: The Labor Story, she critiques the effectiveness of traditional dispute settlement mechanisms in enforcing labor commitments within trade agreements. Claussen argues that these mechanisms are often ill-suited for addressing labor issues, as demonstrated by the US-Guatemala case under the CAFTA. She advocates for the development of alternative compliance frameworks that better accommodate labor rights enforcement, suggesting that innovative institutional designs are necessary to achieve full enforcement of labor commitments in trade agreements. These topics have also been extensively analyzed in the work of Mary Jane Bolle, Gerda van Roozendaal and Marco Bronckers. Research on trade and labor rights is expanding to encompass new regions, particularly China, due to its growing influence in the global economy and its evolving labor practices within international supply chains. Scholars like Ruiqi Yang and Han Luo are exploring how China's role as a major economic power impacts global labor standards and the integration of labor rights within trade agreements. As China becomes increasingly central to global production and trade, understanding its approach to labor rights offers critical insights into the future of labor protections and regulatory standards worldwide. This approach will probably be extended to other countries that are similarly on the rise and that have entered the trade-labor arena.

This thesis identifies a notable gap in the literature: a close comparison of the two traditional approaches to including labor rights in trade agreements, namely, the US versus the EU model. To conduct a meaningful benchmark analysis, it is essential to evaluate these two approaches using consistent

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parameters. The parameters chosen here include the historical evolution of the practice of incorporating labor rights into preferential trade agreements, the specific wording and scope of labor provisions, the institutional frameworks created by these clauses, cases brought before trade panels, and issues surrounding enforceability. Additionally, this thesis addresses another gap often overlooked in critical papers: the formulation of policy proposals. While critical analyses frequently highlight challenges and shortcomings, they rarely suggest concrete policy solutions. By proposing actionable recommendations, this thesis aims to contribute constructively to the discourse on labor rights in trade agreements, offering a foundation for improved practices and frameworks. Last, but most importantly, this thesis complements gaps in the literature by analyzing the EU and US approaches to the trade-labor nexus in a hands-on analysis of a real case, which is the trade relationship with Vietnam. Previous studies have rarely examined theoretical approaches to labor chapters into practical cases. This thesis will instead examine how the US and the EU have faced challenges with the same trading partner, i.e., Vietnam, and whether and how this concrete instance mirrors their traditional choices in terms of labor obligations within trade agreements.

1.2 Methodological Note

This thesis consists of a qualitative analysis of international legal instruments, including Treaties, documents published by international and supranational organizations, soft law tools and, above all, trade agreements. This qualitative analysis is instrumental for comparing the aforementioned texts on different grounds, examining the ways in which provisions are worded, and the legal consequences that they give rise to. To do so, the legal analytic method is employed to define the law through authoritative sources. This method implies studying the normative content, interpretative frameworks, and practical implications of the texts under analysis. Moreover, the law is not only described as it currently stands (*de lege data*), but rather this thesis also encompasses

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proposals for future law and ideal legal frameworks (*de lege ferenda*). When doing the former, we focus on the interpretation, clarification, and systematization of existing legal norms and principles. When doing the latter, we evaluate the adequacy of the *status quo* and propose policies based on identified gaps, shortcomings, negative loopholes or emerging trends. In this context, the method facilitates not only a rigorous analysis of the existing legal landscape but also reasoned discussions on potential developments. This method also facilitates the identification of legal trends and contextual nuances essential for the broader interpretive analysis that this research entails. The policies proposed in the final paragraphs of the third and fourth chapters of this thesis constitute a new body of knowledge that is not current present in the literature, hence filling a gap identified in the literature. In addition to the qualitative research, the final chapter features an interview with Professor Claudio Dordi, who directed for ten tears the EU-Vietnam 'Multilateral Trade Project' in Vietnam and has now been for six years the Director of the USAID Project, again in Vietnam, focusing on trade facilitation and digital trade. Conducted in written form via email between October 18 and October 21, this interview offers expert insights, providing a valuable complement to the primary analysis. All statements from the interview have been reviewed and approved by the author and by the interviewee, ensuring accuracy and fidelity to the their perspectives. Last, in addition to the proposed policy reforms, this interview adds new information to the current body of knowledge on the topic concerned, thereby qualifying this work as a research thesis.

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2. INTERTWINING TRADE AND LABOR RIGHTS

The interrelationship tying trade and labor is a crucial but complex aspect of the global economy and of the regulatory arena. As trade agreements increase and international markets become increasingly interconnected, the impact of trade and globalization on labor standards, worker rights, and employment conditions across different countries has become a pivotal field of focus for scholars, activists and legislators. The trade-labor linkage is not just a subject of studies, but it is also a phenomenon that has concrete impacts and real-life consequences. Indeed, the integration of labor conditionality within free trade agreements is a pillar of contemporary trade negotiations,[3] and the ever-rising connectedness of states today has amplified the impacts of such negotiations.[4] The 'sustainable development' doctrine, which aims at mitigating trade liberalization's negative impact through the enforcement of labor (and environmental) standards, has permeated the trade law landscape, which has stood out as a critical forum for addressing international disparities in working conditions effectively. Indeed, FTAs are both an arena to redress labor-related disputes *ex post* and an innovative approach to prevent them from arising by improving conditions *ex ante*.[5] This is not mere theory: several states have already benefitted from labor provisions carefully customized for them and included in FTAs, that have eventually improved their economic and working conditions, leading to higher economic stability and safer labor environments.[6] However, understanding and regulating the inextricable bond between trade and labor is still a puzzle for policymakers,

[3] Wu C. H., 'ASEAN at the Crossroads: Trap and Track Between CPTPP and RCEP' (2020) 23(1) *Journal of International Economic Law* 97.
[4] Yang R. and Luo H., 'Navigating the Evolution of Labor Provisions: Comparative Insights from China, the US, and the EU in Free Trade Agreements' (2023) *Journal of the Knowledge Economy* 1-33.
[5] Brown R. C., 'China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions' (2019) 29 *Washington International Law Journal* 61.
[6] Lee S. H., 'ASEAN's Economic Security and Regional Economic Cooperation: Past, Present, and Future' (2022) 7(1) *Asian Journal of Comparative Politics* 10.

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businesses, and international organizations aiming to balance the two cogent interests at stake: economic growth on one side, and fair and equitable working conditions worldwide on the other. But can these two interests coexist, or does one necessarily exclude the other?

While one might argue that the trade-labor linkage has already been widely addressed by international regulation, many issues arising from this interconnectedness are largely unresolved. Indeed, while there is wide international agreement that trade liberalization must enhance rather than undermine labor rights,[7] how to integrate workers protection within trade agreements is still a controversial matter. Nowadays, developed countries still face concerns on how to properly create effective mechanisms to prevent the so-called 'race to the bottom', a phenomenon whereby national authorities formulate lower standards of worker protection in order to attract foreign investment in their territory so, in turn, business transfer to such countries that offer economically advantageous conditions for conducting market operations.[8] This practice has clear detrimental consequences for labor standards and worker protection, as the countries engaging in such 'race to the bottom' lower wages and cut behind on obligations related to work safety, wages, working hours and social protection. This consequently triggers severe human rights violations such as child and forced labor.[9] Here, the conflict mentioned above starks clear: policymakers shall intervene, and their intervention must strike a balance between worker protection and business growth. While the former primarily aims at improving labor conditions worldwide and guaranteeing a safe and just work environments for all,

[7] See e.g., United Nations General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development* (25 September 2015) UN Doc A/RES/70/1, paras 17.10–17.12.
[8] Tyc A., 'The Linkage Between Labour Standards and International Trade: How to Offset the Global Inequality?' (2019) 9(1) *Wroclaw Review of Law, Administration and Economics* 58.
[9] Bercusson B. and Estlund C., 'Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions' in Bercusson B. and Estlund C. (eds), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Hart Publishing, Oxford-Portland, Oregon 2008) 4.

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the latter aims at enhancing efficiency and at enlarging consumption through the regulation of the cross-border exchange of goods and services. However, the two realms are connected by some sort of complementarity. Indeed, it is inevitable that trade policy creates winners and losers, *haves* and *have nots*. On the other hand, international labor law can also boost productivity, smooth out economic growth and avoid failures in the labor market. Therefore, the two policy areas are indeed connected by an overarching economic goal that calls for an equilibrium. With a view to fostering growth, the combination of labor protection and international trade can effectively give rise to greater social justice and more effective labor markets. Amidst many policy proposals that have been formulated by both legislators and scholars throughout the years, one will be examined in this work: the social clause within trade agreements. The following chapter will delve deeper into defining the trade-labor linkage. In paragraph 2.1, this will be done through an historical perspective, analyzing the dynamics that have given rise to such topic, the discussions that have occurred at the international level, and the legal instruments that have dealt with the trade-labor linkage overtime. Above all, it will explain what power dynamics on the international plane have led to an unsatisfactory solution to the trade-labor problem, both in the sense that such linkage is not included in any relevant international instrument, and that there is no international organization which has ever taken ownership over the matter. Paragraph 2.2 will analyze the topic from another perspective, namely, identifying the rationales behind the trade-labor linkage and the main controversies that derive from it.

2.1 History of the Trade-Labor Linkage

From a historical perspective, the trade-labor linkage has dominated the scholarly and political debate for incredibly long, and some theorists and historians even argue that it has been a recurrent topic for as long as three hundred

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years.[10] In fact, the trade-labor linkage was already and underlying assumption in the renowned theory by David Ricardo on comparative advantage explaining why nations choose to participate to international trade even though they are less competitive than others in producing every good. Such theory dates to the eighteenth century. Notwithstanding, greater debate on the matter was sparked in the following century. There is wide consensus among scholars that the nineteenth century was when the most heated discussions on the very nature of the bond between trade and labor occurred, as it became of utmost priority to enlarge the boundaries of trade through its liberalization, while concurrently placing the first efforts to define whether trade should also be fair, and not just free.[11] During this period, many industrialists realized that countries seeking to improve the living standards of their working class would be negatively affected by competition from those other countries that did not share the same goal, and these complaints were voiced to their governments.[12] Another common concern of states around the end of the nineteenth century was the prohibition of slave importation and of the production of goods by prisoners; such bans were often incorporated into national law as a result.[13] However, all of this remained pure theoretical debate until 1919, when the ILO was founded and charged with the formulation of international labor standards. The ILO Constitution's Preamble itself recites as follows: 'the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries'.[14]

[10] Tyc, 2020.
[11] Cottier T. and Caplazi A., 'Labour Standards and World Trade Law: Interfacing Legitimate Concerns' in Cottier T. (ed), *The Challenge of WTO Law: Collected Essays* (Cameron May, London 2016) 551–586.
[12] Tyc, 2020.
[13] Charnovitz S., 'The Influence of International Labour Standards on the World Trading Regime – A Historical Overview' (1987) 126 *International Labour Review* 565. Notice how the ban on goods manufactured by prisoners was included into the GATT Art. XX(e), under the general exception clause.
[14] *Constitution of the International Labour Organization* (adopted 1 April 1919, entered into force 28 June 1919), as amended, Preamble.

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One of the founding objectives of the ILO was indeed to make sure that the ongoing liberalization of international trade would not conflict with the fostering of labor rights worldwide.[15] Such pressure heightened after World War II, when the International Labour Conference convened under mottos such as 'labor is not a commodity' and 'poverty anywhere constitutes a danger to prosperity everywhere', integrated in the 1944 Declaration of Philadelphia first and later on included in the ILO Constitution itself. The Declaration of Philadelphia was also noteworthy for broadening the ILO scope, as it endowed the organization with the task of scrutinizing other organization's work on social aspects, including economic security.[16] However, the broadness of such provisions led to their failure, and meanwhile more specific international organizations were in the process of being created exactly for the purpose of regulating economic cooperation in international markets. Indeed, the United Nations, the World Bank Group and the International Monetary Fund were soon established, and the ILO lost its grasp and ambition on economic matters. In both the latter two institutions' funding documents are included clauses related to labor rights. Art. I (III) of the IBRD Articles of Agreement states that the purposes of the World Bank group are:

> 'To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of

[15] De Schutter O., *Trade in the Service of Sustainable Development. Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing, Oxford-Portland, Oregon 2015) 7.
[16] (d) it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective. *Declaration concerning the aims and purposes of the International Labour Organisation* (adopted 10 May 1944), annexed to the ILO Constitution (1946).

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members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories'.[17]

In a similar fashion, Art. I (II) of the IMF Articles of Agreement defines the organization's purposes as:

'To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy'.[18]

For what concerns the United Nations framework, the most decisive step towards the trade-labor linkage happened in 1945, when the Economic and Social Council (ECOSOC) was established. Artt. 55 and 56 of the UN Charter, which set out the purposes of the Council, both mention the inherent interaction between employment and social development.[19] Another attempt at including an overarching labor provision within the United Nations framework was the Havana Charter, concluded in 1948 and founding the International Trade Organization, an agency acting under the supervision of the ECOSOC. Even though this instrument has regrettably failed to be ever ratified, hence never coming into effect, it is still considered to be the starting point of the trade-labor linkage, at least for what concerns its formalization into other international instruments of all sorts. As Art. 1 of the Havana Charter enshrines,

'The Members recognize that the avoidance of unemployment or underemployment, through the achievement and maintenance in each country of useful employment opportunities for those able and willing to

[17] Articles of Agreement of the International Bank for Reconstruction and Development (adopted 22 July 1944, entered into force 27 December 1945, as amended 27 June 2012), Art. I (III).
[18] *Articles of Agreement of the International Monetary Fund* (adopted 22 July 1944, entered into force 27 December 1945), Art. I (II).
[19] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945).

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> work and of a large and steadily growing volume of production and effective demand for goods and services, is not of domestic concern alone, but is also a necessary condition for the achievement of the general purpose and the objectives set forth in Article 1, including the expansion of international trade, and thus for the well-being of all other countries'.[20]

The whole text of the Havana Charter is impressively precursor of the trade-labor linkage, containing an entire chapter on 'employment and economic activity'[21] linking the two topics. A Havana Charter provision that was essential to establish the trade-labor linkage is Art. 7, which recites as follows:

> 'The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory'[22]

This Article's importance cannot be overstated. Scholars believe that it is due to this provision that the idea of including labor rights into the international trading discussions has been persistent since World War II came to an end.[23] Unfortunately, the Havana Charter failed to ever enter into force due to strong

[20] *Havana Charter for an International Trade Organization* (adopted 24 March 1948), Art. 1.
[21] Namely, Chapter II.
[22] Havana Charter, Art. 7.
[23] Gourevitch P. A., 'International Trade, Domestic Coalitions and Liberty: Comparative Responses to the Crisis of 1873–1896' in *The Political Economy: Readings in the Politics and Economics of American Public Policy* (Routledge 2021) 279.

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opposition from the US government, thereby leaving a softer trace on the trade-labor linkage than what could have been otherwise.

As soon as it was clear that the Havana Charter would have not entered into force, the trade and tariff-related norms contained in it were picked out and framed in another agreement, the General Agreement on Tariffs and Trade,[24] which entered into force in January 1948. However, such agreement failed to include any reference to the trade-labor linkage previously included in the Havana Charter, which were all dropped. However, some of its member states had pushed for their inclusion. The discussion within the GATT negotiations was the following: the EU and the US would push for the inclusion of labor rights conditionality within the GATT, and such proposals were consistently dismissed. The main critics of labor conditionality were developing countries. As decolonization rapidly became a focal point for the United Nations, developing countries formed a group known as 'the Group of 77', who aimed at shaping the new rules governing the global economy in their favor.[25] With this friction, the international debate on trade and labour rights came to halt. Global trade had undergone an intense but gradual phase of progressive liberalization, and such a process only resumed around fifty years later. From then on, the issue of human rights conditionality in trade agreements was hardly ever mentioned in any international fora.

On 15 April 1994 the global trade regime took its most decisive step forward to date, as on this date the Marrakesh Agreement was signed and on 1 January 1995 the WTO was established. In short, the WTO has incorporated the former GATT system and complemented it with new regulation on, *inter alia*,

[24] Stoll P., 'International Economic and Social Dimensions: Divided or Connected?' in Gott H. (ed), *Labour Standards in Economic Law* (Springer 2018) 19.
[25] *Ibid*.

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intellectual property law and trade in services.[26] The WTO also integrated an upgraded dispute settlement mechanism, making it compulsory and establishing the Appellate Body.[27] However, while this was certainly the most pivotal event for international trade, it was not necessarily the same for what concerns labor rights. Once again, labor conditionality was a major stumbling block during the negotiation process.[28] The social clause was firstly set forth during the negotiations of the Havana Charter and was vastly debated during the Uruguay Rounds;[29] nevertheless, neither the Marrakesh Agreement establishing the WTO, nor the 1996 Singapore Ministerial Declaration have dealt with the topic. These first attempts to establish a solid link tying trade liberalization and labor at the international level law failed:[30] all initiatives aimed at introducing a social clause within the WTO, which would have heightened the role of labor standards in international trade, were dismissed. Just like the GATT, the WTO Agreement only addresses labor-related matters in an exception to the GATT referring to prisoner labor.[31] This was mainly due to the fact that member states believed that labor issues did not fall under the competence and scope of the WTO, but rather

[26] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) Annex 1C, 33 ILM 1197, and *General Agreement on Trade in Services*, Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) Annex 1B, 33 ILM 1168.
[27] *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995), Annex 2, 33 ILM 1226, Art. 17.
[28] Leary V.A., 'The WTO and the Social Clause: Post-Singapore' (1997) 1 *European Journal of International Law* 118, 119.
[29] Tyc, 2020.
[30] Velluti S., 'The Promotion of Social Rights and Labour Standards in EU External Trade Relations' in *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations* (Springer, 2020) 181.
[31] Cheong D. and Ebert F.C., 'Labour Law and Trade Policy: What Implications for Economic and Human Development?' in Marshall S. and Fenwick C. (eds), *Labour Regulation and Development. Socio-Legal Perspectives* (Edward Elgar Publishing, Cheltenham-Northampton 2016) 83-84.

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under that of the ILO.[32] Such division between the two realms was made explicit during the first WTO Ministerial Conference taking place in Singapore in 1996. There, the delegates adopted a Ministerial declaration reciting as follows:

> 'We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration'.[33]

By means of this declaration, delegates committed to respect internationally recognized core labor standards and appointed the ILO as the most suitable organ for the supervision of such obligations. The ILO was thus chosen as the only competent authority for any matter dealing with labor rights.[34] The quest for the insertion of the social clause within the founding documents of the WTO was mostly yearned for by the US, who was motivated by both ethical considerations, concerns of unfair competition from developing countries, and the scarce ability of the ILO in enforcing its own Conventions.[35] Not too long thereafter, the EU

[32] Stoll, 2019.
[33] *Singapore Ministerial Declaration*, WTO Ministerial Conference (adopted 13 December 1996), WT/MIN(96)/DEC, 36 ILM 218.
[34] Thomas H. and Turnbull P., 'From a "Moral Commentator" to a "Determined Actor"? How the International Labour Organization (ILO) Orchestrates the Field of International Industrial Relations' (2021) 59(3) *British Journal of Industrial Relations* 87, Halonen T. and Liukkunen U., *International Labour Organization and Global Social Governance* (Springer Nature 2021) 146.
[35] Kenner J., 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?' in Van Vooren B., Blockmans S. and Wouters J. (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP, Oxford 2013) 306-321.

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joined the US in standing for the inclusion of the social clause within the WTO regime: this, together with unilateral trade policy, were advocated for in a 1994 Resolution of the European Parliament.[36] The European Parliament has never stopped championing the inclusion of social conditionality within all EU trade agreements since then, and still today it is a strong advocate of stricter enforceability of labor provisions.[37] Nevertheless, the WTO took a clear and definitive standing: that labor rights and trade are to be severed. Such sharp separation is due to the underlying friction connotating all aforementioned negotiations: that between, on the one hand, the United States and the European Union, and developing countries on the other hand. Indeed, the latter had strongly opposed the formalization of the trade-labor linkage within the Agreement, fearing both that this would constitute the basis for disguised protectionist policies and that they would lose their comparative advantage over developed countries.[38] Moreover, the block of developing countries also argued that their counterparts would be leveraging labor conditionality in the WTO as a path for retaliation in case of failure to comply, and as a way to couch broader foreign policy goals into trade matters.[39] Overall, developing countries argued so persistently against the proposition of incorporating labor standards within the WTO system because they feared that developed countries were trying to forcibly impose their external standards onto their domestic labor markets, which would not only lead to economic distress, but also to an unfair imposition within their systems.[40]

[36] European Parliament, Resolution of 9 February 1994 on the Introduction of a Social Clause in the Unilateral and Multilateral Trading System [1994] OJ C 61/40.
[37] Velluti, 2020.
[38] Hepple B., *Labour Laws and Global Trade* (Hart Publishing, Oxford 2005) and De Schutter, 2015.
[39] Harrison J., *The Human Rights Impact of the World Trade Organisation* (Hart Publishing 2007).
[40] Palmeter D., Mavroidis P.C., and Meagher N., *Dispute Settlement in the World Trade Organization* (Cambridge University Press 2022).

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During the 1999 Seattle Conference, the third WTO Ministerial Conference, the trade-labor linkage was again a theme for discussion. The EU fiercely championed and renewed its support for the core labor standards, reiterating that these would be the backbone of its foreign trade policy and that labor standards would not be exploited for protectionist purposes.[41] Moreover, the EU also wished to strengthen the relationship between the WTO and the ILO, proposing to establish an ILO observership in the WTO and a joint working group comprising representatives of both the organizations.[42] In addition, then US President Bill Clinton proposed to set up a dedicated team to identify some core labor standards that all WTO members could agree on. This far-reaching proposal shook developing countries to the point that they opposed any such initiative thereon,[43] hence they 'sealed the fate of the Seattle conference'.[44] The interventionist approach of the EU-USA block precipitated the end of the discussions on the trade-labor linkage. Such a topic had definitely lost its momentum on the international plane. The opposition received from developing countries was so radical that at the following Conference, located in Doha, labor standards were dismissed wholly on the grounds that they fall under the scope of the ILO only.[45] During these rounds, even the European Commission and the Council adopted a more cautious approach, fearing that the discussion would hinder the outcome of the Doha Development Round entirely, as it had done in

[41] Council Conclusions on the third Ministerial Conference of the WTO, 26 October 1999.
[42] Velluti, 2020.
[43] Harrison J., 'The Labour Rights Agenda in Free Trade Agreements' (2019) 20 *Journal of World Investment & Trade* 705.
[44] Panagariya A., 'Trade-Labour Link: A Post-Seattle Analysis' in Drabek Z. (ed), *Globalisation under Threat: The Stability of Trade Policy and Multilateral Agreements* (Edward Elgar 2001) 102, 288.
[45] Addo K., 'The Correlation Between Labour Standards and International Trade – Which Way Forward?' (2002) 36 *Journal of World Trade* 285.

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Seattle.[46] Since the Doha Conference, the formalization of labor clauses into multilateral trade agreements has not been a topic for discussions anymore.[47]

WTO instrument	***Objective achieved***
Havana Charter	Consensus that labor standards can be ensured through foreign trade
Tokyo and Uruguay Rounds	Discussion on whether labor standards should be included in the WTO doctrine
1996 Singapore Ministerial Declaration	Decision that the WTO is not competent for labor standards, only the ILO is

Table 1- Historical development of labor commitments in the WTO. Source: author's elaboration.

To find a reference to the trade-labor linkage within WTO instruments, one must apply some sort of evolutionary interpretation to the GATT. Indeed, the GATT allows legitimate state policy to adopt measures deviating from GATT basic rules; moreover, national legislation concerning non-trade values can overcome trade principles if such national laws are applied *bona fide* and fall within the scope of Art. XX of GATT, which lists all relevant exceptions. In addition, whether trade can be subject to labor rights should be analyzed together with another issue, i.e., whether trade law can introduce a differentiation in terms of *criteria unrelated to the products themselves*, that is, the 'process and production method'.[48] Since labor measures affect working conditions or

[46] Velluti, 2020.
[47] Orbie J., 'Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe' in Whitman R.G. (ed), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave MacMillan 2011) 161.
[48] Marceau G., 'Trade and Labour' in Bethlehem D., Van Damme I., McRae D., and Neufeld R. (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press, Oxford 2009) 539-570.

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workers' rights and not products themselves, relying on 'process and production methods' is quite pertinent, and could constitute grounds for arguing that labor standards do in fact fall within the scope of the WTO.

Even though the WTO was at a deadlock, and scholars now apply broad interpretations of the GATT to find hints of the impacts of labor on trade, the debate was up and running in other international fora. Outside the WTO bubble, the idea of imposing a labor dimension to trade liberalization was ever more taking ground.[49] In 1995, the Copenhagen World Summit for Social Development examined a set of International Labor Conventions and picked a sub-group of fundamental rights of workers. Moreover, the ILO, which was designated as the sole competent institution on the matter of labor rights, was also rapidly evolving and publishing legislation on the topic. The ILO issued the Declaration on Fundamental Rights and Principles at Work in 1998, thereby stating that labor rights should not interfere with trade-related matters, because the risk of hindering comparative advantages is too high. In the words of the document itself,

> '[…] that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.'[50]

Trough the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the organization's member states committed themselves to the respect of the fundamental ILO Conventions enshrining four core labor standards, namely,

[49] OECD, *Trade, Employment and Labour Standards: A Study of Core Worker rights and International Trade* (OECD Publishing 1996), and OECD, *International Trade and Core Labour Standards* (OECD Publishing 2000).
[50] *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (adopted 18 June 1998, amended 2022), International Labour Conference, 86th Session, Geneva.

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freedom of association and collective bargaining,[51] the elimination of forced labor,[52] the abolition of child labor,[53] and the elimination of all forms of discrimination at work.[54] According to Art. 2 of the Declaration, all ILO parties are bound by the core conventions by mere virtue of their membership to the ILO, even if they have not ratified the conventions. Recognizing labor standards as human rights was a long overdue step for the international arena, finally joining other pivotal international instruments such as the UN Charter, the 1948 Universal Declaration of Human Rights,[55] the 1996 International Covenant on Civil and Political Rights[56] and the 1999 International Covenant on Economic, Social and Cultural Rights.[57] In 2000, the ILO also adopted the Decent Work Agenda, which includes among its pillar that of labor market governance.[58] Notwithstanding these impressive steps ahead, the two issues of trade and labor were still kept separate, both in terms of Conventions on the matter, and in terms of legal arenas where they were discussed. In 2001, the World commission on the Social

[51] *Convention concerning Freedom of Association and Protection of the Right to Organise* (adopted 9 July 1948, entered into force 4 July 1950) ILO Convention No. 87, and *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (adopted 1 July 1949, entered into force 18 July 1951) ILO Convention No. 98.
[52] *Convention concerning Forced or Compulsory Labour* (adopted 28 June 1930, entered into force 1 May 1932) ILO Convention No. 29, and *Convention concerning the Abolition of Forced Labour* (adopted 25 June 1957, entered into force 17 January 1959) ILO Convention No. 105.
[53] *Convention concerning Minimum Age for Admission to Employment* (adopted 26 June 1973, entered into force 19 June 1976) ILO Convention No. 138, and *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (adopted 17 June 1999, entered into force 19 November 2000) ILO Convention No. 182.
[54] *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (adopted 29 June 1951, entered into force 23 May 1953) ILO Convention No. 100, and *Convention concerning Discrimination in Respect of Employment and Occupation* (adopted 25 June 1958, entered into force 15 June 1960) ILO Convention No. 111.
[55] *Universal Declaration of Human Rights* (adopted 10 December 1948, entered into force 10 December 1948) UNGA Res 217 A(III).
[56] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).
[57] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI).
[58] *ILO Decent Work Agenda* (adopted June 1999), International Labour Organization, Geneva.

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Dimension of Globalization was founded and, in 2004, it published a report naming (for the first time!), the concept of 'social dimension of globalization'. On these grounds, only then did different international organizations come together to discuss the possible linkages between the two realms. From such moment thereon, the ILO core Conventions have been evermore being mentioned and referred to in trade agreements, whether regional or bilateral.[59] Still, even against this renewed background, the ILO did not adopt any change of pace on its view on the trade-labor linkage. In the 2008 ILO Declaration on Social Justice for a Fair Globalization, the organization formulated its first authoritative comment on the matter,[60] stating as follows:

> 'The violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes'.[61]

The developments at the WTO and at the ILO must be considered in conjunction with one another. The adoption of the 1998 ILO Declaration has revived the idea that WTO norms do not happen in a vacuum, but rather that they should be interpreted in light of international human rights law.[62] The main argument flowing from this is that Art. XX of GATT, as mentioned above, allows for a new interpretation: that it is legitimate to restrict the trading of goods that

[59] Leenknegt P., 'EU Trade Policy and International Labour Standards: The View from the ILO' in Blanpain R. (ed), Wouters J., Rayp G., Beke L., and Marx A. (guest eds), *Protecting Labour Rights in a Multi-polar Supply Chain and Mobile Global Economy* (Kluwer Law International, Alphen aan den Rijn 2015) 75-76.
[60] *Ibid*.
[61] *ILO Declaration on Social Justice for a Fair Globalization* (adopted 10 June 2008), International Labour Conference, 97th Session, Geneva.
[62] Breining-Kaufmann C., 'The Legal Matrix of Human Rights and Trade Law: State Obligations Versus Private Rights and Obligations' in Cottier T., Pauwelyn J., and Bürgi E. (eds), *Human Rights and International Trade* (Oxford University Press, Oxford 2005) 95–136.

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were produced in a manner that contravenes labor standards.[63] The WTO Treaty could also be read in light of ILO instruments;[64] for instance, when the Preamble states that it aims at '[…] increasing the standards of living, ensuring full employment',[65] going as far as referencing sustainable development, could be read through an evolutionary interpretation approach that takes into consideration labor principles too.[66] Questions related to the extent and modality of how this normative argument could develop in practice are still open. Nevertheless, this topic appears to be out of the table in most international arenas as of now. The very last development on the matter happened following the 2015 United Nation summit for the adoption of a renewed agenda, where the 2030 Agenda for Sustainable Development defined several goals to be achieved in the following 15 years in terms of environmental and social sustainability. Among the Goals, number 8 enshrines the promotion of 'sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'.[67]

The deadlock in international organizations has nothing but generated a slew of labor clauses within trade agreements. In fact, while this heated debate was taking place within international organizations, states appeared to move ahead on their own on the matter;[68] as a consequence, social clauses were included in a number of international commodity agreements.[69] Moreover, from the 1990s to today, regionalism and bilateralism have been ever growing, and the spread of

[63] Bartels L., 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) *Journal of World Trade* 353-403, Bartels L., 'Social Issues: Labour, Environment, and Human Rights' in Lester S. and Mercurio B. (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (Cambridge University Press, Cambridge 2009) 342–366.
[64] Marceau, 2009.
[65] Marrakesh Agreement, Preamble.
[66] Velluti, 2020.
[67] *Transforming our world: the 2030 Agenda for Sustainable Development* (adopted 25 September 2015), UN General Assembly Resolution A/RES/70/1.
[68] Harrison, 2019.
[69] Velluti, 2020.

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social clauses within such agreements has risen concordantly.[70] Even though the trade-labor bond was not made explicit in any international binding instrument of any sort, states proceeded to enforce it nevertheless by including such linkage in their trade agreements. This was – and still is – done via the insertion of a social clause within the text of the agreement itself. In international law, the social clause is defined as

> 'Provisions included in regional trade agreements or the agreement establishing the World Trade Organization (WTO) providing for the use of restrictive measures such as trade restrictions or the withdrawal of trade preferences, where fundamental rights at work are not respected'.[71]
>
> The aim of a social clause is generally considered to be the following:
>
> 'Improving labour conditions in exporting countries by allowing sanctions to be taken against exporters who fail to observe minimum standards. A typical social clause in an international trade arrangement makes it possible to restrict or halt the importation or preferential importation of products originating in countries, industries or firms where labour conditions are inferior to certain minimum standards'.[72]

The social clause can be included in a treaty or in an international trade agreement – in which case, it is said to have multilateral source; or it can be foreseen by a national law of a state – in such case, it is said to have unilateral source.[73] Usually, in the former situation, the social clause is employed as a way to punish (usually through sanctions) countries that have exploited their own labor

[70] Addo, 2002.
[71] Salmon J. (ed), *Dictionnaire de Droit International Public* (Bruylant, Bruxelles 2001) 41-68.
[72] Van Liemt G., 'Minimum Labour Standards and International Trade: Would a Social Clause Work?' (1989) 128(4) *International Labour Review* 433–448.
[73] Tyc, 2020.

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laws so to gain a competitive advantage in trade.[74] Concerning the unilateral use of the social clause, on the other hand, the US government was the first to employ such measure in its national law so as to withdraw custom duties advantages from countries that have contravened international labor standards.[75] Such system entered into force in the 1980s and it is called US Generalized System of Preferences (GSP). This practice soon proved to be effective, as scholars believe that is has been a successful nudge towards upholding labor laws under the threat of sanctions for the Dominican Republic, Costa Rica, El Salvador and Guatemala in the 1990s.[76] The European Union also has a comparable scheme in place, again called GSP. The EU GSP scheme has been used against Myanmar under accusations of government use of forced labor,[77] and against Belarus, for denying trade unions rights. The EU has been found to be less effective in inducing policy change than the US,[78] and it has also often faced allegations of using this practice to its own discretion and as a disguise for broader foreign policy objectives.[79] Against this backdrop, many questions have arisen during the years: is the trade-labor linkage a subtle way for the EU to safeguard its domestic economy and to promote its own values beyond its borders? And shall this not be the case, then why has the EU been so hesitant to make the social conditionality within its trade agreements enforceable?[80] Notwithstanding this criticism, from a historical perspective, the EU has proven to be the most collaborative entity with

[74] *Ibid*.
[75] *Ibid*.
[76] Bronstein A., *International and Comparative Labour Law: Current Challenges* (Palgrave Macmillan, International Labour Office, Geneva 2009).
[77] *Ibid*.
[78] Cheong and Ebert, 2016.
[79] Velluti S., 'The EU's Social Dimension and Its External Trade Relations' in Marx A., Wouters J., Rayp G., and Beke L. (eds), *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing, Cheltenham-Northampton 2015) 50.
[80] Velluti, 2020. Please notice that some weak forms of labor conditionality can be found in the EU GSP scheme and in the 2008 EU-CARIFORUM Partnership. More of this in later chapters.

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international organizations on trade and labor. This is visible in its relationship with the ILO, with whom it formed a partnership in 2004[81] and with which it collaborated systematically for the establishment of the GSP+ arrangement.[82]

The number of trade agreements which contain a labor clause is rising steeply. According to the ILO database on the matter, there were only four trade agreements with labor provisions in 1994, while in 2024, at the time of the writing, the number has rose up to 125.[83] In percentage terms, this means that the overall share of trade agreements that include labor conditionality has risen from 11,4% in 1994 to 33,8% in 2024.[84] While this may seem unusual, it is actually quite a common path for international trade law: developed countries try to foster advanced agendas in the WTO, undergo some sort of block, and end up sneaking their progressist proposals in bilateral negotiations (such dynamic has also happened concerning intellectual property and investor protection, for instance).[85] When media and civil society pressure lowers, powerful countries overcome less powerful nations' vetoes more efficiently. At the same time, though, one must be wary of such simplifications: almost a quarter of all trade agreements today now involve developing countries only.[86] This means that the goal is now shared more broadly globally and is not only just pushed by developing countries. Even though the EU and the US remain the key players in pushing such an agenda, it appears that the rationale behind it is slowly being accepted by other actors as well.

[81] European Commission—ILO, Memorandum of Understanding concerning the establishment of a strategic partnership between the International Labour Organization and the Commission of the European Communities in the field of Development, 17 July 2004, Brussels and 16 July 2004, Geneva https://www.ilo.org/brussels/ilo-and-eu/european-commission/WCMS_169299/lang--en/index.htm, accessed 5 September 2024.
[82] Please find more on this topic in the following chapter.
[83] International Labour Organization (2022). *ILO Labour Provisions in Trade Agreements Hub (LP Hub)*. International Labour Organization, Geneva.
[84] *Ibid*.
[85] Harrison, 2019.
[86] International Labour Organization, 2022.

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To this day, trade and labor continue entailing some aspects that are still divisive. A new focal point of discussion in the trade-labor linkage topic is who should take ownership of such matters. Because it is so hybrid in nature, in fact, it has been very controversial to pinpoint the most suitable international arena to redress any matter related to the connection between trade and labor. There is no consensus as to whether WTO should be entitled to tackle labor-related issues in connection with trade, nor there is agreement on how should labor regulation interact with trade law. In the words of Cottier and Caplazi,

> 'There is ample consensus that labour standards are required. Yet, there is ample disagreement on how they should be implemented and enforced in international law. Labour standards apparently touch upon domestic regulations on labour relations. They are mainly part of internal affairs. And it can be readily seen that this aspect has disabled powerful implementation and supervision by international instruments, so far'.[87]

While the ILO is the most competent international organization on labor issues, many argue that it may not be the fittest forum to address the merger of labor with trade as well. This is due to the fact that the ILO lacks any kind of enforcement capability: it adopts standards, but it does not enforce them; therefore, even when it successfully detects instances of labor standards violations, it is not able to take enforcement measures to stop said breaches.[88] It often uses 'name and shame' methods, but the member states have not afforded it the power to issue sanctions. This was made evident by the EU-Myanmar case, where the ILO froze under its inability to enforce its own standards.[89] For this reason, scholars have long been arguing that ownership of this topic should shift

[87] Cottier and Caplazi, 2016.
[88] Tyc, 2020.
[89] Langille B., 'The Curious Incident of the ILO, Myanmar and Forced Labour' in Blackett A. and Trebilcock A. (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing, Cheltenham-Northampton 2015) 522.

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into the hands of the WTO.[90] The latter, indeed, is equipped with enforcement measures and a dispute resolution mechanism, it can extend its reach to labor standards insofar as they fall within human rights protection, and it is a competent body on the matter given that labor is an essential aspect of trade. Moreover, some scholars go above and beyond these considerations by adding that, since labor standards violations have economic repercussions, the best way to address them is with economic consequences (i.e., sanctions and incentives). Given this, as the WTO is endowed with the ability to issue sanctions and incentives, it is also the most suitable arena to deal with the trade-labor linkage.[91] Baclawski goas as far as arguing that 'Incorporation of the core labor standards in the WTO regulations is the only appropriate way of doing justice to their claims to validity under international law'.[92] In sum, the issue with taking ownership of the trade-labor linkage is that coercive authority and international agreement are both missing on the matter, while they would also constitute the fundamental elements to establish international regulation of the topic.[93]

2.2 The Trade-Labor Linkage Rationales

The main idea for finding grounds to link trade law and labor standards together is that these two fields are not 'two solitudes',[94] but rather that thy are inextricably tied and that they must be regulated in accordance with one another so to grasp the bigger picture of globalized markets today, without missing any

[90] Baclawski B.C., 'Re-Thinking the WTO's Relationship to International Labor Standards: Is It Finally Time for a Global Approach' (2016) 48 *Georgetown Journal of International Law* 243, 247.
[91] Wolffgang H-M. and Feuerhake W., 'Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labour Standards in the World Trade Organization' (2002) 36 *Journal of World Trade* 900-901.
[92] *Ibid*.
[93] Teague P., 'Standard-Setting for Labour in Regional Trading Blocs: The EU and NAFTA Compared' (2002) 22(3) *Journal of Public Policy* 325-348.
[94] Langille B., 'Eight Ways to Think About International Labour Standards' (1997) 31(4) *Journal of World Trade* 27-53.

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crucial cornerstone of it such as worker protection.[95] What are the main rationales to support such an argument? Scholars have suggested several different explanations as to why labor provisions must find their way within trade agreements.

One overarching motivation as to why trade and labor are intertwined is that the set of issues that they give rise to are in large part in common between the two spheres.[96] Such shared problems are, *inter alia*, trade liberalization's impact on domestic jobs, the facilitation (or restriction) of labor mobility, worker rights in dispute settlement mechanisms, and exploitation of workers in global supply chain due to convenience of outsourcing. Another generic, but nevertheless fundamental, rationale as to why labor provisions should be included in trade arrangements is that such mechanisms would provide desirable incentives and positive externalities.[97] Such incentives would imply nudging states towards applying policies that are desirable in terms of workers protection, thereby improving their labor governance, adherence to the international human rights regime and compliance with the ILO core Conventions. Other than these two broad explanations, there are three more specific sets of rationales that scholars have identified that might constitute solid basis for justifying the trade labor linkage.

The first justification for the trade-labor linkage is the economic rationale. According to this idea, labor provisions can be leveraged to avoid unfair competition in trade exchange, creating a so-called 'level-playing field' where no actor is unduly advantaged due to the poor quality of its domestic labor

[95] Marceau, 2009.
[96] Reddy S., 'Foreword. International Trade as a Means to Diverse Ends: Development, Workers, the Environment and Global Public Goods' in De Schutter O. (ed), *Trade in Service of Sustainable Development* (Hart, Oxford 2015) v–xvi.
[97] Reddy, 2015.

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regulation.[98] This would ensure that working standards of the exporting country are analogous to those of the importing country, thereby ensuring fairness[99] and constituting a necessary regulatory policy.[100] Moreover, in this perspective, linking trade with labor standards would also prevent a 'race to the bottom' effect, as developing countries would have no leeway to lower their working conditions so to attract aggressive foreign direct investment driven by the absence of a minimal set of labor rights in place.[101] The deregulation created in a 'race to the bottom' context could be prevented by inserting hard conditionality in trade agreements, and by creating proper avenues for redress in cases of violations.[102] In short, breaching labor rights distorts competitiveness hence constituting an unfair trading practice.[103] The economic rationale is substantiated by the 2008 ILO Declaration of Social Justice for a Fair Globalization which established that a country's comparative advantage cannot flow from low labor standards. Such principle is also enshrined in the Preamble of the ILO Constitution, which recites as follows: 'the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries'.[104] This provision has many ripple effects. Indeed, one could argue that any ILO member state could claim that other member states' not upholding labor rights is also impeding its own ability to do so within their jurisdiction;[105] or that a member state who is not complying with labor standards

[98] Velluti, 2020.
[99] Lee E., 'Globalization and Labour Standards: A Review of Issues' (1997) 136(2) *International Labour Review* 1–16.
[100] Cottier and Caplazi, 2016.
[101] *Ibid*.
[102] Hradilová K. and Svoboda O., 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness' (2018) 52(6) *Journal of World Trade* 1019.
[103] Hradilová and Svoboda, 2018.
[104] ILO Constitution, Preamble.
[105] Thomas C., 'The WTO and Labour Rights: Strategies of Linkage' in Joseph S. et al (eds), *The World Trade Organisation and Human Rights: Interdisciplinary Perspectives* (Edward Elgar, Cheltenham 2009) 257.

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is putting pressure on other states to lower their own standards as well.[106] It should come as no surprise that such interpretations have been strongly opposed by developing countries, who fear that their comparative advantage in trade could be hindered by social clauses. On the other hand, developed countries has fostered broad applications of labor conditionality, often justifying it under the 'domestic analogy thesis', according to which the EU can legitimately pursue its quest for social policy even beyond its own borders.[107] This argument has been employed by the EU during the negotiations of the EU-India FTA, but it was rejected by the other party as it was received as patronizing and driven by protectionist objectives.[108]

The second basis on which to justify the trade-labor linkage is the social rationale. Under this idea, inserting labor conditionality within trade agreements would constitute a way to redress the negative externalities created by globalization.[109] Indeed, it is now well-known that globalizing and expanding trade markets has created, as well as destructed, jobs.[110] While democratic countries may trigger a trickle-down of positive externalities in the process of trade liberalization, autocratic countries will hardly witness any improvement in working conditions following economic growth, nor will countries hostile to the rule of law, nor those with high inequality levels.[111] Therefore, labor conditionality would serve as a redistribution means to allocate trade gains more fairly between those countries negatively affected by liberalization and those

[106] *Ibid*.
[107] see European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europe: Competing in the World—A Contribution to the EU's Growth and Jobs Strategy' COM (2006) 567.
[108] Velluti, 2020.
[109] *Ibid*.
[110] Jansen M. and Lee E., *Trade and Employment: Challenges for Policy Research—A Joint Study of the International Labour Office and the Secretariat of the World Trade Organization* (WTO Secretariat, Geneva 2007).
[111] *Ibid*.

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positively impacted by it.[112] It is thus a mechanism to exploit the progressive globalization of labor regulation, as this is in large part still governed by national laws under the territorial jurisdiction principle, but it is progressively being underpinned by greater policy consistency thanks to shared international labor standards.[113]

Last, a human rights rationale could also justify the trade-labor linkage. This argument is more controversial than the previous two, as it is strongly tied to moral and ethical considerations that are by nature subjective, and engaging philosophically with human rights is *per se* challenging. According to the human rights rationale, trading with autocratic countries that systematically violate human rights should be morally unacceptable for developed countries.[114] Higher labor standards would thus pave the way for a broader recognition of universally respected human rights, and such idea would be enforced through a strict prevention of trading with countries that commit consistent human rights breaches. As mentioned above, such rationale is morally valid, but it is hardly sustainable in real life events. However, the EU has often associated its use of the social clause to this argument, in conjunction with the social rationale; on the other hand, the US has always shown to be much more driven by the economic justification and by fear of third countries exploiting their comparative advantage against them.[115]

Notwithstanding these arguments, critics of social conditionality have also formulated numerous theses against it over time. The main claim that has been put forward against the trade-labor linkage is that its effects extend much beyond

[112] *Ibid*.
[113] *Ibid*.
[114] Velluti, 2020.
[115] Van den Putte L. and Orbie J., 'EU Bilateral Agreements and the Surprising Rise of Labour Provisions' (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 263-283.

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the mere goals pursued by the trade agreement itself. Opponents of the trade-labor linkage argue that this concept hides a more complex agenda, including protectionism, false humanitarianism, and fears of bearing the price of other countries' comparative advantage.[116] Considering that cheap labor constitutes, indeed, a comparative advantage for many developing countries, they argue that labor clauses in trade agreements would amount to protectionist measures in the hands of developed countries.[117] The insertion of a labor rights clause within a trade agreement is often seen as a way of sneaking into FTAs a smokescreen for protectionist measures or as a means for patronizing the other country's values.[118] This idea is substantiated by the fact that social clauses are often hardly enforceable. Countries' reluctance to afford actual enforceability to labor rights conditionality many times has been interpreted as a sign that developed countries employ human rights clauses instrumentally so as to serve their broader geopolitical aims, and the lack of hard conditionality would imply an unwillingness to overcome mere rhetoric.[119] Indeed, since international trade-related labor disputes often remain unresolved due to the lack of proper avenues for redress, such disputes find resolution only within diplomatic means,[120] proving that developing countries are pursuing geopolitical objectives rather than strictly legal ones. Notwithstanding this criticism, labor rights within trade agreements are now a widespread practice, especially in instruments negotiated by the EU and the US, and their existence hardly represents a controversial issue anymore. This does not mean that every aspect of labor chapters is settled, nor that the two global

[116] See, for example, Bhagwati J., 'Trade Liberalisation and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues' (1995) 18 *The World Economy*. Also, International Organisation of Employers, *The Evolving Debate on Trade & Labour Standards*, IOE information paper (Geneva 2006) 2, accessed 8 September 2024.
[117] Hradilová and Svoboda, 2018.
[118] Velluti, 2020.
[119] *Ibid*.
[120] Srinivasan T.N., *Developing Countries and the Multilateral Trading System: From GATT to the Uruguay Round and the Future* (Routledge 2019).

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powers agree on what is the rationale justifying the inclusion of labor obligations into preferential trade schemes. However, the existence of trade-plus commitments *per se* is not subject to conflict anymore, and the critics of this practice have hardly been listened to in international law developments.

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3. THE EUROPEAN UNION'S APPROACH TO TRADE AND SUSTAINABILE DEVELOPMENT CHAPTERS

Despite the failure to incorporate a labor clause in the WTO, the EU has not been discouraged from including worker protection provisions in its bilateral and multilateral preferential trade agreements. Indeed, since the entry into force of the Treaty of Lisbon,[121] the EU has formalized its commitment to fostering human rights protection and it finds legal basis to do so in both its external and internal action in Artt. 3(5) and 21 of the Treaty on the European Union.[122] These provisions also set sustainable development as one of the key objectives driving the EU's policy choices. Additionally, human rights respect has not only motivated non-commercial objectives, but it has also driven larger foreign policy goals. Indeed, it has been decades since the EU's approach to trade policy has shifted from questions arising at the borders to questions arising beyond the borders.[123] Hand in hand with these changes, the EU has been concerned with whether and how to include so-called 'trade and sustainable development' (TSD) matters within its trade policy. In the words of Bertram, TSD includes:

> 'endeavors that link social, environmental, and economic development to external trade policy, with a particular focus on how trade policy can support, or at least not hinder, sustainable development efforts'.[124]

[121] *Treaty of Lisbon* (signed 13 December 2007, entered into force 1 December 2009) [2007] OJ C306/01.
[122] *Treaty on European Union* (signed 7 February 1992, entered into force 1 November 1993) [1992] OJ C191/1.
[123] De Ville F. and Siles-Brügge G., 'The role of ideas in legitimating EU trade policy: From the single market programme to the transatlantic trade and investment partnership' in F. De Ville and G. Siles-Brügge (eds), *Handbook on the EU and International Trade* (Edward Elgar Publishing 2018) 243-262, and Young A. R. and Peterson J., 'The EU and the new trade politics' (2006) *Journal of European Public Policy* 13(6) 795-814.
[124] Bertram C., 'The trade-sustainability nexus: the evolution of the European Commission's trade and sustainable development discourse from 1993 to 2022' (2023) *Journal of European Public Policy* 30(10) 2097-2122.

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TSD is generally intended so as to encompass three different dimensions; namely, the environmental, human rights and economic pillars. These three pillars shall be harmonized throughout the application of coherent policies fostering all three dimensions concurrently and ensuring that the enhancement of one pillar does not hinder the full realization of the other two. However, while such concept defines sustainability at large, given the purpose of this thesis, the following chapter will only focus on the social aspect of sustainable development, specifically on labor rights and workers protection. Such element is equally important as the other two in TSD considerations, and it pertains to the human rights sphere of sustainable trade.

While the trade-labor linkage might feel as a relatively new topic on international negotiators' table, discussions on whether to include workers' considerations in trade agreements have dominated EU institutions for as long as fifty years. The European Commission first proposed to include labor conditionality in its trade policy during the 1970s, setting forward that adherence to core international labor standards should be a *conditio sine qua non* of its negotiations with third parties.[125] Notwithstanding, the Council was irresponsive to said proposal and it dismissed it quickly.[126] It took EU institutions around twenty years to actually materialize such proposal, as the first human rights clause was only inserted in the EU-Argentina Cooperation Agreement in the 1990s.[127] From then on, the EU fine-tuned its approach to TSD in a way that became, year after year, all-encompassing, organic, and quite consistent across all political sides. Shortly after the EU-Argentina agreement, the EU complemented its Generalised Scheme of Preferences with a system of incentives (the so-called

[125] *Ibid*.
[126] Burgoon B., 'The rise and stall of labor linkage in globalization politics' (2004) *International Politics* 41(2) 196-220.
[127] Bartels L., 'Human rights and sustainable development obligations in EU free trade agreements' (2013) *Legal Issues of Economic Integration* 40(4) 297-313.

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'GSP+', upgrading the previous 'GSP' system) benefitting those developing countries that implement key international conventions on human rights protection, environmental matters and good governance practices.[128] Above all, and most pertinently to this thesis, from 2010 on the EU has made a habit of including so-called TSD Chapters within the trade agreement that it concludes with third countries, starting with the 2011 EU-Korea free trade agreement.[129]

After delving deeper into the history of TSD Chapters in the EU foreign trade policy, the following chapter analyzes how the latter are structured across EU preferential trade agreements, as most of the texts share a common structure that has evolved overtime, that gives rise to different implications and that provides some interesting points for discussion. Among the latter, the certainly most debated one is enforceability. Therefore, this chapter will analyze how different trade agreements concluded by the EU have addressed enforcement (or the lack thereof) in various ways, sometimes more successfully, sometimes less so. The EU approach to labor conditionality is, in essence, soft, promotional, and based on cooperation rather than on hard law. This strategy entails the combination of binding and voluntary commitments, most of which are applied and monitored through collaboration between the parties, joint technical assistance and dialogue with diverse actors. This approach ultimately aims at nudging partner countries to strengthen their worker protection regimes through capacity building, cooperation and learning, rather than under the threat of sanctions or judicial retaliation. The issue of enforceability is at the heart of the debate, as it is a matter of means more than one of goals: while all the actors at play have an interest in the proper implementation of labor rights in the context

[128] Orbie J., Vos H. and Taverniers L., 'EU trade policy and a social clause: a question of competences?' (2005) *Politique Européenne* 3(17) 159-187.
[129] Harrison J., Barbu M., Campling L., Richardson B. and Smith A., 'Governing labour standards through free trade agreements: Limits of the European Union's trade and sustainable development chapters' (2019) *JCMS: Journal of Common Market Studies* 57(2) 260-277.

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of the trade agreement, it also appears that there is no shared view on whether the EU shall proceed through hard or soft conditionality. Whether the EU approach to the enforceability of labor provisions contained in trade agreements is effective is still a question open for debate. Against this *status quo*, many scholars and institutional actors have formulated different policy advice to improve the shortcomings of TSD enforceability. Some of these proposals are deepened and analyzed in the following paragraphs.

3.1 History and Evolution of Trade and Sustainable Development Chapters

Setting aside some initial brief mentions that were soon dismissed, the real dawn of TSD policies occurred under Leon Brittan's term as Trade Commissioner, which lasted from 1993 to 1999. It was him who started linking labor and trade more and more often during his public speeches, even stating that 'it is reasonable to insist on, and want to protect, certain basic human rights for the workforce of any country participating in a multilateral economic system'.[130] Even though Brittan's main priority, in line with the *zeitgeist*, was to foster the EU's free trade agenda, he also introduced a notable policy within the trade system, namely, the 'essential elements clause'. Such provision, also known as the 'human rights clause', is a legal mechanism enabling one party to take all appropriate measures, including unilateral suspension of the agreement, in case the other party fails to uphold its commitment to human rights.[131] The scope of the 'essential elements clause' tends to be quite wide, as it extends as far as covering principles of rule of law and democratic norms, other than aiming to protect universal human rights.[132] Even though, as of July 2019, the EU has never activated such clause, opting for a more constructive attitude towards human

[130] Speech of February 3rd, 1999.
[131] European Parliamentary Research Service, *Understanding EU Civil Protection Mechanism* (European Parliament 2019) https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf accessed 28 September 2024.
[132] *Ibid*.

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rights violations rather than a strictly punitive one,[133] such clause symbolizes more than a mere legal mechanism. It is the EU's first solid commitment toward a more ethical trading practice, which proved especially meaningful in times when such explicit trade-labor linkages were being consistently disregarded in international arenas, as it had happened during the Uruguay Rounds. While worker rights were still couched in a human rights perspective and were generically framed within a human rights-related provision, Brittan was forward-looking in realizing that a more ethical approach to foreign trade would have become a pivotal topic of discussion for European citizens soon. To this point, the mid-1990s also witnessed the birth of the Generalized System of Preferences mechanism, whereby developing countries were sanctioned and (or) incentivized by the EU to abide by the ILO core conventions. From then on, the EU has been consistently devoting some provisions of the trade agreements it concludes to human rights protection since 1999, when such clause was first included in the trade agreement with South Africa.[134] Such agreement was also groundbreaking for referring for the first time to the ILO core Conventions. This soon repeated in 2000, when the Cotonou Agreement[135] was signed: here, a block of 77 countries from the Pacific, Caribbean and African areas also committed to the ILO standards. The Cotonou Agreement represents a significant change in the EU's trade policy, which shifted its primary goal from preferential market access to development,[136] and finally embraced a more value-oriented way of trading. Within the Cotonou Partnership Agreement, Art. 9 reflects this aspect, stating that development must be 'centred on the human person', who is seen as the

[133] *Ibid*.
[134] *Agreement on Trade, Development and Cooperation Between the European Community and its Member States, of the One Part, and the Republic of South Africa, of the Other Part* [1999] OJ L311/3.
[135] *Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part* [2000] OJ L317/3 (Cotonou Agreement).
[136] Velluti, 2020.

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protagonist and main beneficiary of development policies, thus deserving 'respect for and promotion of all human rights'.[137] The human rights clauses in the Cotonou Agreement were afforded enforceability through the creation of a dispute settlement mechanism endowed with the task of interpreting and implementing the human rights clauses.

Following Brittan, the subsequent Trade Commissioner Pascal Lamy's work focused intensely on the pros and cons of globalization and trade.[138] Lamy published the EU's first sustainable development strategy, setting it as a global agenda with the EU as its main promoter, and championing the inclusion of labor standards within the WTO normative regime. He was the first Trade Commissioner to strikingly declare that 'trade is also a matter of values, not economics only',[139] and even highlighting that trade is merely a means for development, and not the goal *per se*. In the same fashion, during the Prodi Commission,[140] the process of employing Sustainability Impact Assessments to estimate the sustainability-related risks and opportunities generated by the entry into force of a trade agreement became a common practice of the EU ever since. Sustainability Impact Assessments are crucial tools to lessen the negative impact of trade on human rights as they enable identification *ex-ante* of such detrimental effects, hence pinpointing whether a given trade policy undermines social well-being while fostering economic growth.

Under the Barroso Commission, which was renewed for two consecutive terms, the EU published and committed to two relevant programs, namely, the EU Commission's 'Social Europe' initiative, which focused on improving social

[137] Cotonou Agreement, Art. 9.
[138] Bertram, 2023.
[139] Speech of November 29th, 1999.
[140] Please note that Pascal Lamy was serving under the Prodi Commission.

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rights, employment levels and working opportunities across the EU;[141] and the 2000 Lisbon Strategy, which pushed for greater liberalization of trade, enhancing market access for EU businesses abroad, and negotiating stronger external trade relations.[142] Moreover, it is under this Commission that the EU Commission approved the GSP+ arrangement, which grants market access under more favorable conditions to those countries that have ratified a number of international Treaties on human rights, sustainable development, good governance and anti-drug trafficking. When Barroso was confirmed for a second term as head of the European Commission, his commitment to enforcing the trade-labor linkage in the EU's external relations strengthened. During the second term, all trade agreements signed by the EU contained the Trade and Sustainable Development chapter, namely, a section included in the body of a trade agreement which outlines commitments to promoting environmental protection and labor rights while fostering trade liberalization; in short, ensuring that the growth derived from economic development does not happen at the expenses of sustainability and social justice. All trade agreements that include a TSD chapter as commonly known for being part of the so-called 'new generation of trade agreements'.[143] The governance of TSD chapters is devolved to a broad set of actors, which range from high level officials to civil society organizations and envisage the setup of a complex institutional mechanism to monitor their correct drafting and implementation. Such institutional arrangement also includes the creation of a Committee on TSD composed by senior bureaucrats who convene periodically to supervise the implementation of TSD provisions and that engages in dialogue with civil society on those matters.[144] Before getting to the point where all EU FTAs

[141] *European Commission, Social Economy Action Plan* (9 December 2021) COM(2021) 778 final.
[142] *Lisbon European Council Presidency Conclusions* (23–24 March 2000).
[143] Velluti, 2020.
[144] *Ibid*.

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included TSD chapters as praxis, two pivotal steps occurred. In 2008, the CARIFORUM Economic Partnership Agreement was signed, with the EU on one side and a group of 15 countries of the Caribbean area on the other. This instrument highlighted human rights protection like no other before, even setting up an institutional arrangement with it to uphold labor rights enforcement. Such institutional setup consists of a panel of independent experts to examine complaints referred to them in case of human rights violations from the parties; and a civil society framework to incorporate dialogue between citizens and institutions in the enforcement of the agreement.[145] The CARIFORUM Agreement is also notable as it contains references to the ILO Decent Work Agenda, and it incorporated a provision, namely Art. 73, that states that foreign direct investment cannot occur if it lowers domestic labor standards.[146] This instrument, moreover, sets up two strategic institutional mechanisms: a Joint Council tasked with redressing disputes arising from the Agreement, and a consultation process devoted to the interpretation of the social clauses where the ILO is involved by way of advisor.[147] The second pivotal step was the EU-South Korea FTA,[148] concluded by the parties in 2011. Such instrument was the first to ever contain a TSD chapter, and started what is now a standard common practice in the new generation of EU trade agreements.[149] The TSD chapter emphasizes labor and environmental concerns equally, seeking to establish new obligations focused on the link between trade and sustainable development.[150] The 2011 EU-

[145] Harrison et al., 2019.
[146] Cardwell P.J. and French D., 'The European Union as a global investment partner: law, policy and rhetoric in the attainment of development assistance and market liberalisation?' in C. Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2013) 201-222.
[147] *Economic Partnership Agreement between the CARIFORUM States and the European Community* [2008] OJ L289/3, art 195.
[148] *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.
[149] Bendini R., 'The Future of the EU Trade Policy' (2015) Directorate-General for External Policies, DG EXPO/B/PolDep/Note/2015_227.
[150] Yang and Luo, 2023.

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South Korea FTA has ever since been used as a standard model for subsequent negotiations,[151] as it represented a cutoff in the EU's approach to the trade-labor nexus. Indeed, in such instrument, the link between trade and labor was couched into binding commitments and substantive measures involving cooperation and monitoring; and not anymore as mere exception clauses that were extremely soft in nature.[152] Another trade agreement that is notable for how it handles labor issues it the 2014 EU-Canada Comprehensive Economic Trade Agreement (CETA).[153] The negotiation process for obtaining such high standards of labor rights protection was simplified by the fact that Canada is the first developed, highly industrialized state to finalize such an agreement with the EU; moreover, Canada and the EU jointly share a common ground in terms of legal, political, and ideological background, hence making it easier to heighten the level of worker protection in a shared trade framework.[154] Given this collaborative disposition, the CETA achieved ambitious goals in terms of worker protection, much more than what was previously obtained by the 2011 EU-South Korea FTA. Indeed, such agreement not only contains a TSD chapter, but also a separate chapter on Trade and Environment and another separate one on Trade and Labor,[155] which is elaborated in particularly robust terms through the use of binding language such as 'shall ensure'.[156] The CETA also foresees wide civil society engagement, through the encouragement of debate and activities for raising awareness.[157]

[151] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 '*Global Europe: Competing in the World*' COM(2006) 567 final.
[152] Kenner J., 'Economic partnership agreements: enhancing the labour dimension of global governance?' in B. Van Vooren, S. Blockmans and J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013) 306-321.
[153] *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 L11/23.
[154] Velluti, 2020.
[155] Respectively, EU-CETA Chapters 22, 24 and 23.
[156] E.g. *Ibid*., Artt. 23 (3) and (5) para 2.
[157] *Ibid*., Artt. 23 (5) and (6).

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Within the text of the CETA, reference to labor rights standards is made to the parties' own national legislation, to the ILO 2000 Decent Work Agenda, to the 2008 Declaration on Social Justice for a Fair Globalization, and to the ILO 1998 Declaration on Fundamental Principles ad Rights at Work. The latter is a bit less specific than the ILO core Conventions and does not appoint any avenue for redressing legal disputes, which makes the commitment to ILO principles less strict than it could have been otherwise. This choice was justified by the fact that, at the time of the signing of the CETA, Canada had only ratified six out of the ILO core Conventions. Therefore, the parties agreed on the following formulation for what concerns labor rights references:

> 'Each Party reaffirms its commitment to effectively implement in its law and practices in its whole territory the fundamental ILO Conventions that Canada and the Member States of the European Union have ratified respectively. The Parties shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so. The Parties shall exchange information on their respective situations and advances regarding the ratification of the fundamental as well as priority and other ILO Conventions that are classified as up to date by the ILO'.[158]

During these years, the ethical aspects of trade were fully embraced without reservation by the EU, which aimed at becoming a global leader in fostering sustainable trade and in incorporating labor conditionality as a hard prerequisite for any trade negotiation.[159] Under the succeeding Commission led by Jean-Claude Juncker, a new trade-related strategy program was published, the so-called *Trade for All* initiative of 2015. The *Trade for All* plan was highly connotated for

[158] *Ibid*., Art. 23 (3) para 4.
[159] Orbie J., Martens D. and Van den Putte L., 'Civil society meetings in European Union trade agreements: features, purposes and evaluation' (2016) vol 3 *Centre for the Law of EU External Relations (CLEER) Papers* 1.

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being 'a value-based trade agenda'.[160] Such policy is indeed connotated by a much more ethically driven approach to trade than previous ones, with its text clearly stating that:

> 'One of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection. This applies to external as well as internal policies, and so also includes trade and investment policy'.[161]

Following the publication of the *Trade for All* initiative, the EU Commission supplemented the project with an action plan comprehensive of 15 targets to make TSD chapters more effective, under great pressure from civil society.[162] Indeed, the latter had begun to heavily scrutinize EU action on human rights, especially following rising concern for human rights breaches in Vietnam, whose trade negotiations were underway at the time.[163] As a response to such amplified scrutiny, the Directorate General for Trade has been increasingly more vocal in emphasizing that trade should focus on values, rather than on economic growth only, and that 'strong provisions to promote the respect for labor rights'[164] are essential to align the two policy goals. Notwithstanding such efforts, criticism has also originated from within, with national leaders criticizing the EU ever more for hiding behind mere rhetoric and not substantiating promises with actions.

[160] European Commission, *Trade for All* (Brussels, Commission of the European Communities, 2015) http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf accessed 28 September 2024.
[161] European Commission, *EU Trade Policy: A Balanced and Progressive Policy to Harness Globalisation* (Publications Office of the European Union, 2015) https://op.europa.eu/en/publication-detail/-/publication/d90eda7c-7299-11e5-9317-01aa75ed71a1 accessed 28 September 2024.
[162] Commission, *Non Paper of the Commission Services: Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements* (26 February 2018).
[163] Bertram, 2023.
[164] Commission, DG Trade, 'Strategic Plan 2016–2020' (2016) accessed 28 July 2024.

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Letters inquiring into TSD chapters' lack of enforceability, even launching investigations into it, have been addressed to the EU by the Trade Ministers of France,[165] the Netherlands,[166] Belgium, Sweden and Luxembourg.[167] In response to such widespread criticism, the EU Commission replied through engaging consultations and by publishing a paper promising that 'the Commission is committed to strengthening the implementation and enforcement of TSD chapters in future trade agreements by enhancing monitoring mechanisms and improving the dispute settlement process'.[168] In subsequent occasions, however, Trade Commissioner Cecilia Malström firmly asserted that the EU is not moving towards a sanctions-based approach, but rather towards a stronger implementation of the mechanisms currently in place.[169] Such choice is due to a lack of consensus on the former policy and will be accompanied by enhanced transparency, increased civil society participation and stricter monitoring.[170] Therefore,

[165] France Diplomatie, *Mise en oeuvre du CETA: Le plan d'action du gouvernement* (25 October 2017) https://www.diplomatie.gouv.fr/IMG/pdf/plan_action_ceta_du_gouvernement_cle0c5b74.pdf accessed 28 September 2024.
[166] Douma W.T., 'The Promotion of Sustainable Development through EU Trade Instruments' (2017) *European Business Law Review* 28(2) 216.
[167] *Letter to EU Trade Commissioner Cecilia Malmström* http://www.politico.eu/wp-content/uploads/2017/06/20170511155157994.pdf?utm_source=POLITICO.EU&utm_campaign=e95ace0190-EMAIL_CAMPAIGN_2017_06_27&utm_medium=email&utm_term=0_10959edeb5-e95ace0190-189774485 Accessed 28 September 2024.
[168] European Commission, *Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)* (11 July 2017) http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf accessed 28 September 2024.
[169] European Commission, *Speech by EU Trade Commissioner Cecilia Malmström: Trade and Sustainable Development*, Brussels, 6 October 2017 http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156137.pdf accessed 28 September 2024.
[170] European Commission, *Feedback and Way Forward on Improving Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements*, 26 February 2018 http://www.borderlex.eu/wp-content/uploads/2018/02/2018-02-26-TSD-non-paper-FINAL.pdf accessed 28 September 2024.

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notwithstanding harsh criticism coming from civil society, member states and external actors, the EU appears to be sound on its 'soft conditionality' approach.

The latest policy initiative in terms of trade and sustainable development published by the EU Commission is the 2021 *An Open, Sustainable and Assertive Trade Policy*, which however hardly ever mentions enhancing protection of worker rights abroad through trade agreements and that also fails to set up specific targets or policies for the future in this realm.[171] However, under the current von der Leyen Commission, the issues of competitiveness, sustainability and economic growth have become intrinsically tied, which triggered a great lot of criticism such as accusations of protectionism and opportunism.[172] Moreover, the latter criticism has taken even more ground when, despite flaunting high ambitions of finalizing comprehensive TSD chapters within trade agreements with India and Indonesia (which are countries well renowned for being quite hostile to such topics), the EU Commission does not seem to be as decisive on improving its lack of enforcement measure in said chapters.[173] In fact, a TSD chapter sparked an actual instance of litigation only once. In 2021, when South Korea was found in non-compliance of its obligations on labor rights, the EU initiated a dispute against it and was awarded the case by the Panel. Specifically, the Panel found that South Korea was in breach of the obligation to exert 'continued and sustained efforts' to ratify the four out of ILO core labor conventions that it had not ratified yet,[174] and that it also appeared to lack a time

[171] European Commission, *Regulation of the European Parliament and of the Council on a Carbon Border Adjustment Mechanism* COM(2021) 564 final https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF accessed 28 September 2024.
[172] Bertrand, 2023.
[173] González Garibay M., 'The trade-labour linkage from the eyes of the developing countries: A euphemism for protectionist practices?' (2009) *European Foreign Affairs Review* 14(5) 763-784, and Orbie J., 'EU trade policy meets geopolitics: What about trade justice?' (2021) *European Foreign Affairs Review* 26(2) 197-202.
[174] *Report of the Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement (EU-Korea Panel Report)*, adopted 20 January 2021, para 278.

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horizon to do so, therefore violating its 'best efforts' obligation.[175] As a result, South Korea has now ratified three of the ILO core conventions on labor rights and has enhanced its domestic worker protection laws.[176] Despite this success, no other such instance has ever occurred, and enforcement of labor clauses seems less and less likely overtime. To address widespread criticism on lack of hard conditionality, the EU has attempted at improving its approach to TSD chapters enforcement. In 2022, the Commission passed a new method of TSD implementation, which envisages the possibility to apply sanctions against the country that has signed the trade agreements and that is found in violation of the ILO core conventions (and, for what concerns the environmental side, of the Paris Agreement). Sanctions can only be issued as a measure of last resort. Such feature is already part of the EU-New Zealand trade agreement,[177] which is currently the last FTA concluded by the EU. Whether this practice will be consolidated in future trade agreements is thus yet to be determined.

Notwithstanding this analysis, the fact that the use of labor clauses within FTAs has increased so much in the last decade is not entirely due to the European Commission's push forward. Rather, it is historically the European Parliament that has championed for greater attention to human rights within the EU's foreign trade policy.[178] Indeed, since the Treaty of Lisbon was adopted in 2007, the Parliament has been afforded a larger say and its pressure for widening the trade-labor linkage has increased. Quite unexpectedly, it also appears that, since the European Parliament has gained larger leeway in tackling external policy,[179] all political groups within it agree on stronger enforcement of the trade-labor nexus,

[175] *Ibid*., para 291.
[176] García M. J., 'Sanctioning capacity in trade and sustainability chapters in EU trade agreements: The EU–Korea case' (2022) *Politics and Governance* 10(1) 58-67.
[177] *Free Trade Agreement between the European Union and New Zealand* [2024] OJ L244/1.
[178] Van den Putte and Orbie, 2015.
[179] Raube K. and Wouters J., 'The many facets of parliamentary involvement and interaction in EU external relations' (2016) Working Paper No. 174, *Leuven Centre for Global Governance Studies*.

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even though they might do so for diverging reasons.[180] Empirical studies surveying negotiators from both the EU side and the third country involved confirm that the European Parliament, together with NGOs and the European Trade Union Movement, were the main drivers for the inclusion of TSD Chapters in negotiations for the FTAs with Moldova, South Korea, and the Caribbean states.[181] These counterparts also reported that including TSD Chapters within their FTAs was not a priority for them, hence that the negotiating process for those clauses was completely driven by the EU, which instead appeared adamant that labor provisions were a natural part of the FTA's text.[182] During the negotiation process, trade-offs had to be struck and the EU had to let go of some of its requests. For instance, South Korea obtained a reduction of the references related to ratification of ILO Conventions; and the Caribbean states successfully secured that labor clauses could not constitute grounds for sanctioning.[183] It is up to future developments to prove whether the greater influence afforded to the European Parliament, together with its outstanding cohesion on the issue of the trade-labor linkage, will actually lead the EU to a stricter approach to enforcement and hard conditionality in TSD Chapters.

3.2 Analyzing TSD Chapters

TSD Chapters are very complex and multi-layered in terms of obligations they give rise to, of institutional implications they entail and of policy impacts they generate. Therefore, an analysis of TSD Chapters could take many different forms and focus on varying details of the topic. For the purposes of this thesis, the following paragraphs will analyze three aspects of the subject matter: the way TSD Chapters are worded and structured, the institutional framework they entail,

[180] Van den Putte L., 'Involving civil society in social clauses and the decent work agenda' (2015) *Global Labour Journal* 6(2) 221-235.
[181] Harrison et al., 2019.
[182] *Ibid*.
[183] *Ibid*.

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and the issue of enforceability of labor rights obligations contained in the Chapters. These topics are intrinsically linked, as the wording of a legal text is carefully drafted in order to give rise to specific implications, fully aware that different wordings can generate several interpretation issues, even influencing whether a provision will be actually enforced or not. The EU style of structuring EU Chapters is quite distinctive insofar as it is very poor in generating proper response mechanisms in case violations of TSD Chapters provisions occur. Such issues have been heavily criticized by scholars, NGOs, and even EU Member States themselves; however, the institutional response has been wanting. The following paragraphs will delve deeper into such analysis.

3.2.1 Wording and Scope of TSD Chapters

The way TSD Chapters are worded, phrased and structured is common across all agreements that contain them. Clearly, some variation is still to be foreseen as different parties call for different specifications due to varying economic conditions, constitutional frameworks, and development levels. These underlying differences allow for greater leeway in the way commitments are envisaged and phrased, thus allowing for case-by-case *ad hoc* tailoring while ultimately maintaining the overarching final goal of worker protection. Against this background, it is interesting to delve deeper into the common structure that TSD chapters share for the largest part. First of all, all TSD Chapters are marked by the concept of 'decent work', which is originally an ILO terminology. Indeed, the connection to the ILO regime is frequent across EU TSD Chapters consistently and in many ways: not only the EU employs ILO terminology, but also the labor provisions contained in TSD Chapters are aligned with the minimum labor standards identified by the ILO.[184] More generally, the paradigm appears to be one of full adherence to the obligations outlined by the ILO, with the EU mostly

[184] Hradilová and Svoboda, 2018.

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conforming to what was previously underpinned by the former.[185] The fact that EU TSD Chapters uses international labor standards issued by the ILO as a reference point for underpinning their own substantial obligations has often been used as a response to critics arguing that TSD policies are an externalization of EU norms.[186] Another overarching aspect that all TSD Chapters of the 'new generation of trade agreements'[187] share is that third countries are endowed with a more proactive role, having been empowered as co-shapers of the agreement and not just as mere recipients of it anymore.

There are three categories of provisions that always make their way into TSD Chapters concluded by the EU.[188] First, there are the substantive provisions. These clauses contain the material obligations that the parties shall uphold in the context of labor rights, and always refer to external frameworks of workers protection, those of the ILO. All EU trade agreements require third states to ratify and implement the ILO core labor standards, whether it is the eight core Conventions, the four key principles, the 1998 Declaration or some other instrument such as the Decent Work Agenda. Another external framework for labor rights that is often referenced in substantive provisions is that of the UN, such as the 2006 Ministerial Declaration of the UN Economic and Social Council on Attainment of Full and Productive Employment. Moreover, third parties are asked to leverage their own domestic labor laws to protect workers affected by the trade agreement. Secondly, other clauses can be grouped into procedural obligations. Such provisions concern all processes that monitor the correct

[185] Yang and Luo, 2023.
[186] Damro C., 'Market Power Europe' (2012) 19(5) *Journal of European Public Policy* 682–99 and Young A., 'Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's "New Generation" Preferential Trade Agreements' (2015) 22(9) *Journal of European Public Policy* 1253–75.
[187] Velluti, 2020.
[188] For the classification of TSD provisions into three categories, please refer to Harrison et al., 2019.

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implementation of the substantive commitments and involve cooperation between the states. Among these procedures we find institutionalized dialogue between the parties, studies assessing the sustainability impacts of the instrument during and after its entry into force, and civil society scrutiny. The last category of provisions recurrent in all TSD Chapters are those that structure institutional mechanisms, usually laying out a common institutional framework that is expected to interact regularly not only intra-institutionally, but also in a way that is cross-cutting between the parties. The institutional layout generated by these provisions will be further analyzed in the following sub-paragraph.

This initial division is just face-value, as it contains one more sub-division to be analyzed. Indeed, the substantive provisions themselves can be further categorized into three separate types, as follows:[189]

- Obligations based on existing international legislation: these provisions basically entail the ratification and implementation of pre-existing international instruments on worker rights. This kind of obligation can be further split into two different formulations:
    - In many of these clauses, the parties are mandated by the FTA to ratify certain given international instruments on labor law;[190] this is commonly considered the most effective clause formulation to obtain such goal.
    - Otherwise, the parties may be asked to use their best efforts to ratify the international instruments on labor law, usually through a clause containing terms such as ‘continued and

[189] For the classification of TSD substantive provisions into three categories, please refer to Bronckers M. and Gruni G., ‘Retooling the Sustainability Standards in EU Free Trade Agreements’ (2021) 24 *Journal of International Economic Law* 25–51.
[190] For example, see CETA Art. 23 (3) para 4; EU-Vietnam FTA Art. 13 (4) para 3; EU–Japan FTA Art. 16 (3) para 3; EU–Singapore FTA Art. 12 (3) para 4; EU–Mexico FTA TSD Art. 3 (4); EU–Korea FTA Art. 13 (4).

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sustained efforts';[191] this formulation is highly contested as, in the past, it has given rise to interpretation disputes such as in the South Korean case.

Moreover, the clauses containing obligations based on existing international standards can be split into other categories depending on what conventions or principles they refer to:

- Most provisions, especially those phrased with the 'best efforts' formula, ask the parties to ratify the core ILO Conventions.
- Others (and these are not mutually exclusive), instead, ask the parties to 'respect, promote and realize' the key principles of labor law, regardless of a country's ratification of the relative conventions on the matters. While formulated ambiguously, these clauses are not to be considered soft law, especially in light of the Panel's ruling against South Korea following their claim that such provision did not carry binding power.
- Last, other substantive provisions based on existing international obligations require the parties to the agreement to 'effectively implement' those labor-related conventions that they have already ratified.

- Obligations based on existing national legislation: these provisions relate to the domestic labor law regime of the parties to the agreement, and they are twofold in nature. On the one hand, the parties must not lower their existing national levels of workers protection (so-called 'non-regression clause'); on the other hand, the existing laws must be aligned with the country's international commitments and properly enforced throughout its

[191] EU–Korea FTA Art. 13 (4). For example, see EU–Mercosur FTA TSD Art. 4; EU–Mexico FTA TSD Art. 3 (4); EU–Singapore FTA Art. 12 (3) para 4; CETA Art. 23 (3) para 4.

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territory (so-called 'non-enforcement clause'). These commitments, however, are not absolute, meaning they are conditional on impacts on trade. This entails that, in order for the weakening of domestic labor laws to actually infringe the TSD Chapter obligations, such lowering must have an intended or actual effect on trade and investment. These clauses are considered breached when their violation has triggered trade-related, as hindrance to enforcement and regression to lower labor standards are only prohibited 'in a manner affecting trade'.[192]

- Obligations based on aspirations: these clauses contain aspirational language encouraging the parties to strive for obtaining higher levels of workers protection. Such language is vague in nature; hence these provisions will carry less binding weight than the two aforementioned ones. Given such lower clarity, though, it is also much harder for the EU to ensure compliance with this kind of clauses.

In conclusion, the TSD Chapter's obligations follow a standard, one-size-fits-all paradigm that is applied to most partners, irrespective of their *ad hoc* necessities. Nevertheless, the EU approach is still complex and layered enough to cover several legislative realms (such as the ILO framework, other international instruments and domestic legislation) and to nuance obligations with different compliance requirements (such as the mandatory *vs.* 'best efforts' schemes). Moreover, not only the EU formulates its TSD Chapters so as to entail substantive and procedural obligations to comply with, but it also includes institutional clauses that set up complex mechanisms to ensure implementation, monitoring and enforcement of the previously mentioned obligations. These are analyzed in the following sub-paragraph.

[192] For an example of a non-regression clause, see EU–Vietnam FTA Art. 13 (3) para 2. For an example of a non-enforcement clause, see EU–Korea FTA Art. 12 (7) para 1. For an example of a clause that is both non-regression and non-enforcement, see EU–Singapore FTA Art. 13 (12).

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	Commitment to effectively implement ILO principles within national legislation	Commitment to promote and implement ILO principles within national legislation	Commitment not to derogate from national law, nor to fail to effectively enforce it through a sustained course of action or inaction to encourage trade or investment	Commitment not to derogate from national law, nor to fail to effectively enforce it through a sustained course of action or inaction in a manner affecting trade	Commitment not to fail to effectively enforce national labor laws in a manner affect trade or investment between Parties

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				between the parties	
EU-Colombia FTA	✓			✓	
EU-Central America AA	✓				✓
EU-Georgia AA	✓		✓		
EU-Moldova AA	✓		✓		
EU-Ukraine AA		✓		✓	
EU-Korea FTA	✓			✓	
EU-Japan EPA	✓			✓	
EU-Canada FTA	✓		✓		

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EU-Mexico FTA	✓			✓	
EU-Singapore FTA	✓		✓		
EU-Vietnam FTA	✓		✓		

Table 2 – Wording of labor commitments in EU trade agreements. Source: author's elaboration.

3.2.2 Institutions and Procedures under TSD Chapters

The institutional mechanisms foreseen by EU TSD Chapters are setups envisaged by the text of the trade agreement itself and that are tasked with the effective implementation of the TSD Chapter. Such institutions are charged with diverse functions all connected to ensuring the proper functioning of the labor clauses. Ever since the 2011 EU-South Korea FTA, institutional mechanisms are all endowed with a similar tripartite division that is structured as follows:

- Sub-Committees on Trade and Sustainable Development: these are joint intergovernmental working groups with members from both parties who are in charge of monitoring the implementation of the TSD Chapter. The EU is represented by its own officials, which is why the other party will send some state representatives as their spokespersons in the Committees. The Sub-Committees meet on an annual basis and report back to the Trade Committee established by the FTA, thereby giving rise to a multi-layered framework contained within the agreement.

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- Civil Society Mechanism (CSM): this is a mechanism fostering dialogue with civil society, ultimately aimed at issuing recommendations to the Committees. This group pertains to the aforementioned 'network effects' that the EU wants to amplify. Each party establishes one Domestic Advisory Groups (DAG), which is composed of several selected civil society organizations that represents different interests, and they will meet annually.[193] The CSM is usually composed of members from varying backgrounds, ranging from NGOs, lobbyists, trade unions and scholars. Other than civil society organizations, this group also involves the European Economic and Social Committee (EESC) in the overseeing process. While the DAG groups together different societal categories with varying interests, the EESC provides technical recommendations and support to the CSM. Together, they form the so-called Joint Civil Society Dialogue, which meets once per year in a forum presided by the Sub-Committee. Often, the effective operationalization of CSM is delayed due to the scarce familiarity of third parties with the inclusion of civil society into formal governmental structures.[194]
- Panel of experts: this group is tasked with handling TSD enforcement, as it is in charge of receiving the complaints issued by the parties to the agreement and making recommendations on how to proceed with them. The panel of experts is only established when necessary, i.e., if after government-to-government consultations a dispute has not been resolved.

[193] E.g., Art. 294 (4) of the EU-Central America agreement enshrines that 'The Advisory Groups of the Parties shall comprise independent representative organizations, in a balanced representation of economic, social and environmental stakeholders including, among others, employers and workers organizations, business associations, non-governmental organizations and local public authorities'.
[194] Harrison et al., 2019.

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This tripartite structure enhances one of the main features of the EU's approach to trade policy, that is, the institutionalization of civil society involvement in drafting, implementing and monitoring trade agreements.[195] This principle is also somewhat pivotal in distinguishing the European approach from the US and Canadian ones.[196] The direct involvement of civil society into TSD-related matters emerges, obviously, from the existence of the CSM. While very rooted in the institutional setup of the TSD Chapters, the CSM is not afforded a specific function within this settlement, other than mere representative purposes. Scholars have hypothesized four different roles of the CSM, which are not mutually exclusive but also very dissimilar from one another. These are the following:[197]

- Instrumental role: according to this purpose, civil society is merely involved to engage non-institutional actors in decision-making processes, which would supposedly foster a more complete implementation of the agreement, irrespective of the actual outcome of the CSM's meetings.
- Functional role: under this interpretation, the CSM would serve as a monitoring objective, overseeing the advancements and setbacks of the implementation process of the TSD Chapter. Civil society is thus the watchdog of labor-related issues and possibly the most suited actor to blow the whistle on any infringement thereof, detecting violations and ensuring a smooth operationalization of the clauses.
- Deliberative role: were this the purpose of the CSM, then such group's inherent quality and skill would be its democratic nature. The

[195] Orbie J., Van den Putte L., and Martens D., 'Civil Society Meetings in EU Free Trade Agreements: The Purposes Unravelled' in Gött H. (ed), *Labour Standards in International Economic Law* (Springer, Cham 2018) https://doi.org/10.1007/978-3-319-69447-4_8.
[196] *Ibid*.
[197] For more information on the possible roles of the CSM, please refer to *Ibid*.

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CSM is convened for improving transparency in the EU policy-making process and for providing democratic inputs to it. Moreover, involving the CSM would empower previously marginalized social actors whose voices are rarely heard but that are also pivotal in matters such as worker rights. Under this interpretation, thus, the CSM creates a new 'opportunity structure' for formerly silent (or silenced) actors.[198]

- Policy role: under this interpretation, the CSM's goal would be to influence the policy-making process by formulating advice and recommendations on how to frame and operationalize the trade agreement. Therefore, different from the other three roles, according to this idea the CSM's role is to actively participate in producing policy advice for improving the TSD Chapter as a whole.

From these institutional arrangements, it emerges that the EU creates the network-based governance through which it performs part of its rule-setting functions, and which characterizes it against the USA model of enforcing labor rights standards in trade agreements, namely, sanctions.[199] Therefore, while there is surely great margin for improvement of these collaborative mechanisms, the way the EU has institutionalized them has represented a best practice and its most distinctive feature in trade law doctrine. In fact, the EU method of obtaining regulatory convergence is supposedly long-term oriented, disregarding immediate compliance in favor of increasing shifts towards improvement in labor protection. The means to obtain such results are not financial sanctions nor judicial retaliation; rather, the EU wants to exploit processes of learning, dialogue, governance, persuasion and socialization so to obtain a more sustained impact in

[198] *Ibid*.
[199] Harrison et al., 2019.

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their counterparts.[200] The trade-off at stake consists in giving up short-term results in favor of long-term policy learning, strengthening international networks and ensuring mutual trust among the parties.[201] This policy choice exemplifies the so-called 'normative power Europe', which is based more on prestige and influence rather than on hard conditionality.[202] This is channeled, as mentioned before, through enhancing the involvement of third countries, not just in governmental terms but also civil-society wise. While the engagement of civil society organizations varies widely from agreement to agreement, those actors always have a role in overseeing labor standards provisions,[203] eventually leading to heightened democratic input, transparency, and legitimacy.[204]

Because of the soft approach to achieving long-term goals, in most EU trade agreements there is no avenue for redress of disputes that would potentially lead to the suspension of preferential trade against the other country; that is to say, the panel of experts is not endowed with sanctioning ability.[205] Indeed, the most distinctive feature of the EU approach to drafting TSD Chapters is the use of soft language backing up the substantive provisions. The EU chooses to draft its labor provisions within trade agreements with rather weak terminology, often couching obligations into a 'best endeavor' language. Therefore, neither enforceable dispute settlement mechanisms nor economic sanctions following non-

[200] *Ibid*.
[201] Keck M. and Sikkink K., 'Transnational Advocacy Networks in International and Regional Politics' (2002) 51 *International Social Science Journal* 89–101.
[202] Manners I., 'The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective' (2009) 14 *European Foreign Affairs Review* 785–803.
[203] Orbie et al., 2018.
[204] Korkea-aho E., 'Evolution of the Role of Third Countries in EU Law—Towards Full Legal Subjectivity?' in Bardutzky S. and Fahey E. (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Elgar, Cheltenham 2015) 206–226.
[205] Harrison J., Barbu M., Campling L. et al., 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda' (2019) *World Trade Review* 18(4) 635-657.

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compliance are envisaged by the EU TSD framework.[206] An exception to this is the 2008 EU-CARIFORUM partnership, which envisages a full sanctioning mechanism in case of breaches of certain labor (and environmental) clauses.

Clearly, such complex adherence to the ILO doctrine and the establishment of institutional frameworks was something that the EU built step by step, with a slow learning process throughout the negotiations of each trade agreement it concluded. The labor clauses and the obligations arising from them have become more and more elaborate overtime, starting with some very basic layouts and coming to impressive peaks in terms of scope and ambition. Indeed, in the 199 EU-South Africa Trade Agreement did not contain any specific mention of labor rights, but just a general link to the pertinent ILO norms that could form a basis for further development of workers' rights obligations in the future.[207] As already noted above, on the other hand, significant steps forward were taken in 2008, when the EU-CARIFORUM Economic Partnership Agreement was concluded. Its text envisaged obligations related to the ratification and effective implementation of the four core ILO labor principles, the 1998 ILO Declaration, the 2006 Ministerial Declaration on Full Employment and Decent Work, and to domestic labor laws. In 2017, the EU and Canada concluded an FTA binding the parties to respecting the 2008 ILO Declaration on Social Justice for a Fair Globalization and the ILO Decent Work Agenda, as well as the aforementioned instruments. This FTA largely drew on the structure of the EU-South Korea FTA,[208] which acted as a benchmark for many subsequent negotiations, and was then adapted to Canada's national context. The FTA binding the EU and Canada

[206] Colli Vignarelli M., *EP EF 2021* https://iris.unito.it/retrieve/e27ce433-13a9-2581-e053-d805fe0acbaa/EP_EF_2021_H_001_Mattia_Colli_Vignarelli_00445.pdf accessed 28 September 2024.
[207] Marslev K. and Staritz C., 'Towards a stronger EU approach on the trade-labor nexus? The EU–Vietnam Free Trade Agreement, social struggles and labor reforms in Vietnam' (2023) *Review of International Political Economy* 30(3) 1125-1150.
[208] *Free Trade Agreement between the European Union and the Republic of Korea* (signed 6 October 2010, provisionally applied 1 July 2011) [2011] OJ L127/6.

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is, still today, considered to be one of, if not the most advanced instrument ever drafted by the EU in terms of incorporating high labor protection standards into a preferential trade agreement.

3.2.3 Analyzing Enforceability Issues of TSD Chapters

Other than discussing *how* the EU drafts its labor standards obligations within preferential trade agreements, a second set of issues arises from *what* consequences TSD Chapters give rise to when actually implemented.

The way most TSD Chapters are structured in the EU framework does not involve avenues for redressing disputes endowed with binding power, as the EU never managed to gather consensus on this issue. To fill the gap created by this lack of binding means for enforcing TSD obligations, the EU instead foresees a dialogue-based procedure for addressing disputes concerning the interpretation or application of clauses contained in the TSD Chapter. Such mechanism is composed of three phases. First, intergovernmental consultations between the parties occur, and they try to agree on a shared resolution of the issue at stake. If they do not manage to solve the dispute, the second step is activated; namely, the establishment of the Panel of Experts on Trade, Labor and Environment. This group is composed of technical experts on the subject matter of the debate and it is tasked with drafting a final report where the issue is analyzed from a more technical point of view and a resolution is sought. Within the report, the Panel not only examines the matter in question, but it also issues final recommendations on how to settle it, thereby closing the litigation and awarding final instructions on how to proceed. The report published by the Panel of Experts is publicly available for consultation. Therefore, in the third and last phase, the Sub-Committee will meet regularly as foreseen by the TSD Chapter's text so as to oversee whether the Panel's recommendations are being properly implemented and respected by all parties. The TSD Sub-Committee will periodically review this in their meetings.

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Notice that, despite the Panel's report being highly authoritative and carrying large influential weight, it still *de iure* and *de facto* lacks enforceability: the recommendations of the Panel are, indeed, *recommendations* only and remain soft in nature. The Panel is the only avenue for redress available for parties wanting to initiate litigation following a breach of labor provisions since recourse to the general dispute settlement mechanism provided by the FTAs is barred for disputes falling under the scope of the TSD Chapter. Notwithstanding this separation, the two methods for settling disputes are very similar, almost identical: it is often the case that procedural provisions under the trade-related sections and under the TSD Chapter are exactly the same.[209] The only difference, which cannot be disregarded nor understated, is that the Panel's ruling under the former sections is binding, while the Panel's recommendations under the latter Chapter are not. The Panel's report following a TSD-related dispute is merely one stepping-stone in the parties' path to reconciliate their differences,[210] thereby mining at the credibility of the Panel's decision overall and hindering its operationalization.

Figure 1 – TSD enforcement procedure. Source: author's elaboration.

Underlying this whole process, the EU envisages continuous interaction between the parties through a framework of cooperation that is supposed to involve all actors, even civil society ones, in the monitoring, implementation and

[209] Prévost D. and Alexovicová I., 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6 *International Journal of Public Law and Policy* 236, 249.
[210] E.g., EU-Mercosur FTA TSD Chapter Art. 17 (11).

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evaluation of TSD provisions. However, notice how only governments are endowed with the capacity to initiate litigation under TSD Chapters; civil society's involvement in the matter is limited insofar as it does not have such power.[211] Civil society is also impaired due to limited resources allocated to their engagement and to scarce influence exercised on the committees to which they have access.[212] Cooperation with civil society organizations, though, is fostered through the creation of projects aimed at improving a country's commitment to ILO core principles, or to acting as watchdogs for companies from which good corporate governance is expected.[213] For instance, the institutional setup envisaged by the EU-South Korea FTA entails the creation of a joint cooperation project between civil society and governmental actors aimed at fostering the implementation of the ILO Convention No. 111 on Discrimination (Employment Occupation).[214] This mechanism, which excludes the application of punitive measures such as sanctions or unilateral suspension of preferential trade policies, reveals the scarce enforceability entailed into EU TSD Chapters. The provisions therein contained, in fact, are hardly enforceable in court, which means that a party that is found in violation of its commitments will rarely incur any repercussions because of its breaches. Labor provisions, thus, do not carry mandatory weight and rely on self-regulation from the parties and cross-monitoring between them. Criticism of the EU because of this choice is

[211] Marx A., Eber F., Hachez N., and Wouters J., *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements*, Leuven Centre for Global Governance Studies, 18 November 2004 https://ghum.kuleuven.be/ggs/publications/books/final-report-9-februarydef.pdf accessed 28 September 2024.
[212] European Commission, *Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)* (11 July 2017) http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf accessed 28 September 2024.
[213] *Ibid*.
[214] *International Labour Organization (ILO) Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation* (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31., Hradilová and Svoboda, 2018.

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widespread, and it has even originated from within. As mentioned above, indeed, the European Parliament has always been the most vocal institution in championing a stricter application of labor requirements within preferential trade agreements. Indeed, the Parliament is also the harshest critic of such soft form of conditionality that is entailed in TSD labor clauses, as in 2010 it had already voiced complaints asking for these provisions to be subject to a binding dispute settlement mechanism.[215] The Commission, however, proved irresponsive to such complaints and replied by issuing the *Global Europe* communication paper, in which it argued that it would have rather strengthened the existing processes than establishing new ones.[216] Besides this paper, the EU Commission has also always argued that a soft approach to conditionality in TSD Chapters will prove to be more effective in the long term, considering cooperation and dialogue-based mechanisms as more impactful when international labor standards are at stake.[217] The EU also claims that hard conditionality would not be beneficial vis à vis the different development levels of the parties with whom the EU concludes trade agreements; which tends to be less developed than the EU in terms of institutional structures and familiarity with international standards and must therefore be nudged to bring about compliance and governance, rather than being forced to generate these *ex abrupto*.[218] The soft mechanisms preferred by the EU are thus deemed the most appropriate tools to incentivize worker protection capacity in partner countries. The latter are supposedly as encouraged to do so through

[215] European Parliament, *European Parliament Resolution of 25 November 2010 on Human Rights and Social and Environmental Standards in International Trade Agreements* (2009/2219(INI)) http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-434 accessed 28 September 2024.
[216] European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy*, COM(2006) 567 final, 4 October 2006 https://eur-lex.europa.eu/procedure/EN/194745 accessed 28 September 2024.
[217] Hradilová and Svoboda, 2018.
[218] *Ibid*.

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collaboration and cooperation as they would be disincentivized to incorporate such provisions in FTAs if they were conditional to the threat of sanctions.[219] Overall, however, the EU approach to social clauses remains 'largely promotional in nature'[220] and conceived more as an aspirational goal than as a binding commitment.

One outstanding exception from the soft enforcement mechanism described above is the EU-CARIFORUM Economic Partnership Agreement. While this agreement shares the first step in the dispute resolution process as other FTAs, i.e., the intergovernmental consultations, as a second step in the dispute resolution process the EU-CARIFORUM EPA envisages a dispute settlement mechanism. As Art. 213(2) of the Agreement lays out, the procedure is the following: the dispute is analyzed by the Panel through a litigation procedure within the parties. If the party under accusation is found in violation of its TSD commitments, the Panel will rule against it and it will apply financial measures against it, namely, it will have to provide the complainant with financial compensation for its breaches. Another possible action against the violating party is unilateral suspension by the EU of financial aid for development. Notice that such a mechanism does not entail the application of economic sanctions against the breaching party. Another partial exception to the lack of enforcement measures is the GSP+ system. While completely separate from anything related to TSD Chapters, the GSP+ system still envisages the possibility to apply trade sanctions to those developing countries that were previously benefitting from the system that are found in breach of international labor standards. Under this framework, developing countries that benefit from the system will be monitored and, if found responsible of 'serious

[219] Sun D., 'China's Partnership Diplomacy in the Middle East' in *Routledge Handbook on China–Middle East Relations* (Routledge 2021) 299–311.
[220] Velluti, 2020.

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and systematic violations of principles laid down in the conventions',[221] their trade benefits will be unilaterally withdrawn, and they will not be allowed to enjoy them anymore. Such instance has occurred in August 2020, when the EU Commission partially suspended enjoyment of preferential trade policies from Cambodia, which was found multiple times in breach of the fundamental ILO Conventions by the Commission.[222]

Operationalization of labor clauses under TSD Chapters is also difficult because the lack of a threat of juridical action results in a reduced deterrent effect for parties that are hostile to upholding labor commitments.[223] Scarce deterrence is also given by the fact that the EU has historically hesitated to follow through on conflicts arising from labor provisions, even when faced with striking violations of worker rights by its partner countries.[224] Even the cooperation activities set out in all TSD Chapters, which are supposed to characterize EU action in this realm, have either not being fully implemented or their implementation has not being closely monitored.[225] Proper operationalization of monitoring clauses is indeed hampered by the vague formulation of the clauses enshrining such processes, and to the significant margin of freedom afforded to the parties in choosing their own approach to monitoring application of labor clauses.[226]

[221] See e.g. European Parliament and Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC), OJ L 303/1 (2012), art 19(1)(a).
[222] Commission Delegated Regulation (EU) 2020/550, OJ 2020 L 127/1 (currently on appeal before the General Court, Case T-454/20 *Garment Manufacturers Association in Cambodia/Commission*).
[223] Harrison, 2019.
[224] Tran N.T., Bair J., and Werner M., 'Forcing Change from the Outside? The Role of Trade-Labour Linkages in Transforming Vietnam's Labour Regime' (2017) 21 *Competition & Change* 397.
[225] Harrison, 2019.
[226] *Ibid*.

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Despite being criticized on all fronts for lacking means of redressing disputes before a tribunal, EU TSD Chapters have not consistently failed to bring results; in reality, there have been some successful instances where breaches of labor provisions contained in TSD Chapters have not gone unnoticed. To this point, the most important milestone took place in 2018 in the context of the EU-South Korea Trade Agreement. Following South Korea's blatant failure of upholding its labor rights obligations, and after many attempts at solving the question more diplomatically exploiting the role of the Sub-Committees,[227] the EU Commission activated a legal proceeding against the other party under the TSD Chapter mechanism for the first time. According to the European Union South Korea was in breach of its TSD obligations, specifically of Art. 13 (4) (3) on Multilateral Labour Standards and Agreements, given that it had not ratified all core ILO Conventions. Another issue of concern of the European Union was South Korea's failure of upholding its commitments in terms of the right to collective bargaining and freedom of association, both of which were weakly protected in South Korea's domestic legislation.[228] The Panel issued its report and recommendations in 2021, and it largely ruled in favor of the European Union. The report carried such influential weight that South Korea promptly adjusted its domestic labor law regime accordingly and it ratified three core ILO Conventions, thus aligning to the international workers standards framework. Another landmark change occurred in June 2022, when the EU Commission published a report revealing a new approach to enforcement of the TSD Chapter: namely, it now envisages the possibility to use financial sanctions as a last resort tool to force compliance on parties that are breaching 'key TSD obligations', i.e., the

[227] European Commission, *Annual Report on the Implementation of the EU-Korea Free Trade Agreement*, COM/2017/0614 final, 20 October 2017 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0614&from=CS accessed 28 September 2024.
[228] Velluti, 2020.

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fundamental ILO Conventions for what concerns labor rights, and the Paris Agreement on the environmental side.[229] So far, the possibility of responding to a TSD breach with economic sanctions has been included in the EU-New Zealand trade agreement only. Even this radical choice of the EU has not stood the test of critics, as they claim that such approach could create twofold damage: on one hand, it could never be applied due to the enormous foreign trade policy costs that it implies; on the other hand, if used, it could provoke unwanted negative consequences such as unbalanced impact on the most vulnerable groups of the population, or uncertain drawbacks.[230]

Another problematic aspect concerning labor clauses' enforceability originates from the way these are worded. Indeed, TSD provisions on workers protection merely require the parties to effectively implement, and not derogate from, their current international labor commitments, but they rarely ask to further raise their commitment to protecting worker rights by adhering to more instruments than they already do.[231] This evidently leads to a loophole: the parties are requested to fulfill their obligations foreseen by the ILO core labor Conventions, which they should already be doing by virtue of their mere ILO member status.[232] Other than sticking to international frameworks on labor standards, the parties are also required to ensure that their level of domestic worker protection is not lowered so to be more convenient to the eyes of foreign investors. Here again, such a wording gives rise to another loophole: the parties may still be able to reduce their guarantees of labor rights, provided that this does not happen for attract foreign investment or trade on their territory.[233] Here again, the mere aspirational nature of TSD provisions, which leads to their scarce

[230] Bertram, 2023.
[231] Clearly, with the exception of the eight ILO core Conventions for those parties that have not ratified them all yet.
[232] Velluti, 2020.
[233] *Ibid*.

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enforceability, is revealed: labor rights clauses do not strive for enhancing worker protection and compliance with international labor law, but rather at maintaining the status quo, or not to damage it. The TSD Chapter is, in essence, not conceived as having conditional force in shaping trade relations.[234] Moreover, the wording of labor clauses within TSD Chapters is often ambiguous. This is the case, for instance, of the so-called 'implementation clause' in the 2012 EU-Central America trade agreement, which requires the parties to adopt whatever new measure is needed to ensure fulfillment of their obligations under the agreement. This provision's meaning presents two different - but equally likely interpretations: it could entail a positive obligation to ensure that labor rights are fostered, or a negative one imposing that labor rights are merely respected as per the status quo.[235] The harshest critics of this approach have come to state that the average labor-related TSD clause is 'formulated in such manner that it often seems hard or even impossible to prove that a party is not meeting its obligations'.[236]

Two other categories of issues regarding the doubtful enforceability of labor clauses with TSD Chapters must be analyzed. The first concerns the governmental officials that negotiate these provisions. On one side, the EU bureaucrats tasked with drafting such procedures perceive their role as limited, as pre-ratification conditionality[237] is either unavailable or rejected by the third party, which makes labor issues less of a priority. On the other hand, government administrators from partner countries who negotiate TSD Chapters do not see this

[234] *Ibid*.
[235] Bartels L., 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40(4) *Legal Issues of Economic Integration* 297–313.
[236] Douma W., 'The Promotion of Sustainable Development through EU Trade Instruments' in Pantaleo L., Andenas M. (eds), Reul C. (ass ed), *The European Union as a Global Model for Trade and Investment*, University of Oslo Faculty of Law, Legal Studies Research Paper Series, No. 2016-02.
[237] I.e., requiring changes in the third party's national legal system before the agreement under negotiation enters into force, and as a condition for ratification.

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issue as their responsibility[238] and reportedly feel led by EU officials to conclude labor clauses, as they have more 'ownership of the labor agenda'.[239] The last issue concerning scarce enforceability of worker rights within TSD frameworks is that the EU applies a standard format to negotiating and drafting all TSD Chapters disregarding differences in trading partners, thereby ignoring some key characteristics of their counterpart which could give rise to different implications in terms of application. Instead, applying a one-size-fits-all approach to labor law and disregarding the economic, social and political scenarios of the trading partner inevitably leads to disappointing implementation of labor provisions, given that they are not tailored to any specific country hence less fitting to all.

Despite these numerous flaws in how labor provisions in TSD Chapters are drafted, there are some positive examples that stand out for the opposite reasons. For instance, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) enhances existing labor commitments both at the domestic and at the international levels. On the national plane, the CETA raises the existing bar by setting further obligations on the trade-labor linkage, consisting of more frequent inspections and higher involvement of the judiciary. On the international sphere, the CETA sets additional obligations on many aspects of labor law, including health and safety at the workplace. While these supplementary substantive obligations are set, the CETA framework replicates standard EU practice for what concerns dispute settlement mechanisms and its approach based on dialogue and cooperation. Furthermore, the CETA lacks any guarantee that its provisions will not hinder existing labor standards for the purposes of attracting foreign direct investment, thereby replicating in large part the shortcomings of all EU-negotiated TSD Chapters as analyzed above.[240]

[238] Harrison, 2019.
[239] Harrison et al., 2019.
[240] *Ibid*.

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The debate on whether TSD Chapters in EU preferential trade agreements are effective in sorting out enhanced compliance with international labor standards could potentially be settled by empirical studies on the matter. However, even those report conflicting results. Postnikov and Bastiaens, when studying bilateral trade agreements concluded by the EU and already in force by 2010 through a regression analysis, find that those which include labor provisions have overall proved to be more beneficial to workers' rights for the third countries than those which do not contain such clauses.[241] Likewise, Garcia and Masselot argue the same, following surveys conducted on EU officials for what concerns the consequences of the EU preferential trade agreement concluded with Malaysia.[242] On the other hand, many studies contradict these findings. Orbie and Van den Putte claim that the EU-Peru FTA actually worsened labor conditions in the latter country, which lowered health and safety standards following the implementation of the FTA.[243] In a similar fashion, the EU-Colombia FTA has also been empirically proven to have impaired heightened protection of labor, as Colombian stakeholders soon realized that the EU's attitude towards such commitments was more of a 'window dressing' than hard conditionality.[244] This study further finds that, while Colombia has put quite a lot of effort into strengthening its normative and institutional frameworks for protecting labor rights, such measures have proven to be merely cosmetic *vis à vis* weak design and application of the FTA, scarce monitoring from the EU, and recurrent and institutionalized anti-union practices that are difficult to root out.[245] Overall, it is empirically true that

[241] Postnikov E. and Bastiaens I., 'Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements' (2014) 21(6) *Journal of European Public Policy* 923–40.
[242] Garcia M. and Masselot A., 'EU–Asia Free Trade Agreements as Tools for Social Norm/Legislation Transfer' (2015) 13(3) *Asia Europe Journal* 241–52.
[243] Orbie J. and Van den Putte L., 'Labour Rights in Peru and the EU Trade Agreement' (2016) *Austrian Foundation for Development Research Working Paper* No. 58.
[244] Marx A., Lein B., and Brando N., 'The Protection of Labour Rights in Trade Agreements: The Case of the EU–Colombia Agreement' (2016) 50(4) *Journal of World Trade* 587–610.
[245] *Ibid*.

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countries that are particularly hostile towards the effective implementation of labor laws, the EU approach to drafting TSD Chapters results ineffective.[246] Studies have also found critical results on the EU's strategy towards TSD enforceability as a whole: Ebert finds that the inclusion of labor clauses in trade agreements has not redirected financial aid towards labor-related programs,[247] Van den Putte claims that the EU-South Korea FTA has failed in properly involving the civil society mechanisms in its decision-making process,[248] and Sicurelli states that the EU was not persuasive enough with Vietnam to convince it to ratify the ILO Freedom of Association and Protection of the Right to Organise Conventions.[249] According to other studies, there is no empirical evidence that institutionalized dialogue and cooperation induce long-term improvements in the labor law governance.[250] When taken together, these studies reveal little about the results of the EU's strategy on TSD Chapters implementation, as they are too contradictory to reveal any meaningful common denominator shared by all instances. The point is that it is still unclear whether the EU should revise its TSD Chapter strategy in terms of scope, procedure, or substance.[251] If the issue is one of scope, the EU should clarify whether it wants to extend labor protection ambitions further, aiming for higher ethical standards but potentially facing harsher implementation challenges, or whether to narrow them down, in order to prioritizing the realistic enforcement of a more limited set of requirements. If the issue concerns procedures, the EU should evaluate more closely the shortcomings of the dialogue-based mechanisms and, if deemed necessary, attempt at reaching

[246] Velluti, 2020.
[247] Ebert F., 'Labour Provisions in EU Trade Agreements: What Potential for Channelling Labour Standards-Related Capacity Building?' (2016) 155(3) *International Labour Review* 407–33.
[248] Van den Putte L., 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6(2) *Global Labour Journal* 221–35.
[249] Sicurelli D., 'The EU as Promoter of Human Rights in Bilateral Trade Agreements' (2015) 11(2) *Journal of Contemporary European Research* 230–45.
[250] Harrison et al., 2019
[251] *Ibid*.

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consensus on different institutional setups endowed with enforcement capacity. Last, if the issue is substantial in nature, the EU should evaluate whether relying wholly on the ILO standards as a benchmark for negotiating TSD labor provisions is effective enough for the objectives it wants to achieve.

3.3 Policy Proposals to Strengthen the Current EU Approach to TSD Chapters

How to strengthen the effectiveness and enforceability of labor provisions within the TSD Chapters included in the trade agreements that the EU concludes with trade countries is a much-discussed policy matter. Indeed, in the words of Moore and Scherrer,

> 'enforcement goes beyond the ratification of new standards. It is about the response of the trading partners when a violation of those agreed-to standards occurs, the development of the necessary conditions for implementation and the political will to follow through such processes'.[252]

In the following assessment of several policy proposals that have been set forth to improve labor conditionality, the aforementioned judicial, strategic and political aspects will all be considered, and the policy advice presented will be critically analyzed against the background of an ever more complex and multi-layered foreign policy arena, knowing that implementing such policies would require gathering consensus on them and having them undergo lengthy legislative processes. Therefore, knowing very well that these are all 'easier said than done', the following reforms will be presented nevertheless, aware of their potential criticalities. The underlying idea is not necessarily to fill in all the inadequacies of the EU model, but rather to elaborate constructive policies to address such

[252] Moore M. and Scherrer C., *Conditional or Promotional Trade Agreements—Is Enforcement Possible? How International Labour Standards Can Be Enforced through US and EU Social Chapters* (Friedrich Ebert Stiftung, Singapore 2017) https://www.fes-asia.org/news/conditional-or-promotional-trade-agreements-is-enforcement-possible/ accessed 28 September 2024.

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shortcomings at least partially. However, we also believe that the Commission's approach to stubbornly insist on reinforcing existing policies rather than putting new ones on the table will hardly prove to be constructive. In 2017, the EU Commission published a paper unveiling the TSD Chapters reform process underway, and that the two options under review were either making the existing approach more 'assertive', or building a new one based on sanctions and hard conditionality.[253] In the following report of 2018,[254] the Commission revealed that a choice was made in favor of reinforcing the EU's current approach; specifically, it clarified that no binding dispute settlement avenue was open for discussion anymore, but rather, 'the implementation of TSD chapters should be stepped-up and improved'. Therefore, the Commission claimed that existing framework was being strengthened, thus enhancing current mechanisms such as cooperation with stakeholders, partnerships with the ILO, emphasis on ratification of the core labor Conventions, and an overall end goal of 'revamping' TSD Chapters.[255] The Commission was thus focused on exploiting the tools already at its disposal to pursue labor-related goals, but not on building new ones. To foster such 'revamping' of labor clauses in TSD Chapters, the Commission formulated five policy initiatives:

i. Tailoring TSD Chapters to the country that they are being negotiated with, thus shifting away from the 'one-size-fits-all' approach and including country-specific topics in the text of labor clauses.

[253] European Commission, *Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)* (11 July 2017) http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf accessed 28 September 2024.
[254] *Ibid*.
[255] European Commission, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (26 February 2018) Non-Paper of the Commission Services https://www.borderlex.eu/wp-content/uploads/2018/02/2018-02-26-TSD-non-paper-FINAL.pdf accessed 28 September 2024.

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ii. Enforcing pre-ratification conditionality, i.e., encouraging trading partners to ratify the relevant ILO Conventions before the entry into force of the agreement, as a condition *sine qua non* for that to happen.
iii. Involving civil society to a greater extent and clarifying its role in trade-related frameworks.
iv. Devolving more resources to the implementation of TSD Chapters, using the Global Aid for Trade Funds and the G7 Vision Zero Funds to redress economic streams to said activity.
v. Making the monitoring activity more assertive by following up more often to labor rights' violations, leveraging the dispute redress mechanisms that are already in place.

3.3.1 Enforcement-Related Policies

While all these policies may, in theory, strengthen the EU's approach *vis à vis* third countries, they do not address many of the numerous shortcomings identified in the paragraphs above. When looking for new policy tools instead, the most common and prominent one among scholars is endowing the EU with the capacity to suspend preferential access to its markets upon violations of labor rights.[256] This policy would have a twofold impact: on the one hand, when taken at face value, it would simply make EU action in terms of labor law more coercive; on the other hand, it would incentivize trading partners to engage more in dialogue and cooperation under the threat of such sanctioning.[257] But how to avoid a social clause holding disguised protectionism, merely hiding economic nationalism? This would entail a complex set of design problems including setting up a dispute settlement body that is third-party, independent and endowed with the ability to issue binding rulings. Moreover, allowing for the unilateral suspension of the FTA following a breach of labor clauses would imply labeling the latter as 'essential

[256] Harrison et al., 2019.
[257] *Ibid*.

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elements' of the FTA. Doing so would enable one party to terminate the agreement upon violation of said essential elements. However, this would be an incredibly far-reaching measure, usable only in extremely serious and systematic cases, and it would leave an open gap on how to address smaller, occasional breaches.[258] Other than suspending trade relations, the hypothesis of issuing financial penalties against a trading partner found in breach of TSD clauses has also been discussed. During the CETA negotiations, Canada even proposed to the EU to include financial penalties in the instrument, but the latter refused[259] (and it kept doing so in all subsequent negotiations where the topic was discussed).[260] The reasons for such refusal are unclear but, speculating, one could suppose that it was controversial whether the payment of financial penalties should come from the collective EU budget, and whether financial responsibility falls under the EU's or the Member States' competence.[261]

Note that policy proposals linked to sanctions and financial incentives can be declined in many different ways. For instance, in 2020, the governments of France and the Netherlands have advanced an alternative reform idea on how to induce compliance from third countries, namely, by setting up a mechanism of positive incentives rewarding the countries that uphold their sustainability commitments.[262] In practice, the trade agreement would envisage tariff reductions

[258] Bronckers and Gruni, 2021.
[259] Araujo B.M., 'Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality' (2018) 67 *International and Comparative Law Quarterly* 233, and Fritz T., 'Analysis and Evaluation of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada' (Hans-Böckler-Foundation Project Number 2014-779-1, 26 January 2015) 29.
[260] European Commission, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (26 February 2018) Non-Paper of the Commission Services https://www.borderlex.eu/wp-content/uploads/2018/02/2018-02-26-TSD-non-paper-FINAL.pdf accessed 28 September 2024.
[261] Bronckers and Gruni, 2021.
[262] 'Non-paper from the Netherlands and France on Trade, Social Economic Effects and Sustainable Development' https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and accessed 28 September 2024, 20–21.

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following effective implementation of labor standards, linking the safeguard of worker rights with trade-related incentives. This mechanism was not proposed out of the blue; in reality, it takes inspiration from a notable best practice, namely, the US-Cambodia Textile Agreement.[263] Within this framework, positive sanctions were embedded in a particularly effective manner: the US committed to increase its textile and clothing import quotas by 14% every year, conditional on Cambodia upholding and improving its labor law obligations. Under the monitoring of the ILO, whose technical assistance was requested *ad hoc* for this project, Cambodia's commitment to protecting worker rights was consistently supervised. The ILO even provided a whistleblowing mechanism for reporting potential violations and provided material assistance to Cambodia for enforcement issues, as the country was previously lacking a suitable institutional environment to ensure proper operationalization of the agreement.[264] This textile agreement is a successful instance of leveraging economic and trade incentives towards enhancement of labor rights, furthermore partnering with international organizations into the project to ensure compliance. Given this best practice, scholars have argued that similar incentive mechanisms involving 'smart sanctions' constituting additional preferences in trade and fostering improved practices could be integrated in the EU system as well.[265] Other than representing and innovative and effective instrument for improving worker protection within trade frameworks, these policies would also be instrumental for overcoming accusations of using labor clauses for disguising protectionism.

[263] This agreement expired in January 2005.
[264] Kolben K., 'Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7(1) *Yale Human Rights and Development Law Journal* 79–107.
[265] Siroën J.M., 'Labour Provisions in Preferential Trade Agreements: Current Practice and Outlook' (2013) 152(1) *International Labour Review* 85.

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Another interesting enforcement system was envisaged by Portela.[266] This mechanism is aimed at redressing the systematic, persistent and harshest forms of labor rights violations perpetrated by the EU's trading partners. Under this framework, the European Parliament, backed by civil society organizations and by the EU Member States, is in charge of detecting such violations and reporting them to the Commission. The latter will then initiate consultations with the Council and decide whether or not to proceed with the sanctions. If so, Portela foresees four different types of sanctions, layered per level: sanctions can happen at country, sector, company and individual level. Such targeted sanctions would be more effective than blanket ones insofar as they reduce negative externalities on actors that have no responsibility for the violation; they entail escalation and de-escalation; and minimize negative drawbacks on the entity issuing the sanctions (i.e., the EU).

In addition to sanctions, enforceability can also be pursued by creating more solid and effective avenues for settling disputes. These would allow to move beyond the binary debate of sanctions' pros and cons, enlarging policy reforms to broader design issues that, as complex as they are, would be less controversial than applying sanctions but perhaps similarly effective. Identifying the optimal design for a dispute settlement mechanism adjudicating TSD-related issues is certainly complex. In this regard, the EU should look beyond the mere US model, which it cannot gather internal consensus for and would probably not be as suitable for market-related reasons. Alternative models for dispute settlement mechanisms could inspire the EU in redesigning its, such as the following ones:

- The OECD Guidelines for Multinational Enterprises' National Contact Points system, which is similar to the EU TSD Panel insofar

[266] Portela C., *Enforcing Respect for Labour Standards with Targeted Sanctions. CLS + Core Labour Standards Plus. Linking Trade and Decent Work in Global Supply Chains* (Friedrich-Ebert-Stiftung 2018) http://library.fes.de/pdf-files/bueros/singapur/14689.pdf accessed 28 September 2024.

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as they both issue non-binding statements and they facilitate dialogue rather than mandating enforcement; however, the OECD system follows a more formal adjudication process and offer tailored long-term remedies that are flexible depending on the country and the circumstances under judgement. Moreover, the idea of setting up a National Contact Point in the EU's partner countries where anyone can blow the whistle on labor rights violations would enhance the inclusion of civil society in the decision-making process and make up for lacks in governments' discretion in institutionalizing their participation.

- The ILO supervisory system: here again, this framework is analogous to the EU TSD Panel for reasons of incapacity to issue binding decisions; however, the former could inspire the EU for its progressive approach that uses multi-step and phased processes to solve controversies, for its focus on capacity building and for the way it leverages public exposure to encourage compliance.
- The Investment Court System: while the Investment Court System is able to issue binding decisions, this is not the only feature that could inspire the EU to reform its TSD Panel adjudication mechanism. Indeed, the Investment Court System is particularly interesting as its composition is permanent, and not created *ad hoc* on a case-by-case basis, and for its appeal system allowing parties to the dispute to have their decisions reviewed by an appellate court.

3.3.2 Negotiation-Related Policies

Other than tackling enforceability, which is surely the most pressing issue but also the most complex to solve, scholars have envisioned other policies to redress several other shortcomings in the EU approach to TSD Chapters. Among these, particularly interesting is the idea that the EU should consider starting to

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tailor its approach based on the third country that it is negotiating with. Indeed, as shown above, the EU tends to apply the same one-size-fits-all model to all its trading partners, inserting into TSD Chapters standardized clauses irrespective of who they're concluding the agreement with, their economic and political domestic scenarios, and their initial development levels. Instead, scholars have pushed the EU to rather 'critically analyse the expected consequences of norm promotion for all parties involved and adapt',[267] as different interlocutors may need different incentives to obtain the same goals. Indeed, while it is commonly assumed that labor clauses are supposed to raise the bar of domestic labor law in the EU's trade partners, it is never questioned how this can happen regardless of how the national average standard is measured.[268] Therefore, customizing the negotiation and drafting process to the other party would definitely smooth out and facilitate their implementation and enforcement paths, as they would feel more comfortable with the agreement at stake. In this sense, one successful instance of implementation of this policy is the 2018 EU-Mexico Trade Agreement.[269] This instrument is the first of its kind to entail anti-corruption obligations, affecting both the public and the private sectors, which is a topic of particular salience in Mexico.

Another potential reform is to include fixed ratification deadlines for trading partners that have not yet ratified all fundamental ILO Conventions. This would avoid unfortunate situations such as what happened with South Korea, which had committed via the TSD Chapter to ratify said instruments and then delayed this action without even setting credible timeframe to redress the issue, eventually leading to the dispute mentioned above. Fixing a reasonable deadline within which the parties are expected to have ratified the international instruments that they will be bound by by virtue of the trade agreement would give

[267] Bicchi F., 'Our Size Fits All: Normative Power Europe and the Mediterranean' (2006) 13(2) *Journal of European Public Policy* 286–303.
[268] Harrison et al., 2019.
[269] *Free Trade Agreement between the European Union and Mexico* [2020] OJ L 276/40.

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concreteness to the 'best efforts' obligations and provide a measurable threshold to quantify the country's progress. More generally, the idea of implementing time-bound objectives into labor clauses would surely improve the effectiveness of these provisions in trade agreements. Pre-ratification conditions would entail a twofold process:

- *Ex-ante*, the trading partners could demand ratification of given ILO Conventions, adoption of new domestic labor laws, and the setup of capacity-building programs involving, *inter alia*, trainings, mutual exchange of technical assistance, and the institutionalization of new procedures such as labor inspections.
- *Ex-post*, the trading partners would have the ability to monitor one another and mutually oversee the implementation of the TSD Chapter, possibly establishing partnerships with external international organizations (e.g., the ILO, NGOs, or trade unions) to provide independent monitoring, recommendations, and aid.

3.3.3 Provisions-Related Policies

Last, the EU could build on the existing provisions that it consistently includes in TSD Chapters and widen their reach so to make them more effective. This can be done by working on the wording of said provisions, or by retooling how and what labor standards are referred to. To do so, for instance, the EU should strengthen its engagement with voluntary sustainability initiatives that aim at promoting compliance with the ILO standards,[270] such as the United Nations Global Compact. Such provisions would need to be very concrete and ensure that adherence to said frameworks is instrumental to a more solid protection of worker rights in the context of the trade agreement. Indeed, practice has proven the

[270] Marx A., Brando N., and Lein B., 'Strengthening Labour Rights Provisions in Bilateral Trade Agreements: The Case of Voluntary Sustainability Standards' (2017) 8(3) *Global Policy* 78–88.

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opposite, as similar clauses that have already been included in trade agreements aiming at enhancing the countries' engagement with voluntary sustainability initiatives are very vague and shallow. For instance, Art. 271 (4) of the 2012 EU−Colombia-Peru Trade Agreement mentions that:

> 'The Parties recognise that flexible, voluntary, and incentive-based mechanisms can contribute to coherence between trade practices and the objectives of sustainable development. In this regard, and in accordance with its respective laws and policies, each Party will encourage the development and use of such mechanisms.'[271]

Phrased in such a way, without mandating nor even mentioning any specific voluntary mechanism that the parties shall adhere to, this provision is nothing more than aspirational and cannot produce any real change. More generally speaking, the EU should aim at phrasing its obligations in a way that makes the measurable and clear. Another way to widen and improve the scope of the substantive labor provisions included in TSD Chapters is to recognize that sticking to ILO standards only is not enough. While paramount, indeed, the labor rights covered by the ILO might nowadays be insufficient for the high ambitions that the EU has in the field. The ILO core Conventions framework lacks coverage of many labor-related rights that have acquired great importance overtime, such as living wages, health and safety at work, workers in the informal economy and migrant worker rights.[272] These issues are incredibly pressing, and some of them demand particular attention in developed countries. Against this background, the EU cannot let them slip out of its reach.

[271] *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, provisionally applied with Peru since 1 March 2013 and with Colombia since 1 August 2013.
[272] Harrison et al., 2019b.

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4. THE UNITED STATES' APPROACH TO LABOR CHAPTERS IN TRADE AGREEMENTS

After having analyzed the European paradigm, this work will delve deeper into the US doctrine in the field of labor matters in preferential trade agreements. It is commonly considered for these two approaches to stand at opposite ends of a spectrum: while the EU's method is characterized by an extensive use of soft law, the US' method is characterized by hard law and strong enforcement mechanisms, which the EU lacks. At their very core, indeed, what differentiates these two methods is their reliance on enforcement: while the EU fosters diplomatic means to redress litigations, the US engages in compulsory arbitration which entails the possibility to ultimately issue trade sanctions against the other party. Even though this juxtaposition seems convincing, real-life experience does not always confirm it. Indeed, soft law is not an exclusively European prerogative: in reality, the US tends to resort to diplomatic means quite a lot as well. Out of all the proceedings that have been initiated under labor chapters, in fact, only one has made it to the arbitral stage; namely, the case against Guatemala under the CAFTA. How can these contradictions coexist? Where do these features originate from? And what are the key legal elements and normative architecture that connotate all US labor chapters in trade agreements? This chapter will navigate these ambiguities and attempt at answering these questions first through a historic overview of the trade-labor linkage in the US, and then by analyzing the wording, institutional framework and enforcement procedures of the FTAs that the US has concluded. Last, policy reforms will be proposed.

These questions are, however, not as easy to answer. Indeed, examining worker protection in the US foreign trade policy is particularly challenging in these years. After decades of flourishing on the international plane as the strongest negotiator of trade agreements, being widely looked up as the cornerstone country in exporting economic welfare beyond its borders, the US seems to have reached

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a halt in this matter. This notable setback is not due to a downsizing in ambition – anything but; rather, it is linked to political rationales and to the rise of populism and nationalism in Western politics. Following Donald Trump's election, his administration put into action what he had promised during the electoral campaign – namely, that future trade agreements would secure benefits for American workers over anything else and that the slogan 'America first' would have been operationalized in trade policy choices as well. A concrete implication of such rhetoric is that violations of worker protection rights abroad were of no concern to the US, unless such breaches directly affected the American labor market. During his term, Trump has withdrawn the US from a number of trade agreements and suspended several trade negotiations underway. In addition, the Trump administration imposed new tariffs on imports so in order to elicit investment in the US territory to revamp the American manufacturing sector, especially in the Rust Belt, where much of his electorate is concentrated.[273] All these policy choices tremendously disrupted the previously well-established global trade policy system, twisting it to a new protectionist vision aimed at favoring the American industry and at shielding its workers and their wages from foreign competition.[274] Consequently, this sudden shift in policy preferences has reframed the whole system in such a way that makes analyzing it quite hard, as the inconsistencies created by such political volatility render the US approach to labor chapters in FTAs unpredictable and ever-changing. Moreover, the fact that trade-plus choices are not linked to legal considerations as much as they are connected to political will tends to create counterproductive results, as the trade agreements

[273] Donnan S., 'Trump's Tariff Strategy Sharpens America First Focus' *Financial Times* (London, 15 June 2018) accessed 12 October 2024.
[274] The White House, Office of the Press Secretary Press Release, 'Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement' (23 January 2017)

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will not be structured to embed efficient legal solutions; rather, they will be formulated so as to reflect political preferences.

In any case, as happens with many other topics, the US approach to labor chapters in FTAs must be studied because it represents a blueprint followed globally. Since 1988, the American Congress decided to start including worker protection in Trade Promotion Authority legislation, setting it as one of the main objectives to be achieved through foreign trade. Since then, labor provisions in trade agreements have assumed different shapes and forms, evolving overtime so as to entail improved coverage. As the historical paragraph will demonstrate, labor obligations have first started as a side agreement to the main commercial instrument,[275] and they are now commonly integrated as whole chapters within the main text of the FTA. The most recent US trade agreement, namely, the 2020 US-Mexico-Canada Agreement, goes even further than that by integrating a labor-related requirement within the commercial provisions of the agreement.[276] Thie evolving practice reflects an ever more growing awareness that the inclusion of labor standards in preferential trade agreement is not a peripheral topic to the main subject matter but, rather, that it is central for the proper achievement of the commercial goals that the instrument aspires to fulfill. Achieving these objectives also requires a proper formulation of the labor provisions, one that makes the trading partners incentivized to comply with them, and that makes the provisions themselves enforceable in court. To this end, as the paragraphs on wording and enforcement will show, the US has tested many slightly different wordings overtime to frame its labor standards provisions in trade agreements. Worker rights obligations in US FTAs initially only bound the parties to uphold their own domestic labor norms and not to deviate from such standards with the end goal of favoring trade and investment. Later, the US started phrasing labor obligations in

[275] I.e., in the NAFTA. Please find more details below.
[276] I.e., in the Rules of Origin Chapter. Please find more details below.

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FTAs more ambitiously, requiring the parties to adopt, implement and enforce labor legislation in line with the ILO core principles. Later on, the US went above and beyond by introducing new labor standards within their FTAs, ones that are not even covered by ILO doctrine itself – such as the right to acceptable working conditions, entailing a number of other rights including minimum wage and health and safety at work. Therefore, despite a couple setbacks due to political reasons, the US labor chapters in trade agreements have generally become more organic and all-encompassing with the passing of time. Does this mean, however, that their increasingly comprehensive nature has led to better results in court? The answer is, unfortunately, no. Indeed, the only case ever brought before the arbitration Panel in the history of trade-plus matters in US FTAs is the case against Guatemala. As detailed in subsequent paragraphs, this case was win by Guatemala due to an excessively strict formulation of labor provisions, which set the bar too high for the US to effectively prove that the defendant had violated its worker protection commitments. This ruling created widespread concern among stakeholders as it triggered the realization that setting high labor standards did not necessarily lead to effective enforcement of those, thereby implying a rethinking of the whole approach. This discouraging case constituted the grounds for the Trump administration to review much of the existing US foreign trade system, and the following Biden presidency to take very few steps in terms of foreign trade initiatives. Against this background, some key questions remain. What is the role of the US in raising labor standards beyond its borders today? Is the current enforcement system appropriate for leveraging the intended results? Will the last trade agreement negotiated by the Trump administration represent the standard template for future negotiations? What features of the current approach must be fixed so to have more success in court? And, overall, are FTAs the most effective method to bring about a positive impact on working conditions? While answering all these questions is outside the scope of this chapter – and it is likely impossible,

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anyways – the subsequent paragraphs will attempt at providing a satisfactory analysis of the *status quo,* of its advantages and disadvantages and of the reasons that have brought to it.

The following chapter will proceed as follows. First, a historical overview of the US approach to the trade-labor nexus will be provided. Second, the labor chapters in US-negotiated FTAs will be examined under three different standpoints: the way they are phrased and the scope they cover, the institutional structure they establish (with a specific focus on the arbitration mechanism), and the enforcement issues they entail. Last, following this analysis, the last paragraph will take the key areas for improvement identified previously and issue some policy proposals to redress the shortcomings in the US-drafted labor chapters. This chapter mirrors, in terms of structure and context, the previous one on the EU approach to trade-plus matters in trade agreements and it is aimed at supplying a comparative overview of the two methods, both with their pros and cons and with their distinctive features.

4.1 History and Evolution of Labor Chapters in US' Trade Agreements

In the US, the trade-labor nexus had been a prominent topic in political discussions since the very beginning of the 20th century.[277] While the first pieces of legislation on this matter were not mainly driven by labor-related concerns, but rather by considerations on economic advantage, worker protection still was still addressed and included in such norms, albeit as a secondary matter. Labor rights never became the central impetus for trade negotiations, but they started nonetheless being taken into account as a smaller part of broader legal instruments. During these years, the main trade-labor nexus concern included in US legislation was the prohibition on imports of goods produced in violation of

[277] See, e.g., *Act to reduce the revenue and equalize duties on imports, and for other purposes* (McKinley Tariff Act) 1 October 1890, Ch. 1244, 26 Stat 567, s 51; and *Tariff Act of 1930* 66 Stat 1, 19 USC § 1307.

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basic worker protection standards.[278] Later on in time, this approach became pivotal for defining the US' style of negotiating trade agreements. As opposed to the EU, indeed, the US uses a much more assertive approach to enforcing labor rights in its foreign trade policy. To this end, while the EU's approach has often been labeled 'soft unilateralism', the US' standpoint has been defined as 'aggressive unilateralism'. Such a decisive slant, however, was only developed overtime. The US GSP program entered into force in January 1976 following the Trade Act of 1974, whose goal was ensuring that developing countries could access the American market fairly and at reasonable conditions.[279] Given its goal, the GSP entails that the US can grant to certain developing countries unilateral and duty-free tariffs applying to specific imported goods.[280] However, such grant was conditional on a review of worker rights enforcement carried by the US: upon negative results stemming from said review, the US could suspend GSP benefits for lack of proper implementation of labor standards.[281] The 1980s then marked a shift in priorities for the US trade policy, as fostering labor rights beyond the US' borders had become a prominent issue in the field, following great public pressure exerted by labor and human rights activists pushing the US government to improve its reach on the matter.[282] In said decade, the US promoted several statutes targeting specific countries which, if deemed eligible, would be able to access the US market under preferential conditions. Eligibility depended on effective adoption and implementation of domestic labor laws. Among these statutes, the most prominent ones are the Caribbean Basin Recovery Act,[283] the

[278] Claussen K., 'Reimagining Trade-Plus Compliance: The Labor Story' (2020) 23 *Journal of International Economic Law* 25.
[279] *Trade Act of 1974* (US GSP Program) 19 USC § 2461.
[280] Addo A., *Core Labour Standards and International Trade: Lessons from the Regional Context* (Springer 2015).
[281] Velluti, 2020.
[282] *Ibid*.
[283] *Caribbean Basin Economic Recovery Act* 19 USC § 2701.

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Andean Trade Preference Act[284] and the African Growth and Development Act.[285] Furthermore, in 1984, under the presidency of Ronald Raegan, the GSP framework was revamped through the GSP Renewal Act, which also encompassed a more specific provision on labor rights.[286] Such clause banned access to the US' markets to any country that is refraining from, or not actively making progress towards, implementing internationally recognized labor rights into its domestic labor law system. While this clause still allowed for great leeway to third countries, being worded in a 'best efforts' manner and entailing the possibility of waiver due to national economy reasons, it still represented one big step forward compliance with international labor standards. In reality, these Acts have proven effective also in enforcement terms, as the US has occasionally suspended or withdrawn preferential access to those countries that were not properly complying with the obligations laid out in their respective statues or under the GSP scheme.[287] What is interesting about this provision, especially when seen in contrast with the EU approach to similar laws, is that it does not make any reference to the ILO framework of labor rights; rather, it just mentions 'internationally recognized worker rights' without adding any specific link to external regimes. While *de iure* the US does not ground its trade-labor linkage on ILO frameworks, though, *de facto* the labor reviews mentioned above are carried out by officials who rely on ILO norms to make their decisions. The rationale behind this apparently controversial choice is purely political:[288] the US itself has not ratified all relevant ILO Conventions; hence it would not be credible in asking

[284] *Andean Trade Preference Act* 19 USC § 3201.
[285] *African Growth and Opportunity Act* 19 USC § 3701.
[286] *GSP Renewal Act of 1984* 19 USC § 2465.
[287] Overtime, the US has suspended or withdrawn GSP benefits to many countries for breaching labor commitments, including (among others) Chile, Liberia, the Maldives, Mauritania, Nicaragua, Romania, Pakistan, Paraguay, Sudan, and Syria. For further details, please see Elliott K.A., *Preferences for Workers? Worker Rights and the US Generalized System of Preference* (Peterson Institute for International Economics 1998).
[288] Compa L., Vogt J., 'Labour Rights in the Generalized System of Preferences: A 20 Year Review' (2001) 22 *Comparative Labor Law and Policy Journal* 199.

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its trading partners to do so while keeping itself outside of the same system. Moreover, since there is not yet enough consensus to consider the ILO core Conventions as customary international law, the US could not even rely on that claim to have its trading partners enforce them.[289] Besides the GSP system, other policies affecting the US' pattern of including the trade-labor linkage within its foreign trade commitments started years later. Starting from the adherence to the GATT up until the 1990s, no trade agreement concluded by the US included any labor-related obligation. Specifically, the first two FTAs signed by the US, i.e., the first with Israel in 1985 and the second with Canada in 1988, did not include any labor-related clause. Around 1993, however, the pattern took a turn due to several factors, many of which were exogenous. Among the reasons for starting to include labor provisions in its trade agreements, we surely find the fast spreading of globalization, which was bearing both benefits and costs, and generally caused a downward pressure on wages, jobs and import-intense sectors economic.[290] Moreover, the trade-labor linkage became an undeniable factor when negotiating trade agreements, as the nexus tying the two issues had become more and more evident overtime, having gathered consensus internationally. These exogenous rationales were paired with some more internal one; namely, that the US had started negotiating trade agreements with less developed countries, which called for a stricter monitoring of how they operated their labor markets. Indeed, developing countries were greatly incentivized to produce at low costs, thereby lowering their national labor safeguards to ensure more convenient playing fields for foreign investors. However, this phenomenon was in turn putting great pressure for regulation on developed countries, which would have suffered from the former's comparative advantage in producing goods. Against this backdrop, interest groups both on the business and labor side finally came

[289] Hepple B., *Labour Laws and Global Trade* (Hart Publishing 2005).
[290] Bolle M.J., 'Overview of Labor Enforcement Issues in Free Trade Agreements' (Congressional Research Service, 22 February 2016).

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together to negotiate trade agreements that would enhance investment without overlooking worker protection.[291] All these reasons compounded provided sufficient motivation for the US to start incorporating labor standards within its foreign trade policy.

This trend started with the signing of the NAFTA, the trade agreement between the US, Canada and Mexico, which contained a side agreement called the North America Agreement on Labor Cooperation (NAALC)[292] specifically devoted to tackling worker protection in the scope of the trade agreement. This side agreement contained several so-called 'labor principles' that the three parties committed to uphold and foster within their territories. Basically, under NAALC, the parties were effectively bound to uphold and enforce their domestic labor laws. The NAALC was also particularly salient for the institutional mechanism it created, as it envisioned a multi-party reciprocal monitoring system whereby each party was entitled to oversee each another's actions in regards of enforcement of domestic labor laws. The dispute settlement mechanism envisioned by the NAALC was an inter-state tribunal endowed with the capacity to issue sanctions, notably charged with suspending trade benefits upon a party's failure to comply with its obligations under the NAALC.[293] While its institutional setup was certainly a strength, the NAFTA did not lack shortcomings too. In fact, the members of the agreement are not bound to any specific international labor framework by virtue of NAFTA and neither they are subject to new commitments envisioned by the agreement. Rather, the link with binding obligations is in reality quite weak, and the fact that the NAALC is formally a separate agreement to NAFTA has also not helped in considering it as an organic part of the binding commitments envisioned by it. Critics of the NATA have been vocal in expressing

[291] *Ibid*.
[292] *North American Agreement on Labor Cooperation* (1993) 32 ILM 1499.
[293] Stoll, 2019.

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their reprehension against it, with Bolle even describing it as 'non-invasive in that it does not require any country to adopt any new worker rights laws or conform to any international standards – only to enforce what it already has on the books'.[294] One last weakness of the NAFTA is that it failed to include civil society in its negotiation and implementation phases. The only instance when civil society's voice was heard was, indeed, during the drafting of the NAALC. At that time, President Clinton was under great pressure from interest groups to ensure that an FTA with Mexico would not spark a race to the bottom competition in terms of wages, labor conditions and regulation.[295] Against this criticism, Clinton promised through a political settlement that the NAFTA would not have been concluded without appropriate labor (and environmental) commitment guaranteeing no negative backlash from free trade and flows of capital.[296] Despite all the criticism projected on the NAFTA, its importance must still be not underestimated and cannot be overstated, especially when analyzing this topic in a historical perspective. In fact, since the entry into force of the NAFTA, which occurred in 1994, up until today, all regional trade agreements to which the US is part of contain a labor provision.[297] It was after this historical milestone that the US started consistently integrating worker rights and labor-related obligation in each and every single one of the trade agreement it concluded, no matter with what partner or under what economic conditions. The NAALC has acted as a standard-setting landmark instrument for the US, as it has set the first

[294] Bolle M.J., *NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate* (CRS Report, Congressional Research Service, Washington, DC, 11 June 2001).
[295] Housman R.F., Orbuch P.M., 'Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead' (1993) 8 *American University Journal of International Law and Policy* 724.
[296] *The Washington Post*, 'Clinton's Conversion on NAFTA' (19 September 1993) https://www.washingtonpost.com/archive/business/1993/09/19/clintonsconversion-on-nafta/3a5b9cb5-dfc8-4b5c-9ae6-30781f0a99fc/?utm_term=.963badecbc90 accessed 12 October 2024.
[297] International Labour Organization (2022). *ILO Labour Provisions in Trade Agreements Hub (LP Hub)*. International Labour Organization, Geneva.

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steppingstone to build the entire US trade-labor linkage system around. Since its entry into force, the NAALC represented an evergreen fundamental blueprint for all following US trade agreements containing labor obligations.[298] For this reason, it is generally considered to be the first US FTA to start the so-called 'first generation agreements', which comprehends all FTAs signed from 1993 to 2009 or, in other words, from the NAFTA[299] to the CAFTA.[300]

Within the first generation of trade agreements, another notable one is the 2001 US-Jordan Free Trade Agreement (USJFTA),[301] especially for what concerns labor commitments. Said instrument incorporated enforceable labor standards and worker rights within the main text of the agreement itself, rather than placing them in a separate side instrument as it was in the NAFTA-NAALC instance. Moreover, the USJFTA empowered both parties to implement 'any appropriate and commensurate measure'[302] against the other, shall the litigation process result in an insufficient resolution. In a way that is strikingly different from the NAALC, this framework relies external international frameworks of labor law, namely, that of the ILO, and does not merely ground its worker protection obligations on the effective upholding of national labor norms. Art. 6 (1) of the USJFTA enshrines the following commitment:

> 'The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the

[298] Stoll, 2019.
[299] *North American Free Trade Agreement* (1992) 32 ILM 289, 605.
[300] *Central America-Dominican Republic Free Trade Agreement* (CAFTA-DR) (2004) 43 ILM 514.
[301] *Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area* (2002) 41 ILM 63.
[302] *Ibid*., Art. 17 (2) (b).

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internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law.' [303]

Such express linkage to ILO norms was an effective first attempt for the US at exporting international labor protection laws beyond its borders. Indeed, empirical studies have proven that, following this agreement, Jordan has taken the following steps to enhance its worker protection regime: adopting domestic labor policy reforms in 2006; establishing partnerships with IOs and other supranational entities relevant in the field such as the ILO, the International Finance Corporation, the World Bank, the EU, and US Agency for International Development; implementing policies against human trafficking and renewing their labor inspection system. Following this first shift, another important step forward in institutionalizing the trade-labor nexus in the US happened in 2004, when the country signed two FTAs, one with Singapore and the other with Chile, which both contained a so-called 'Labor Chapter' wholly devoted to outlining labor-related commitments of the parties. Between NAFTA and the CAFTA, many other US-negotiated FTAs entered into force. These are, in chronological order: the already mentioned Jordan FTA, the Singapore FTA,[304] the Chile FTA,[305] the Australia FTA,[306] the Bahrain FTA,[307] the Morocco FTA[308] and the Oman FTA.[309] Moreover, it is around the same time of the USJFTA that the role of the US Trade Promotion Authority (TPA) was strengthened, specifically in 2002, thanks to the enactment of the Bipartisan TPA Act. This law enshrines that, to the least, the US shall mandate its trading partners to respect its domestic labor

[303] *Ibid*., Art. 6 (1).
[304] *United States-Singapore Free Trade Agreement* (2003) 42 ILM 1026.
[305] *United States-Chile Free Trade Agreement* (2003) 42 ILM 1026.
[306] *United States-Australia Free Trade Agreement* (2004) 43 ILM 1248.
[307] *United States-Bahrain Free Trade Agreement* (2006) 45 ILM 514.
[308] *United States-Morocco Free Trade Agreement* (2004) 44 ILM 544.
[309] *United States-Oman Free Trade Agreement* (2006) 45 ILM 954.

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laws and not to derogate from their national regimes.[310] Therefore, following the Bipartisan TPA Act, all subsequent trade instruments contained the above-mentioned obligation.

Last, closing the first generation of US trade agreements, is the CAFTA. The latter was negotiated under the Bush administration, which imposed a clear standard template (analyzed below) to all the FTAs' labor chapters. The CAFTA, while being a very ambitious agreement due to the large geographical scope it applies to, was also harshly criticized for the labor obligations it enshrines. Indeed, critics claimed that such a far-reaching agreement should have aimed at affording greater protection and broader coverage in terms of labor rights.[311] Not only it was often argued that this agreement does not contain sufficiently assertive provisions on worker protection, but also that it does not implement an effective enforcement system to mandate implementation of the labor chapter. To exemplify this, consider that the CAFTA does not require the parties to ratify and implement the ILO core Conventions, nor does it establish a comprehensive dispute settlement mechanism applying to the entirety of the labor chapter.[312] Moreover, the parties are just required to use their best effort, or 'to strive to ensure' respect of labor provisions in accordance to core labor standards and no weakening of national labor norms for the purposes of attracting foreign direct investment.[313] Overall,

[310] Fergusson I. F., *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy* (Congressional Research Service, 2015).
[311] For more details on the criticism of the CAFTA labor chapter, see e.g. *Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy* (LAC); and 'CAFTA's Weak Labor Rights Protections: Why the Present Accord Should be Opposed' (Human Rights Watch, March 2004) https://www.hrw.org/legacy/english/docs/2004/03/09/cafta90days.pdf accessed 12 October 2024.
[312] Vogt J. S., 'The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership' (2015) 18 *Journal of International Economic Law* 827.
[313] Van Roozendaal G. C., Voogsgeerd H.H., 'International Framework Agreements versus Labour Rights Included in Trade Agreements: Models for the Empowerment of Trade Unions?' (2011) 11(4) *Economic and Environmental Studies: A Journal for Sustainable Development* 319.

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the CAFTA was undoubtedly quite weak, and what is striking is that it is even weaker when compared to other FTAs concluded before it. For instance, it represented a step back from the USJFTA, as the latter envisioned that all provisions contained in the labor chapter would be subject to the dispute settlement mechanism, while the CAFTA makes only certain labor provisions enforceable (namely, those concerning the respect of the parties' own national labor law regime). With the CAFTA, the first generation of US trade agreements came to a close. Such era is now widely considered to be very weak in terms of labor standards, especially when considering the extremely light demands that the USA imposed on its trading partners.

The second generation of US trade agreements starts with the so-called 'compromise of 10 May 2007'. At the time, the Democratic party held the majority of seats in both Chambers, the Senate and in the House of Representative; thus, this favorable political arena allowed them greater leeway in maneuvering the foreign trade policy in a way that was more consistent with their agenda – namely, by demanding higher labor standards from their trading counterparts, supported by support from trade union, environmental activists groups and consumers organizations.[314] Moreover, the US was quick to realize that the few obligations entailed in the 2002 TPA Act were too minimal to bear any results: indeed, if the initial level of labor laws in a trading partner was already very low, asking for a non-derogation commitment would have been close to null.[315] Against this background, on 10 May 2007, the government organized a press conference unveiling that a bipartisan deal had been struck. Such deal is the Bipartisan Agreement on Trade Policy, commonly known as the May 10th Agreement (or May 10th),[316] and it contains new guidelines on how to draft labor

[314] Vogt, 2015.
[315] Fergusson, 2015.
[316] *May 10th Agreement* (2007) 46 ILM 602.

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chapters in FTAs that have started the so-called second generation of trade agreements. Following the May 10th Agreement, the second-generation of FTAs afforded several important steps forward concerning labor-related demands. These especially concern broader reach of labor provisions, now including commitments linked to the ILO Declaration, and a new dispute resolution mechanism applying to commercial litigations and to labor-related ones both in the same way. The second generation of trade agreements contains the following instruments, whose labor chapters are all worded analogously: the Peru Trade Promotion Agreement,[317] the Colombia FTA,[318] the Korea FTA[319] and the Panama Trade Promotion Agreement.[320]

The beginning of another important era in the US trade-labor linkage history is the Obama presidency. The most outstanding result that this administration achieved is the negotiation and entry into force of the Trans-Pacific Partnership (TPP),[321] which was finalized in 2016. The TPP is considered a very ambitious trade agreements in many regards: first of all, for its size and scope, as it covers 12 countries across the Pacific Rim and is greatly diversified among partners since it includes some big players such as Japan and some smaller ones such as Malaysia; second, because it sets high standards for labor regulation, for instance mandating adherence to the 1998 ILO Declaration. This is not the only major agreement concluded by the Obama presidency. In July 2013, in fact, the Transatlantic Trade and Investment Partnership (TTIP)[322] started being negotiated, with the EU and the US sitting at a table to decide what trade conditions to define, along with the labor commitments that ensued. This instrument contained a quite ambitious labor chapter that broadened its scope

[317] *United States-Peru Trade Promotion Agreement* (2006) 46 ILM 69.
[318] *United States-Colombia Free Trade Agreement* (2006) 46 ILM 1026.
[319] *United States-Korea Free Trade Agreement* (2007) 46 ILM 642.
[320] *United States-Panama Trade Promotion Agreement* (2007) 46 ILM 916.
[321] *Trans-Pacific Partnership Agreement* (2016) 55 ILM 1021.
[322] *Transatlantic Trade and Investment Partnership* (proposed).

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beyond the NAALC, and any other bilateral trade agreement concluded by the US; moreover, given its entity and paramount importance, the TTIP was expected to represent the new blueprint template for all subsequent US trade agreements. While most of the contents of the labor chapter mirrored those prescribed by the May 10th model, the TTIP takes some steps forward. For instance, it encompasses a series of labor rights under the umbrella term of 'acceptable conditions of work' (i.e., minimum wage, hours worked, health and safety in the workplace)[323] that were not envisaged in previous FTAs. Moreover, another provision goes as far as discouraging the parties from importing goods made by child labor or under conditions of forced labor.[324] Last, the TTIP has also proven innovative by way of implementing a new wat to access that dispute settlement mechanism that entails a submission process, and a national contact point that civil society can use as an avenue for submitting their complaints. Other than this, the litigation process *per se* remains the same as that envisioned by the May 10th framework. At the moment of the writing, TTIP negotiations have been on hold since 2016, and no formal agreement between the US and the EU is currently in place.

The Trump administration constitutes the last era of US trade agreements, marking a huge shift compared to previous approaches to trade-plus matters in international trade arrangements. The Trump presidency disrupted many of the existing trade agreements that were in place before his arrival, especially the two largest and most comprehensive frameworks of all. First, in January 2017, shortly after taking office, Trump withdrew the US from the TPP. Second, it revised NAFTA. Indeed, the most notable change Trump brought to this realm is the renegotiation of NAFTA, which he had largely criticized under claims that it was mining the American manufacturing sector and its workers. Against this background, Trump sought to replace NAFTA with a new trade agreement, one

[323] *Ibid*., Art. 19 (3) (2).
[324] *Ibid*., Art. 19 (6).

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that better prioritized the necessities of American industrial workers, in accordance with Trump's 'America first' political agenda. This choice led to the United States-Mexico-Canada trade agreement (USMCA),[325] which was signed by the parties in November 2018 and later entered into force in July 2020. Other than these decisions driven by political motives, this era was also largely defined by growing disappointment towards the previous models of drafting labor chapters in trade agreements; more specifically, the May 10th template was placed under great discussion when it was contested following the USA-Guatemala case. Indeed, in June 2017, a dispute settlement Panel constituted under CAFTA ruled against the US in a case against Guatemala for breaches of labor-related obligations enshrined in CAFTA. The Panel's ruling argued that, while the US had brought before the tribunal numerous evidence that Guatemala was, in fact, violating several CAFTA provisions regarding freedom of association and collective bargaining, still Guatemala did not do so 'in a manner affecting trade', thereby arguing that it is not punishable under CAFTA dispute settlement mechanism. This ruling, together with the abovementioned political agenda of the Trump presidency, triggered the renegotiation of NAFTA.[326] Moreover, such unexpected adjudication noticeably lowered the US' confidence in being able to lead trade-plus negotiations globally and unilaterally, as it had been so far. This, combined with the disruptions to a long-standing stable system caused by the Trump presidency, has brought US discussions on the topic to a political deadlock. While the trade-labor nexus seems to be an ever more compelling topic in the American continent, the aforementioned sizeable inconsistencies of American policy choices due to its political volatility have caused growing unpredictability and distrust in the international plane. It is now up to future

[325] *United States-Mexico-Canada Agreement* (2018) 58 ILM 813.
[326] Claussen, 2020.

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administration to set the bar straight again and pave a new, more reliable path for the future generation of US-led preferential trade agreements.

4.2 Analyzing Labor Chapters in US Trade Agreements

While both the EU and the US are cornerstones in drafting labor chapters in trade arrangements, they do so through very distinctive approaches. While, as examined above, the EU worker protection clauses in FTAs are rarely mandatory and cannot be actioned before a dispute settlement avenue, the US has chosen to adopt the opposite approach. As will be shown in the following paragraphs, the American approach is much stricter: most labor provisions have binding character, the US largely employs pre-ratification conditionality on its trading counterparts, parties who do not comply with them will be under the credible threat of sanctions, and worker clauses are actionable before a dispute settlement mechanism that can issue binding rulings. Notwithstanding this apparent strength of the American approach, the latter also has one sizeable flaw: namely, great inconsistency within its own system. Indeed, as the following paragraphs will show, it is quite hard to define some characteristics common to the whole *corpus* of American FTAs in terms of wording used, institutional frameworks and enforcement mechanisms that they establish. Other than there being numerous differences due to the 'generation' of the FTA in question, changes in the drafting of labor chapters often depend on decisions of a political nature, instead of being driven by legal considerations. Because of this, most of the times, the changes in labor provisions in US trade agreements do not necessarily reflect the most effective legal method to obtain a certain goal; rather, they merely mirror the political agenda of the party in power at a certain point in time.

The paragraphs below will proceed as follows. First, differences and commonalities in the wording of labor provisions in US trade agreements will be outlined. Second, the institutional setup entailed in such instruments will be analyzed. Last, the pros and cons of the US method in terms of enforceability of

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the labor obligations will be examined. The main findings of these paragraphs are, respectively: that the way in which the US crafts its labor chapters appears very similar throughout FTAs at face value, but that small details in their formulations have changed overtime generating extremely impactful outcomes; that the institutional framework set up by most US FTAs focuses on dispute settlement mechanisms, rather than on soft law and civil society engagement, thus being opposed to the EU approach; and, last, that while enforcement of labor provisions is certainly the highlight of the US model, it still involves several shortcomings that need to be addressed in the near future.

4.2.1 Wording and Scope of Labor Chapters in US Trade Agreements

As mentioned several times in previous paragraphs above, the inclusion of labor-related provisions within preferential trade agreements is a phenomenon that is on the rise across the world. Nowadays, most of the FTAs that include labor chapters are drafted along the lines of what the US Congress has determined, especially from the entry into force of the May 10th Agreement onwards.[327] The US has, thus, become the primary drafter of the trade-labor nexus obligations all over the world, given its disproportionate influence globally as despite diversity in negotiations in terms of geography and economic conditions. Scholars have identified, broadly speaking, five models of US labor chapters contained in trade agreements.[328] These are the following:

- The NAFTA: under this model, labor provisions are included in a side agreement rather than in the main body of the instrument (e.g., the NAALC is the side agreement to NAFTA that is entirely devolved to labor-related obligations). This approach entails that the parties commit to upholding their own domestic labor laws and that not all labor provisions are

[327] *Ibid*.
[328] For more detailed discussion on these five models of labor chapters in US trade agreements, please refer to Bolle, 2016 and Vogt, 2015.

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enforceable before the Panel. The only obligation that is actionable is the one concerning party's 'persistent pattern of failure […] to effectively enforce its occupational safety and health, child labor or minimum wage technical standards' in a manner affecting trade between the parties and where the provision in question is included in mutually recognized labor norms.[329] On the other hand, all commercial obligations are actionable.

- The USJFTA: under this model, both commercial and labor obligations are enforceable before the same dispute resolution mechanism. Specifically, all labor provisions can be actioned before the panel, and not just a handful of them. Moreover, if such mechanism is not able to obtain a satisfactory resolution of the dispute, the parties have the ability to enact 'any appropriate and commensurate measure'[330] to redress the litigation. Similarly to the NAFTA framework, under this model the parties commit to 'not fail to effectively enforce its labor laws […] in a manner affecting trade'.[331] In this agreement, 'labor laws' are meant to indicate US internationally recognized worker rights.
- The CAFTA and some other subsequent FTAs: this model draws on seven FTAs concluded by the US with 12 countries.[332] Under this approach, only one labor commitment is actionable, namely, that the parties shall not fail to enforce their own national labor norms in a manner that affects trade between the Parties (opposed to commercial provisions, which are all enforceable). In these agreements, 'labor laws' are defined as a party's domestic norms that are directly linked to US internationally recognized

[329] NAFTA, Art. 29.
[330] USJFTA, Art. 17 (2) (b). Please note that the parties have consistently tried to avoid resorting to such measure, e.g., in 2001, the USTR Representative and the Jordanian Ambassador agreed on resolving their litigations through diplomatic means rather than with economic sanctions.
[331] *Ibid*., Art. 6 (4).
[332] The countries are the following: the six trading partners of the US under the CAFTA, plus Australia, Bahrein, Chile, Morocco, Oman and Singapore.

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worker rights. Moreover, these instruments also place limits on the procedural aspects of enforcement: this approach sets limits on the amounts of monetary penalties (which do not apply to commercial procedures), but it foresees suspension of benefits as a last resort mechanism (for both labor and commercial litigations). Within this group, the CAFTA alone needs specific attention. Such an agreement includes four main commitments. First, that the parties uphold their commitments as signatories of the 1998 ILO Declaration and that they strive to ensure adherence to those principles.[333] Second, that the parties' domestic labor laws are consistent with internationally recognized labor rights and that they will strive to improve them and never fail to enforce them or derogate from them.[334] Third, that the parties can access cooperative labor consultations, the Labor Affair Council, a Commission and, as a last resort, an arbitration panel to settle their trade-related disputes arising from the agreement.[335] Fourth (and last), that a monetary fee amounting to maximum 15$ million is imposed on the party in breach of its labor-related obligations upon adjudication of the Commission.[336]

- The May 10th Agreement: as already mentioned above, the Bipartisan Trade Deal enacted on 10 May 2007 was a major change in shift for the US approach to labor provisions in trade agreements. The main changes introduced by this new framework are the following:
    - The same dispute settlement machinery is now applying to both commercial and labor-related litigations, also endowing it with the same portfolio of penalties for both categories of disputes.

[333] CAFTA, Art. 16 (1) (1).
[334] *Ibid*., Art. 16 (1) (2), 16 (2) (1) (a), and 16 (2) (2).
[335] *Ibid*., Art. 16 (6) (1), 16 (6), 16 (6) (4-5), and 20 (6) (1).
[336] *Ibid*., Art. 20 (17).

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- A requirement that the parties ratify and implement the ILO Declaration and its Follow-Up; such commitment being fully enforceable.
- A requirement that the parties do not 'fail to effectively enforce its labor laws […] through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties'.
- A requirement that the parties do not lower domestic labor standards in a way affecting trade or investment between the parties to the agreement; such commitment being fully enforceable.
- Related to the point above, a prohibition of justifying one's lowering of domestic labor standards on the basis of scarce resources or prioritization of other labor-related matters.

This framework thus entailed the abandonment of the 'enforce your own domestic law' standpoint and rather substituted it with the obligation to 'adopt and maintain' national labor laws in compliance with internationally recognized labor rights and to adhere to the 1998 ILO Declaration. Overall, this model has once and for all abandoned the aspirational and promotional language employed previously in favor of actionable and binding provisions, especially for what concerns the non-derogation clause. This model applies to the FTAs that the US has concluded with Colombia, Panama, Peru and South Korea.

- The TPP: this model is largely based on the previous ones but, given the ambitious large scope of countries it aims at covering, it also adds some new provisions. These are the following:
  - The parties shall implement and enforce their own national labor laws with specific regard to minimum wages, hours worked, health

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and safety in the workplace, and acceptable work conditions.[337] Such acceptable working conditions are determined by the parties and not contained in any external labor law framework.

- The parties shall employ their best efforts to discourage the import of goods produced by child labor and forced labor, either wholly or partially.[338] Notice that this provision falls short of imposing a definitive prohibition on the phenomenon, but rather employs soft language.
- The parties shall employ their best efforts to adopt corporate social responsibility standards.
- The parties may resort to corporate labor dialogue as a resolution mechanism for issues arising in the labor field. Moreover, they should set up a public process for submitting complaints that civil society will be able to access through their respective national contact points.[339]

The TPP entails the introduction of action plans setting clear and measurable targets so to be able to verify concretely whether the parties to the agreement are effectively complying with their obligations under the TPP. These action plans might include labor inspections, external audits or setting mandatory deadlines for compliance. The TPP applies to 11 countries on the Pacific Ocean (namely, Australia, Canada, Chile, Mexico, Peru, Singapore, Brunei, Japan, Malaysia, New Zealand and Vietnam. The first six countries mentioned in the list were already parties to previous FTAs with the US, but the obligations therein contained are superseded by those enshrined in the TPP).

[337] TPP, Art. 19 (3) (2).
[338] *Ibid*., Art. 19 (6).
[339] *Ibid*., Art. 19 (9).

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Last, a new era of US-drafted labor chapters might have started with the entry into force of the USMCA. However, it is still too soon to analyze what this era might entail, as since the entry into force of the USMCA in July 2020 the US has not concluded any major new bilateral FTAs, and the Biden administration has kept a very cautious approach on the topic, given the tumultuousness of the previous years. Notwithstanding, an important characteristic of the USMCA in terms of wording and scope must be examined. Indeed, what is notable about this trade agreement is that labor provisions have broken free from the labor chapter and have also sneaked into the chapter dedicated to the Rules of Origin. Here, Chapter 4 Annex 4-B requires that, in order to be eligible for duty-free treatment, at least the 40-45% automotive vehicles produced in the party's jurisdiction must be made by workers earning at least 16 USD per hour.[340] This is the first instance of minimum wage requirements sneaking out of the labor chapter 'ghetto' and finding their way onto commercial provisions, specifically those regarding the rules for producing commodities.[341] Whether such choice will become a common practice in future FTAs drafted along the lines of the USMCA, hence launching a new generation of labor chapters in US trade agreements, is still an open question and will likely depend on the practical implications generated by real-life application of this Annex.

The differences in terms wording separating the first and second generation of US trade agreements are notable, as the former are much weaker and focused mostly on domestic labor law frameworks, while the latter expand their scope to the ILO doctrine and entail stricter enforcement mechanisms. Moreover, the first generation also presents internal differences: NAFTA, for example, covers way less provisions in terms of enforcement than the other agreements of the first generation. In addition, another main difference between the two generations of

[340] USMCA, Chapter 4 Annex 4-B.
[341] Harrison, 2019.

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FTAs concerns enforcement: while the first generation entails two separate redress mechanisms for dispute concerning commercial provisions and those concerning labor provisions, the second generations foresees a unified dispute settlement mechanism for both. This applies equally to penalties, as suspension of trade benefits only pertained to commercial disputes under the first generation and it is now applicable to labor disputes as well since the second generation of labor chapters ins US trade agreements. For what concerns the list of workers' rights covered in FTAs, the second generation is more complete, as it includes some new rights previously deemed minor such as the elimination of any form of discrimination. For instance, while NAFTA merely provided for the maintenance of existing national labor laws, since the USJFTA the US started introducing non-derogation clauses for labor obligations. The CAFTA upgraded the level of protection by including the following sentences: 'shall not fail to enforce [domestic labor standards] through a sustained or recurring course of action or inaction, in a manner affecting trade' and 'shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade or investment'.[342] This practice was carried on in many subsequent FTAs.[343] A binding wording was then introduced in the TPP and in the FTAs with Colombia, Korea, Panama and Peru, where the terms 'shall not fail' were substituted by 'shall strive to ensure', thereby affording binding character to the provision in question. Last, all US FTAs,[344] no matter what generation, entail that all legal entities within the parties' respective territories are endowed with the ability to access judicial (and non-judicial) labor tribunals for having their national labor law enforced.[345] Generally speaking, the

[342] CAFTA, Art. 16 (2).
[343] Specifically, in the trade agreements with Australia, Bahrein, Chile, Morocco and Oman.
[344] Besides the USJFTA.
[345] See the following provisions, among others: CAFTA Art. 16 (3); US-Chile FTA Art. 18 (3); US-Morocco FTA Art. 16 (3); US-Singapore FTA Art. 17 (3); US-Australia FTA Art. 18 (3); US-Bahrein FTA Art. 15 (3); US-Oman FTA Art. 16 (2); US-Peru FTA Art. 17 (4); US-

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US FTAs tend to provide a list of measures concerning procedural fairness that must be granted by their trading partners so to guarantee proper enforcement of labor norms.[346]

For what concerns adherence to the ILO framework, with an exception for NAALC, US FTAs mandate ratification and implementation of the 1998 ILO Declaration on Fundamental Principles and Rights and Work and its Follow-Up. This instrument indicates five core labor rights, namely, freedom of association, the right to collective bargaining, elimination of forced labor, elimination of child labor and abolition of any form of discrimination at work. The US covers a notably smaller scope than the EU in mandating adherence to ILO norms: while the former only requires upholding the 1998 Declaration, the latter refers to the whole *corpus* of core Conventions. This is due to the fact that the US itself is, regrettably, not a party to all the ILO core Conventions[347] and, to be credible in demanding a higher level of compliance, it would first need to ratify the fundamental ILO instruments itself.[348] For this reason, while the EU highlights effective implementation of the ILO paradigm in its trade agreements, the US chose to rather emphasize compliance with one's own domestic labor legislation.

When discussing the wording of US-drafted provisions on labor and trade, one cannot overstate the importance of the 'in a manner affecting trade' sentence. This terminology, which has connotated the US style of drafting labor chapters in FTAs since the May 10th compromise, has caused the US itself a number of

Korea FTA Art. 19 (3), US-Panama FTA Art. 16 (4); US-Colombia Art. 17 (4); TPP Art. 19 (8).

346 Gyanchandani V., *Soft vs Hard Governance for Labour and Environmental Commitments in Trade Agreements: Comparing the US and EU Approaches* (CTEI Working Paper 2018-08).

347 At the moment of the writing, the US have only ratified two ILO core Conventions; namely, the Abolition of Forced Labor Convention (No. 105) and the Worst Forms of Child Labor Convention (No. 182).

348 Weissbordt D., Mason M., 'Compliance of the United States with International Labor Law' (2014) 98 *Minnesota Law Review* 1842, 1846.

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considerable issues in terms of enforcement. The most notable among these is, it goes without saying, the Panel ruling in the USA-Guatemala Case which adjudicated in favor of the latter since, despite evident breaches of the labor provisions embedded in the CAFTA, such violations did not occur 'in a manner affecting trade'. In the light of this disastrous ruling, the US were faced with three main possible rewordings of such terminology in future trade agreements.[349] These are the following:

- First, the US could keep the old wording but include a new footnote to the sentence clarifying its intended meaning so as to prevent future misinterpretation incidents; or
- Second, the US could rethink the whole terminology of the sentence from scratch, even though this could imply renegotiating the May 10th Agreement, which calls for bipartisan consensus, hence would give rise to lengthy and complex negotiations; or
- Third, the US could keep the 'in a manner affecting trade' sentence as it is and rely on the fact that, given that there is no concept of 'precedent' under the FTA framework, subsequent Panel rulings may overturn the one of the USA-Guatemala case. However, should the Panel rule once again against the American interpretation of the clause, this would bear the risk of further settling the interpretation that the US is seeking to discard.[350]

The choice made during the USMCA negotiations was the first option, thus incorporating a recurrent footnote every time the 'in a manner affecting trade' sentence occurred. Such footnotes recite as follows:

> 'For greater certainty, a 'course of action or inaction' is 'in a manner affecting trade or investment between the Parties' where the course involves:

[349] For more detailed discussions on these three rewording options of the sentence 'in a manner affecting trade', please refer to Claussen, 2020.
[350] Claussen, 2020.

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(1) a person or industry that produces goods or provides services traded between the Parties or has investment in the territory of the Party that has failed to comply with this obligation; or (2) a person or industry that produces goods or provides services that compete in the territory of a Party with goods or services of another Party'.[351]

This specification will hopefully clarify the intended meaning of the whole sentence and will restrict the leeway afforded to the Panel members when ruling on a dispute revolving around these terms. However, successful enforcement of this new wording is still unknown, due to no new cases being brought before the Panel on the issue.

	Persistent pattern of failure to enforce national labor legislation	Shall strive to ensure that it does not derogate from national laws to encourage trade	Shall strive to ensure that it does derogate from national laws to encourage trade and investment	Shall not derogate from national labor laws in a manner affecting trade or investment	Shall not fail to enforce its laws through a recurring course of action or inaction, affecting	Shall not fail to effectively enforce its laws, through a sustained or recurring course of action or inaction, affecting trade and investme

[351] USMCA, Chapter 23. The footnote was also inserted for similar purposes in the environmental chapter, but not in the anti-corruption chapter, albeit the appearance of the 'manner affecting trade' terminology in Art. 27 (8).

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					g trade between the Parties	nt between the Parties
NAFTA	✓					
US-Jordan FTA		✓				
CAFTA			✓		✓	
US-Chile FTA			✓		✓	
US-Morocco FTA			✓		✓	
US-Singapore FTA		✓			✓	
US-Australia FTA			✓		✓	
US-Bahrein FTA			✓		✓	
US-Oman FTA			✓		✓	

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US-Peru FTA				✓		✓
US-Korea FTA				✓		✓
US-Panama FTA				✓		✓
US-Colombia FTA				✓		✓
TPP				✓		✓

Table 3 – Wording and scope of labor provisions in US FTAs. Source: author's elaboration.

4.2.2 Institutions and Procedures under the Labor Chapters in US Trade Agreements

In opposition to the EU model, labor chapters in US trade agreements are not as strongly focused on the creation of a standard institutional structure that tackles the monitoring, implementation and enforcement challenges linked to worker protection clauses. While the EU approach foresees the creation of specific bodies devoted to oversight of the TSD Chapter in all its phases and details, and it highly stresses the importance of civil society engagement, the US chose a different pathway. Indeed, the latter formulates its own labor chapters in trade agreements with a much greater emphasis on hard enforcement, i.e., on setting up the proper tribunals and avenues for redress of disputes arising under the FTA's labor chapter. Moreover, while civil society is certainly involved in the monitoring of said provisions, their role is surely emphasized to a much smaller extent than in the EU model and it is all but pivotal. Against this background, the

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institutional structure hereby analyzed will mostly highlight the procedures that the US FTAs envisage for redressing the litigations arising from the labor chapters in trade agreements.

Every FTA to which the US is a party sets up a Labor Commission composed of State officials. Some FTAs might establish some other more specific Commissions, e.g., the TPP sets up a multi-party Commission that involves US officials as well as their counterparts. The NAALC's institutional framework also designates another institution, i.e., a multi-stakeholder Council that includes American civil society representatives, other than American bureaucrats.[352] Moreover, a Secretariat was set up by the NAALC to tackle the more administrative aspects of the labor chapter; the latter was tasked with supplying the Commission and the public with technical advice when dealing with criticalities arising from the agreement. The head of the Secretariat was the Executive Director, who was appointed for a three-year term, must be an American national, and could have been dismissed by the Council at any time.[353] The tasks of the Executive Director are the following: they appoint the members of the Secretariat based on a list provided by the partied and by the Joint Public Advisory Committee;[354] they then fix their wages and monitor the staff's performance;[355] and they provide for efficient mutual exchange of communication between the Council and the Commission.[356] Last, the Executive Director and their team can only be influenced in their decisions by evidence provided by the Council and the Commission, hence they cannot accept any piece of advice from external sources (i.e., to prevent undue influence from arising).[357] However, this

[352] NAALC, Art. 9.
[353] *Ibid*., Art. 10 and 11.
[354] *Ibid*., Art. 11. Please note that, when appointing the Secretariat members, the Executive Director shall take into due regard the equitable representation of the parties' nationalities.
[355] *Ibid*., Art. 11.
[356] *Ibid*., Art. 11.
[357] *Ibid*., Art. 11.

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role stopped existing (even before the renegotiation of the NAFTA) and was replaced by the National Administrative Offices (NAO) of the NAFTA member States. The NAO are charged with the same tasks as the late Secretariat. In addition, all US FTAs entail the creation of two advisory bodies: namely, the National Advisory Committee (NAC) and the Governmental Advisory Committee (GAC).[358] The NAC is composed of members of civil society organizations, especially of NGOs. On the other hand, the GAC is more State-oriented, as it includes national representatives belonging to the federal or state-level bureaus. While both Committees advice the US with technical insights, the latter has a more specific focus on implementation strategies and issues recommendations on how to materially improve the text of the agreement.[359]

Complaints filed under commercial provisions and complaints filed under labor provisions are examined by two separate institutions; namely, the former are considered by the Department of Commerce (DOC) and the latter are received by the Department of Labor (DOL). The two Departments are not only formally separated, but they also follow different procedures when dealing with the complaints received. Indeed, the DOC has a hotline that anyone (i.e., note that this includes any party to the agreement in question) can access and file their complaints under. Any evidence received through the hotline is first analyzed by the Market Access and Compliance Office's Trade Compliance Center, and then the DOC launches research on the allegations. The DOL, on the other hand, has no such avenue for filing complaints arising from labor chapters.[360] In fact, the procedures that it has in place for receiving such complaints are much more restricted: first, they have to be related to issues affecting US workers, whereas

[358] Fergusson I. F., Davis C. M., *Trade Promotion Authority (TPA): Frequently Asked Questions* (Congressional Research Service, 2018) https://fas.org/sgp/crs/misc/R43491.pdf accessed 12 October 2024.
[359] *Ibid*.
[360] Bolle, 2016.

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most criticalities usually arise in the partner countries; second, they are strictly meant to ensure compliance with the trade agreements and its action programs.[361] Both the DOC and the DOL, however, receive information from a wide pool of informants, including trade unions, the Congress, US embassies and other State Departments, and both of them are capable of initiating legal action to solve a controversy prior to official dispute resolution, attempting to redress the issue through diplomatic means. Any case that is not settled through such soft measures will be referred to more formal avenues for redress, such as the competent agencies or the USTR.[362] Besides this consultation process, which is common to most FTAs, procedures and penalties may be different from one agreement to another, and they may also change depending on the nature of the dispute (i.e., whether it stems from commercial or labor clauses). For instance, the CAFTA sets a ceiling for the maximum penalty amount, which is placed at 15$ million, while fees imposed upon a verified breach of a commercial provision have unrestricted penalties available.

The adjudicatory method chosen by the US for redressing litigations arising from the labor chapters is arbitration. This method is recognized as an international dispute settlement mechanism by Art. 33 (1) of the UN Charter,[363] and it is widely used in several international frameworks such as the UN Convention on the Law of the Sea (UNCLOS)[364] and investor-state litigation.[365] One characteristic feature of arbitration, which is quite the exception in public international law, is that it entails 'compulsory jurisdiction', meaning that the

[361] 'Procedural Guidelines for Submitting Complaints to the DOL, Office of Trade and Labor Affairs (OTLA) under a Labor Chapter of a Free Trade Agreement' *Federal Register*, vol 7, p 245, 21 December 2006.
[362] Bolle, 2016.
[363] *Charter of the United Nations* (1945) 1 UNTS XVI.
[364] *United Nations Convention on the Law of the Sea* (1982) 1833 UNTS 3.
[365] For more details on inter-state dispute settlement mechanisms, see Germany Model BIT (2008) Art. 9 (1) and (2).

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parties can unilaterally initiate the proceedings against one another without the need for the defendant's consent.[366] Notwithstanding, access to the arbitration is not as straightforward as 'compulsory jurisdiction' may imply. Before arbitration is launched, in fact, the parties are subject to a requirement to negotiate. This feature is not at all unique to the US approach to labor chapters; rather, it is very common among international frameworks entailing arbitration (e.g., the International Tribunal for the Law of the Sea[367] and several Bilateral Investment Treaties). Moreover, this feature is common to commercial disputes arising from the FTA as well.[368] The requirement to negotiate before resorting to the arbitration tribunal is mandatory on all parties filing a complaint under an FTA's labor chapter for many reasons: first, because it determines the admissibility of a dispute; second, because it gives the parties the opportunity to reach an amicable resolution of the conflict before recurring to hard law means;[369] third, it allows the defendant party to adjust its behavior and redress its violations before incurring in a process for it; fourth, it allows the parties to come to a mutually shared agreement before recurring to intermediation; and, last, it narrows the scope of the dispute to its very core.[370] The most recent FTAs have a common streamlined procedure for the negotiations that precede the actual arbitration process. First, the entities who claim to have suffered a violation of an obligation enshrined in the labor chapter of an FTA file a petition with the national contact point describing the breach in question. The national contact point conducts a brief analysis over the claim, inquiring in the facts of the case and, if necessary, holding

[366] For more details on compulsory jurisdiction, please refer to *Status of the Eastern Carelia* (Advisory Opinion) PCIJ Series B No 5, 27.
[367] UNCLOS, Art. 283 and 286.
[368] NAFTA, Art. 2005; CAFTA, Art. 20 (4); TPP, Art. 28 (5).
[369] Abel P., 'Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs' in H Gött (ed), *Labour Standards in International Economic Law* (Springer 2018) 153.
[370] To this point, please see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v Russia) (Preliminary Objections) [2011] ICJ Rep 70, 124–125.

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public hearings on the issue.[371] After this stage, the matter will pass in the hands of states: here, the role of civil society ends, and only states will have the capacity to decide whether to pursue with the case. Upon receival of the complaints from the national contact points, consultations are launched, and the complaint is forwarded to the competent authority under the FTA, which is usually multi-party and composed of high-level government officials from both sides. The consultations must be requested to the national contact point of the other party by the complainant.[372] Should said consultations prove unsuccessful, the parties can convene the Council of Ministers to oversee the matter.[373] If, after 60 days, the dispute is still unresolved, the parties have the capacity to call on the Commission to take over the procedure.[374] Should the complaining party still be unsatisfied with the solutions proposed, they can issue their case over to the arbitration Panel.[375] Only then, the actual arbitration procedure is launched.

The main exception to this system is the NAALC, which needs specific analysis. The latter, in fact, entails quite a burdensome procedure that deviates from the standard model that the US has envisaged for redressing disputes arising under the labor chapters of all their other trade agreements. First, the NAALC foresees the creation of the NAOs, the administrative offices established by the parties to receive the complaints filed under the NAFTA. Once the NAO receives an issuance, it reviews it against several strict minimum criteria for admissibility concerning the identity of the complainant, the scope of the matter, the harm allegedly caused by the violation in question, and, more generally speaking, the NAO will investigate whether the complaint is substantiated by evidence. To this end, it will often entertain consultations with the NAO of the defendant party.[376]

[371] Abel, 2019.
[372] E.g., CAFTA Art. 16 (6) (1).
[373] E.g., *Ibid*., Art. 16 (6) (4).
[374] E.g., *Ibid*., Art. 16 (6), 20 (4) (5).
[375] E.g., *Ibid*., Art. 20 (6).
[376] NAALC, Art. 21 (1).

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Once this process is over, the NAO receiving the complaint will publish a report detailing whether the allegations are substantiated by evidence and whether it envisages a solution that could potentially gather mutual consensus by the parties. If the parties choose not to go for it, the complaint is forwarded to an Evaluation Committee of Experts,[377] who will identify whether the violation is part of a systematic pattern of breaches and, eventually, will issue a Draft Evaluation Report containing the analysis of the matter, the conclusions on it and recommendations to fix it.[378] The Evaluation Committee of Experts is composed of experts on labor law and it represents the most neutral avenue for redress of the dispute in these proceedings, as it is impartial to the state parties to the litigation and it is merely an analyzer, rather than an adjudicator. It will not come to a legal conclusion, but its role is to settle the facts of the case once and for all based on a neutral review of the evidence submitted by the parties. On the other hand, all the other steps of this procedure are much less impartial and much more politicized, as they al involve state representatives. The Draft Evaluation Report must be published within 120 days of receiving the issuance. Afterwards, should the parties be still unsatisfied with the recommendations, they may further forward their matter to the Committee,[379] which will provide a final report to the Council of Ministries within 60 days,[380] starting yet another round of consultation with the goal to reach a friendly agreement that gathers mutual consensus from the parties.[381] This last round of consultations will last 60 days. If, after this last round, the parties are still unable to come to a resolution, they may proceed with requesting the creation of an arbitration Panel,[382] which is however conditional on a two-thirds majority vote in the Council of Ministries. This implies that, for the

[377] *Ibid*., Art. 23.
[378] *Ibid*., Art. 25 (1).
[379] *Ibid*., Art. 25 (2).
[380] *Ibid*., Art. 26.
[381] *Ibid*., Art. 27 (4).
[382] *Ibid*., Art. 29 (1).

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arbitration Panel to be established, the third country residing in the Council of Ministries must be persuaded to side with the complainant in the dispute and afford their vote in favor of proceeding with the formal litigation. This is a very politically charged objective that requires great amounts of political capital and willpower from the complaining state. All in all, this very lengthy and multi-layered form of institutionalized negotiations is a clear obstacle for any party motivated to press charges and pursue arbitration under the NAALC.[383] This system, however, has a clear perk: namely, that it fosters to the very last step the reaching of an amicable resolution among the parties, in an institutional setting that escalates in terms of diplomatic context and urgency. While pushing for friendly agreements, though, this process also manages to discourage parties from filing a complaint under the NAALC, especially if they lack the political and diplomatic capital to pursue such a lengthy and complicated procedure. Eventually, this system might cause the parties to the NAALC to believe that coming to arbitration is an unrealistic instance, thereby not even initiating the whole procedure at all, in fear of the insurmountable number of hurdles it entails.

4.3.3 Analyzing Enforceability Issues of Labor Chapters in US Trade Agreements

While the US model of approaching labor clauses in trade agreements is surely more assertive than the EU one, this does not mean that its enforcement mechanisms work smoothly. Rather, also the US method presents some structural flaws in terms of enforceability of the labor provisions which will be examined in this paragraph. To analyze how the US structures its labor chapters to embed enforceability in their provisions, a sub-division can be made based on who decides whether the parties to the trade agreement are following their labor commitments. On these grounds, US FTAs can be divided into four categories:[384]

[383] Abel, 2019.
[384] For more details on the four models of compliance with labor obligations in US FTAs please refer to Claussen, 2020.

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- The gatekeeper model: under this approach, the US (specifically, the USTR) unilaterally and non-reciprocally deems which trading partners can access its market under preferential conditions and it one-sidedly determines eligibility for the benefits with full discretion on the final decision. This model is exemplified by the GSP program.
- The outsourced model: under this approach, a third party is designated to assess compliance. This model was used in the 1999 USA-Cambodia textile agreement, where the ILO was selected as the external independent decider of the parties' compliance with trade-plus matters.
- The institutional model: under this approach, several institutions are created *ad hoc* by the instrument to monitor compliance and eventually adjudicate on labor-related matters. Among the institutions created under this model, we often find an independent secretariat, committees tasked with carrying out consultations, national contact points, labor and ministerial council, advisory bodies and sometimes organisms for the inclusion of civil society. Depending on what is established by the parent agreement, these institutions will cooperate to find a mutually agreed solution that entails consultations and diplomatic means, rather than the enforcement of hard law by default. This model was employed in the NAALC.
- The adjudicatory model: under this approach, labor issues and commercial issues are covered by the same procedural rules (including dispute settlement mechanisms, available remedies and penalties, potential application of economic sanctions etc.). This model is used in the USJFTA.

Even though, ever since the May 10th Agreement, the model chosen by the US is *de iure* the adjudicatory approach, *de facto* things tend to go differently. The US, in fact, has often demonstrated to prefer friendly and promotional ways to

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manage labor obligations over the hard way.[385] The USTR and the US Department of Labor are constantly seeking involvement of trade partners in labor-related matters to solve litigation diplomatically before it goes downhill. The US has also often argued that such soft ways to solve controversies are more effective than hard enforcement,[386] because they engage the trading partners first-hand and allow them to strengthen their own labor systems at home. Furthermore, the US often takes part in capacity building programs that materially aid their trade partners in carrying out their labor obligations and reaching their objectives.[387] Such programs have been successfully carried out by the US in Bahrein, Colombia, Honduras and Peru.

Starting on a positive note, in terms of enforceability, the US has shown positive tangible results both pre- and post-ratification. Concerning the former, the US has been successful in imposing pre-ratification conditionality on their trade partners. Such ability has always been exerted by American negotiators, but it has been enhanced following the May 10th Agreement. While this negotiation technique involves a great number of politics and leveraging power asymmetries on the international plane to one's own favor, it still has proven to be a quite successful method to impose compliance with worker protection standards. Indeed, there is empirical evidence that imposing pressure on Bahrein, Colombia, Morocco, Panama and Oman to adopt relevant labor laws to fill their existing normative gaps before the signing of the FTA has succeeded.[388] These considerable legal and institutional reforms hence seem like a useful practical tool

[385] *Ibid*.
[386] Monicken H., 'Ways and Means Dems Question Whether USMCA Will Lead to Mexican Labor Reform' *Inside U.S. Trade* (11 April 2019).
[387] Such capacity building programs have been carried out, among others, in Bahrein, Colombia, Honduras and Peru.
[388] Hornbeck J.F., 'Free Trade Agreements: US Promotion and Oversight of Latin American Implementation' (2009) Inter-American Development Bank PB-I02 accessed 12 October 2024.

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for ensuring compliance. Bahrein and Oman, specifically, have implemented significant amendments to their existing labor norms following pressure of the US during the negotiation of the FTA; however, it should be noted that their respective trade agreements ended up containing much more relaxed labor commitments.[389] On the other hand, the FTA with Korea, which entailed stricter labor obligations, did not include a pre-ratification conditionality phase during its drafting.[390] For what concerns post-ratification stages, the US is usually taken more seriously than the EU when it comes to enforcing labor provisions contained in preferential trade agreements because it is endowed with the ability to impose punitive measures on its counterparts, such as trade sanctions. Notwithstanding, many complaints are consistently being filed under the US FTAs. This might prove, on the one hand, that post-ratification enforcement is scarce; on the other, however, it might imply that monitoring of the agreements is close and effective and that the parties are involved in ensuring that the labor provisions included in the FTA are operationalized.

Another successful feature of the US approach to labor chapters in FTAs is their model for imposing the legal consequences of an arbitral award against the responsible state. Specifically, their approach to monetary sanctions, which has evolved over time, is to be analyzed. In the first generation of FTAs, the US system was the following: once the arbitration is over, the Panel will issue an action plan for the parties to comply with. If a party to the dispute (i.e., the defendant) does not approve of the action plan, or if it fails to properly implement it, the Panel will impose a 'monetary enforcement assessment', i.e., a fee, on the defendant.[391] This payment will constitute a fund that promotes capacity building

[389] Vogt, 2015.
[390] *Ibid*.
[391] E.g., NAALC, Art. 39 (4), (6) and Annex 39; US-Australia FTA, Art. 21 (12); US-Bahrein FTA, Art. 19 (12); CAFTA, Art. 20 (17); US-Chile FTA, Art. 22 (16).

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programs in the field of worker protection in the concerned territory,[392] and none of it will go to the complainant (indeed, the latter are only able to enforce the duty to finance such fund).[393] This approach, while certainly constructive, may give rise to contradictory results: namely, that the party responsible for a labor rights violation will profit from such behavior. Therefore, the incentive to redress the breaching behavior in the future is null. How could a state be compelled to adhere to labor obligations, if by breaching them it will benefit from an *ad hoc* labor program? Moreover, said programs' effectiveness has also been proven to be systematically very small – indeed, they are implemented in the respondent's territory, where the claimant has little leeway due to jurisdictional constraints, and they are monitored by the FTA's organs which are political and in which the respondent party always has a say.[394]

Notwithstanding an apparently clear enforcement apparatus, enforceability of labor provisions in the US-negotiated FTAs still presents many considerable loopholes. First, only certain selected labor provisions are enforceable. While all commercial obligations are always fully enforceable in all models and generations of US FTAs, under the NAFTA, the CAFTA and the given subsequent FTAs mentioned above only certain labor provisions are actionable before a dispute settlement mechanism. The NAALC, indeed, only envisions one enforceable provision: that the parties must uphold their own domestic labor standards on child labor, minimum wage, and health and safety in the workplace. Other rights, such as freedom of association or the right to collective bargaining, are excluded

[392] E.g.: NAALC, Art. 39 (4) (b), (5) (b) and Annex 39 (3); US-Australia FTA, Art. 21 (12) (4); US-Bahrain FTA, Art. 19 (12) (4); CAFTA, Art. 20 (17) (4); US-Chile FTA, Art. 22 (16) (4) US-Chile FTA. The issue of low penalty ceilings is present in the following provisions, among others: NAALC, Annex 39 (1); US-Australia FTA, Art. 21 (12) (2); US-Bahrein FTA, Art. 19 (12) (2); US-Chile FTA, Art. 22 (16) (2).
[393] E.g.: NAALC, Art. 41 (1) (2); US-Australia FTA, Art. 21 (12) (7); US-Bahrain FTA, Art. 19 (12) (6); CAFTA, Art. 20 (17) (5); US-Chile FTA, Art. 22 (16) (5).
[394] Abel, 2019.

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from the scope of actionable provisions (note that the latter two rights constitute the basis for the vast majority of claims submitted before the NAALC avenue for redress of disputes).[395] On the other hand, while the CAFTA and the subsequent FTAs mentioned above also include just one actionable labor clause, the latter entails a wider scope: the parties must enforce all, and not just some, of their domestic norms on worker protection pertaining to internationally recognized worker rights and in a manner that affects trade between the parties. Against these considerations, this method was deemed ineffective. Therefore, starting from the FTA with Peru, the US changed their approach to monetary assessments. In the second generation of labor chapters, the US has implemented the capacity to suspend trade benefits as a measure of last resort against the party responsible for a labor law breach. Once the arbitral award confirms the violation, the complainant party can proceed with the suspension of trade benefits. To avoid so, the respondent can instead pay a monetary penalty to the winning party within a predetermined period of time; the amount of such fee is up to negotiation between the parties. Should that negotiation prove inconclusive, the amount to pay will be fixed either at half of the pay initially claimed by the winning party, or at half of the amount determined by the Panel as the appropriate payment awarded in an equivalent case.[396] Upon failure to pay, the respondent will suffer unliteral suspension of trade benefits.[397] This threat is a credible deterrent for the respondent to dismiss the 50% reduction offered in the first place.[398] The real leverage in this new model is that the monetary assessment is directly paid to the claimant, thereby constating a less distortive penalty. In this way, the remedy does

[395] US Department of Labor, Office of Trade and Labor Affairs.
[396] E.g., US-Colombia FTA, Art. 21 (16) (6); US-Panama FTA, Art. 20 (15) (8); US-Peru FTA, Art. 21 (16) (8); US-Korea FTA, Art. 22 (13) (5) (7) ¸TPP, Art. 28 (20) (12).
[397] E.g., US-Colombia FTA, Art. 21 (16) (8); US-Panama FTA, Art. 20 (15) (6); US-Peru FTA, Art. 21 (16) (6); US-Korea FTA, Art. 22 (13) (5); TPP Art. 28 (20) (7).
[398] Abel, 2019.

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not directly align with the respondents' interests, which was contradictory to the whole system.

Second, enforcement procedures and penalties caps differ among FTAs, thus creating great divergence and unpredictability in the system. To this point, NAFTA, CAFTA and the above-mentioned subsequent FTAs mandate strict caps on monetary penalties imposed upon violations of labor provisions. On the other hand, the same agreements place a maximum number of monetary penalties set upon breaches of commercial provisions. For instance, CAFTA foresees a ceiling of 15$ million as per the monetary penalties that can be imposed for non-compliance with worker protection standards; in the other hand, the imposable penalty is unrestricted for what concerns breaches of commercial clauses. NAFTA also foresees very distinct and divergent enforcement mechanisms for labor and commercial disputes, while CAFTA and the subsequent FTAs which follow its same template entail relatively analogous procedures for breaches under commercial and labor chapters. The USJFTA and the TPP place no penalties' ceilings and have a common set of procedural rules shared between commercial and labor disputes; however, this often go unused: as mentioned above, for instance, the parties to the USJFTA have agreed to pursue diplomatic means of resolutions rather than impose penalties on one another.

Third, compliance with the ILO framework is still a controversial topic for the US. Being signatory of only two of the ILO core Conventions, the US cannot require its trading counterparts to adhere to something that it is not even a party to itself, although most of the substantive obligations imposed by the ILO core Conventions are already covered by US national legislation. As a consequence, the US does not employ ILO instruments as a reference for comprehensive labor rights frameworks to abide by in its FTAs. Rather, only the 1998 ILO Declaration is used to define the internationally recognized labor rights to be respected by the parties to the trade agreement. This link is quite weak, and it excludes from the

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scope of the labor chapter not only the core Conventions of the ILO, but also the Follow-Up to the Declaration. This choice is probably due to scarce harmonization of labor laws across the American states, thereby creating the risk of imposing compliance with some labor standards that might contradict American state law.

Sometimes, enforcement issues happen at the litigation stage, when a dispute is already under debate. This was the case of the US-Guatemala dispute, which brought to the light an interpretative issue related to a provision's wording. The US-Guatemala case was the first dispute to arise under the labor chapter of an FTA. The case started in 2008, when the US Department of Labor received a complaint filed by the American Federation of Labor and Congress of Industrial Organizations and many Guatemalan civil society organizations claiming that Guatemala had breached several labor provisions enshrined in the CAFTA, *inter alia*, freedom of association, the right to collective bargain, the right to organize and the duty to guarantee acceptable work conditions.[399] The Obama administration, newly elected at the time, was under great pressure to consider the case and thus decided to launch the proceedings against Guatemala for the alleged violations mentioned above. After giving Guatemala the chance to comply with an action plan composed of 18 measures to fill its gaps in terms of labor law, the US found that the defendant was still not complying with its CAFTA obligations and decided to pursue formal dispute settlement. The parties then provided the Panel with written submissions on the case. After long consultations, the Panel published its final report in June 2017. There it found that, while Guatemala had, in fact, failed to uphold its commitment under Art. 16 (2) (1) (a) of CAFTA, such

[399] American Federation of Labor and Congress of Industrial Organizations et al., *Public Submission to the Office of Trade and Labor Affairs Under Chapters 26 (Labor) and 20 (Dispute Settlement) of the Dominican Republic—Central America Free Trade Agreement Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply with Its Commitments Under the ILO Declaration on Fundamental Principles and Rights At Work* (23 April 2008).

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failure was not 'through a sustained or recurring course of action or inaction' 'in a manner affecting trade',[400] hence it was not responsible under CAFTA. At the bottom of this decision is the interpretation of the sentence 'affecting trade', which is a terminology that recurs in the vast majority of US FTAs. The Panel interpreted said terms as the instance when an action 'confers some competitive advantage on an employer or employers engaged in trade between the Parties.'[401] The Panel further elaborated three parameters to assess whether an action is affecting trade:

> '(1) whether the enterprise or enterprises in question export to CAFTA-DR Parties in competitive markets or compete with imports from CAFTA-DR Parties; (2) identifying the effects of a failure to enforce; and (3) whether these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.'[402]

In light of these criteria, having applied this legal test to the facts of the case, the Panel ruled in favor of Guatemala as it deemed that the evidence raised by the US were insufficient to prove that Guatemala's failures had affected trade, since no company had derived any sort of competitive advantage from the violations. Following this adjudication, the US foreign trade system suffered great turmoil, as many considered the May 10th Agreement to be now obsolete and ineffective. Scholars have argued that, following this ruling, there are hardly any chances for the US to bring forward successful cases in the future,[403] and politicians seem to agree with this vision, as the ruling has triggered a political

[400] *Final Panel Report, In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (14 June 2017) para 594.
[401] *Ibid*., para 190.
[402] *Ibid*., para 1906.
[403] Paiement P., 'Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute' (2017) 49 *Georgetown Journal of International Law* 675; and Brooks T., 'US−Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement' (2018) 4 *International Labor Rights Case Law* 45.

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confidence crisis in the US approach to FTAs.[404] The USA-Guatemala case has triggered an urgent and necessary review of some central aspects of the trade-labor linkage, especially concerning some unexpected ripple effects that certain provision might have once they get to the enforcement phase. Even certain basic beliefs, such as that stricter agreement conditions necessarily lead to better labor outcomes, might have to be reassessed. Unfortunately, however, such reviews still have to occur. More generally speaking, the main hindrance to a progressive improvement of the enforceability of labor provisions contained in US FTAs is the political volatility of the country, which has been leapfrogging from one party to another term by term. Due to such instability in what party is in power, the trade-labor nexus is subject to continuous alteration, in a 'one step forward and two steps back' fashion. The lack of meaningful political will to pursue litigations on labor provisions is also exemplified by the fact that, to this day, out of circa 50 complaints filed under US trade agreements, only the US-Guatemala reached the litigation phase.[405] Moreover, during the negotiation of the USMCA, the drafters had to decide which standard template to use to draft the USMCA's labor provisions upon. Rather than picking the more modern and more advanced TPP, the negotiators instead turned back to NAFTA as the baseline for the new agreement. This represented a significant step behind in improving the overall system of labor chapters that caused further entrenchment of ineffective models in the US approach to the issue.

Requirements imposed by CAFTA Art. 16 (2) (1) (a)	***Adjudication against Guatemala by the arbitration Panel***
Not fail to effectively enforce	Breach

[404] See, e.g., Neal R., Pascrell B. Jr., 'Statements on Guatemala Labor Report' (Press Release, 26 June 2017) accessed 12 October 2024; and Drake C., 'US Trade Policy Fails Workers' (AFL-CIO, 26 June 2017) accessed 12 October 2024.
[405] International Labour Organisation, *Social Dimensions of Free Trade Agreements* (IILS 2013).

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Its labor laws	Breach
Through a sustained or recurring course of action or inaction	Breach
In a manner affecting trade between the Parties	No breach
RESULT	**Obligation not breached**

Table 4 – Interpretation of CAFTA Art. 16 (2) (1) (a) by the arbitration Panel in the US-Guatemala case. Source: author's elaboration.

4.3 Policy Proposals to Strengthen the Current US Approach to Labor Chapters

From this in-depth descriptive analysis, one can easily grasp how the US system of labor chapters in trade agreements certainly has its own several strengths and weaknesses. Even though the US approach is certainly strong on enforcement, in fact, it still presents some loopholes that hinder full operationalization of several labor obligations. In this light, the following paragraphs will navigate proposed policy reforms to enhance the integration and enforcement of labor obligations within US FTAs. As labor standards are increasingly central to global trade, along with becoming more and more subject to political will, the US faces numerous challenges in ensuring that worker protection standards are guaranteed through its foreign policy initiatives. As the previous paragraphs have identified key areas for improvement, the following ones will offer potential policy proposals suited to align trade goals with effective legal solutions that embed them. These proposals seek to either exploit current mechanisms or to define new ones in order to foster worker rights through enhanced compliance with labor chapters in trade agreements. All in all, however, the biggest flaw of the US approach to the issue is that changes in administration always generate likewise changes in the approach to worker protection in trade agreements. This has often led to newly elected administrations renegotiating, or even suspending, previously negotiated trade agreements; even those generally

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considered as effective or beneficial to global markets. As no policy can redress this structural loophole in the US system, the following proposals aim at fixing some other minor drawbacks that this approach presents.

4.3.1 Procedures-Related Policies

Given its relevance in the field and the turmoil it has generated, most of the following proposed policies take inspiration from the USA-Guatemala case, which has brought into the spotlight some controversial aspects of labor chapters in trade agreements that have only been noticed once their practical effects have played out in court. First, the US could rethink their dispute settlement mechanisms by making the institutional framework it establishes a little more sophisticated, perhaps borrowing some key strategic features of other avenues for redress, such as investor-state dispute settlement mechanisms.[406] In the latter, parties have the option to appoint a neutral adjudicator which is called upon whenever there is an issue with one party or with the panelists. This would make the FTA's dispute settlement mechanism more complete overall, and it would avoid incurring in the risk of delays whenever a procedural matter is raised.[407]

Second, reforms could be implemented to reverse the burden of proof in labor-related matters. This would imply that, when the defendant does not supply the Panel with sufficient convincing evidence on the facts and the causality of the case, a presumption could be held against it.[408] This policy proposal does not originate out of the blue and, even though it might sound reckless, it is actually rooted in lessons from the USA-Guatemala case. In this case, in fact, the application of strict standards of proof and rigorous evidentiary requirements have made it more difficult for the US to successfully pinpoint Guatemala under its violations of worker rights. This is due to the fact that, in trade-plus disputes, such

[406] See, e.g. *UNCITRAL Arbitration Rules* (2010), Art. 6.
[407] Claussen, 2020.
[408] *Ibid*.

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evidentiary rules make labor violations extremely hard to demonstrate before a tribunal, as they usually involve proving an omission, measuring the impact that such omission has on trade or on a whole economy, and linking the two phenomena with a causal nexus.[409] Moreover, the violation must not only be demonstrated *per se*, but according to most labor obligations the claimant has to prove that it is part of a recurring pattern of similar misconduct. This alone would be hard enough, nut the hurdles do not end here: indeed, alleging a violation involves raising evidence to prove an omission in another state, which may be hindered to the claimant due to legal or physical obstacles barring its access to the other state party, also impeding the necessary testimony of disadvantaged employees. It suffices to say that, when collecting evidence for the USA-Guatemala case, the claimant declared to have faced hardships in interviewing workers as they feared retaliation in case their identities were revealed to governmental authorities, despite them having been made aware of the rules on confidentiality.[410] Because proving systemic inaction (plus, its causal link with economic harm) makes building one's case very challenging, the USA could think of redrafting provisions on the burden of proof for trade-plus matters in the reversed way, also in light of the fact that such evidentiary procedure has already prevented it from winning a case once.

Third, one major loophole in the US way of structuring their arbitration process should be reformed: namely, the fact that people affected by worker rights breaches in a party's jurisdiction must notify it to the other party. Clearly, this is due to the fact that only a state can launch a dispute against the other party; therefore, a worker harmed by its home state must refer all the way to the other state to issue a complaint alleging said harm. This implies a disadvantaged worker contacting foreign entities to file a petition. All of this, combined with the fact

[409] *Ibid*.
[410] USA-Guatemala Final Panel Report, para 239.

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that vulnerable workers might lack the organizational, legal, economic and political capital to formulate and forward their claim to a foreign entity, makes it unlikely that victims report the violations incurred.[411] They will most likely feel discouraged, if not beaten at the start, when faced with such a great number of procedural hurdles. In this light, the US should envision a new mechanism that facilitates access to the submission of claims – should this be an online hotline managed by an independent party, a multi-party institution or a relaxing of this admissibility requirement.

The last policy proposed in this field is very wide and ambitious, thus it might represent food for thought more than an actually operationalizable reform. The US could consider rethinking its enforcement method to the root. Instead of using a binary adjudicatory model where the parties are deemed responsible or not responsible for a breach, it could implement a more nuanced scale of rulings. In more concrete terms, this might imply imposing action plans with measurable targets for improvement; or imposing economic sanctions on a scale based on the gravity of the violation at stake, increasing or decreasing with later compliance levels.[412] This proposal would also imply strengthening the current institutional framework behind the enforcement system by including to a greater extent non-state actors and civil society organizations, especially for monitoring purposes, since they have the greatest grasp on the workers' community. While this policy proposal is certainly radical as it implies a profound rethinking of the whole system, it might also bring about more concrete changes in the US' trading counterparts. This is due to the fact that each partner has its own unique characteristics that determine a different relationship to the US. In light of this, a 'one-size-fits-all' model may overlook some key features to enable compliance; on the other hand, implementing a nuanced non-binary system for adjudication,

[411] Abel, 2019.
[412] Claussen, 2020.

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albeit complicated and structural, would take into account such characteristics and exploit them for leveraging better outcomes.

4.3.2 Civil Society-Related Policies

A distinctive feature of the way the US structures the institutional and procedural frameworks of its FTAs is the scarce participation of civil society in the whole process. This lack is not only outstanding *per se*, but it becomes even more striking when this choice is compared to the European approach to the same matter, which is radically opposite, as it entails extensive participation of civil society in the trade agreement implementation and monitoring process. Given this flaw, new policies for enhancing the effectiveness of labor chapters in US FTAs must focus on strengthening civil society involvement. This is not only for cosmetic reasons: indeed, civil society has a pivotal and substantial role in fostering worker protection. Their engagement in the proper implementation of labor chapters must go beyond mere 'democracy-washing', so to speak, to bring out concrete outcomes. Indeed, it is *de facto* always civil society who launches litigations on trade-plus matters. Entities like NGOs and trade unions are the main channels through which workers can have their complaints heard on a higher level. These entities act as collectors of petitions, review them and turn them into a collective claim to be heard by institutions, representing a means for conveying voices to a higher level. Eventually, most of the time, it is these organizations who materially file the complaints with the national contact points to signal a violation of a labor obligation.[413] After having notified the situation to the national contact points, however, the role of civil society ends, and the matter shifts entirely into the hands of the states, which have great leeway in deciding whether to pursue the

[413] *US Federal Register*, vol 71, no 245, 'Procedural Guidelines for the Functioning of Contact Points for All US FTAs'.

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case.[414] Sall the informational capital owned by civil society is then dispersed. Moreover, the political decision to pursue proceedings often times depends on several considerations – political, economic and diplomatic – which cause most of the complaints not to reach further stages of the arbitration process simply because the states do not have the willpower to. Therefore, a lot of the precious information that civil society only is able to convey is lost due to this limited role that they hold in the enforcement process of labor obligations. Knowing that all this knowledge will likely be missed constitutes a considerable disincentive for civil society to file a complaint in the first place. At the same time, without their contributions in terms of factual basis and gathering of voices, no arbitration proceeding would ever start at all. This is a paradox that must be redressed by implementing a policy to enhance civil society participation in the system. To this end, a mixed arbitration system could be a nicer fit, following the best practice examples illustrated by regional human rights courts in Europe, Africa and America, or by investor-state dispute settlement mechanisms such as the one envisaged by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).[415] Mixed arbitration is, indeed, a more flexible process that entails customizing the procedure to the dispute in question by blending the characteristics of several other dispute settlement mechanisms. In this way, mixed arbitration takes into account a case's hybrid features, it enhances cultural sensitivity, and it prefers an adaptive process that ultimately heightens effectiveness. Choosing these systems with the ultimate goal of engaging NGOs and trade unions would account for the fact that civil society often has the most detailed insight into the case, other than easiest access to sources, and would consequently afford it effective tools for participating in and

[414] Usually, these requirements depend on domestic law. Launching negotiation is also conditional on the parties' discretion and no rule regarding this is enshrined in the FTA itself (e.g., see NAALC, Art. 22; CAFTA, Art. 16 (6) (1); TPP, Art. 19 (15) (2)).
[415] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* 575 UNTS 159 (1965).

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shaping the case. Such means lower the discouragement faced by NGOs and trade unions in the current US FTAs method, and actually incentivizes the former to blow the whistle on any violation they know of.

4.3.3 Provisions-Related Policies

The way substantive provisions in the labor chapters of US-drafted FTAs are worded has sometimes proven to be too ambitious to actually produce results in court. Rather, not only it has not produced satisfactory outcomes in court, but it has even given rise to paradoxical and counterproductive rulings, such as the one in the USA-Guatemala case. Indeed, while one may argue that setting the bar high is essential for pinpointing violations, setting it *too high* might make the obligations *de facto* unenforceable, thereby giving rise to conceptual fallacies. Given the wording of most labor provisions in US-drafted FTAs, complainant alleging a breach of labor standards must prove the following two elements before the arbitration Panel:

- That the breach is part of a pattern of violations of labor requirements; and
- That the breach is causally linked to an impact on trade and/or investment.

The claimant party to the dispute must produce evidence of both these criteria. However, these two factors are so hard to prove that they ended up representing the highest obstacle to effectively proving the breach of a labor obligation before the Panel. For what concerns the first criterion, i.e., that the complainant must prove a recurrent pattern of misconduct in several instances, this even produces an unwanted result: namely, that the FTA fails to uphold one of its declared main objectives, that of realizing the self-standing goal of improving individual worker conditions.[416] In addition, demonstrating the existence of multiple instances of recurring labor violations requires whoever is filing the petition, most often NGOs or trade unions, to collect great amounts of evidence and witnesses to prove their

[416] E.g., NAFTA, Preamble (10); TPP, Preamble (1) (13) and Art. 19 (10) (6).

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case. This implies large investments in terms of time, money and organizational capital, hence provoking discouragement to even launch the initial petition. In the words of Abel, 'it follows that US FTAs thus do not succeed in combining individual justice and systemic improvements.[417] In light of this failure, this loophole must be redressed. However, it is very complex to think of an alternative phrasing that is at the same time strict enough to avoid the submission of *de facto* void claims, and broad enough to allow individuals to have their violations examined in court and redressed. To do so, the US could refer to the best practice brought forward by other international courts structured in similar way, such as human rights regional tribunals in Europe and America,[418] who have formulated comparable procedures in more effective ways, ensuring that the gravest complaints reach the litigation stage and are interpreted by the adjudicators so as to produce the intended result. This would not only avoid unexpected unfavorable results in court such as in the USA-Guatemala dispute, but it would also embed legal design choices aimed at making the overall system more efficient.

[417] Abel, 2019.
[418] *Ibid*.

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5. THE VIETNAM CASE STUDY: COMPARING THE EU AND US APPROACHES IN NEGOTIATING TRADE AGREEMENTS WITH VIETNAM

On June 20, 2019, the EU and Vietnam signed the trade agreement binding the two parties, namely, the EU-Vietnam FTA (EVFTA).[419] The European Parliament ratified the instrument in February 2020, and the Vietnamese government ratified it in June of the same year. In August 2020, the trade agreement entered into force. This agreement is not only one of the latest being negotiated by the EU, but it is also one of the most advanced in terms of labor standards' coverage. Other than eliminating trade barriers between the parties, including tariffs on goods, and fostering enhanced economic cooperation, the EVFTA incorporates a broad TSD Chapter. The latter, albeit falling short of allowing sanctions, is all-encompassing in terms of environmental commitments, worker protection clauses and good governance practices. The labor obligations are in perfect EU-style, mandating adherence to the ILO framework without making such commitments enforceable.

On October 5, 2015, the TPP was concluded. The negotiations behind this instrument lasted years, including the following trading partners: the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. These countries, all pertaining to the Asia-Pacific area, sought this agreement to enhance not only economic cooperation, but also higher protection of environmental standards, of worker rights, and of intellectual property. However, despite the ambitions of the TPP and the struggles encountered to conclude it, the agreement soon came to an end as, in January 2017, then US President Donald Trump withdrew the US from the partnership. Following this withdrawal, the remaining eleven partners renegotiated a new deal,

[419] *Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam* [2020] OJ L186/3.

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the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[420] which entered into force by the end of 2018. Among the countries which ratified the CPTPP is Vietnam.

The following chapter is a case study on the EU and US approach to labor obligations within trade agreements in the negotiations with Vietnam. The rationales behind choosing Vietnam as a case study are several. First, both the TPP and the EVFTA involved Vietnam in negotiations with the major global economic powers analyzed in this thesis (i.e., the US in the TPP and the EU in the EVFTA). In both cases, moreover, labor rights were a particularly critical issue because Vietnam, as a developing country, was under great pressure from more developed partners to upgrade its labor practices, conditional on the success of the trade agreement itself. Second, this case study is particularly suitable for this work because both the US and the EU prioritized labor standards as part of a set of broader goals of promoting fair trade and sustainable development. Specifically, the US, through the TPP, sought to counterbalance China's growing influence in the Pacific region while promoting a human rights-based order that underscores labor standards. On the other hand, the EU, through the EVFTA, leveraged labor standards as a way to ensure that its trade policy is aligned with its sustainable development agenda, tying economic development with fairness and respect for human rights. Third, the Vietnam case is particularly spot-on to navigate the differences between the EU and US approaches to labor chapters in trade agreements because the two have showed, during the negotiation phase, the exact typical features analyzed in previous chapters. Indeed, the TPP puts great emphasis on enforcement and entails the potential for economic penalties upon non-observance of labor rights, clearly mirroring the US' confrontational approach to compliance. On the opposite end of the spectrum, the EU took a more

[420] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (signed 8 March 2018, entered into force 30 December 2018).

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promotional standpoint on the EVFTA, choosing dialogue, cooperation and gradual implementation over punitive measures, mirroring the traditional EU's aspirational approach to TSD Chapters. Finally, the last reason for choosing Vietnam as a case study is that this thesis benefitted from the supervision of Professor Claudio Dordi, who directed for ten tears[421] the EU-Vietnam, 'Multilateral Trade Project' in Vietnam and has now been for six years the Director of the USAID Project, again in Vietnam, focusing on trade facilitation and digital trade. The following paragraph, which closes this work, is formulated as an interview with Professor Claudio Dordi, so to enrich with more practical and hands-on knowledge the previous theoretical analysis of the EU and US features. This interview took place in written form via email during the month of October 2024. The text reported below is an elaboration of the author based on the interviewee's answers, reviewed and approved by the interviewee himself.

5.1 Interviewing Stakeholders: A Case Study on Vietnam

- What are the key objectives of the labor chapters in the EUVFTA and the TPP? What are the similarities and differences between the two approaches?

For what concerns the TPP, each party committed to 'adopt and maintain in its statutes and regulations […] the following rights as stated in the ILO Declaration'.[422] The US entered a side bilateral agreement in the form of an exchange of letters with Vietnam specifically, due to its generally low labor protection levels and the particularly concerning lack of independent trade unions. This side agreement, which forms an integral part of the broad TPP doctrine, binds Vietnam to even more stringent provisions than the other parties. These include

[421] 2008-2018.

[422] TPP, Art. 19 (3) (1). The provision then proceeds to list the four core labor standards under the ILO framework: a) freedom of association and the right to collective bargaining, b) the elimination of all forms of forced labor, c) the abolition of child labor, and d) the elimination of any form of discrimination on the workplace.

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the duty to implement national reforms to allow workers to form independent trade unions, thereby breaking the monopoly of the Vietnam General Confederation of Labour (VGCL), which was controlled by the state. Moreover, the US imposed and monitored a timeframe for the implementation of said measures and made such timeline enforceable upon failure to comply with it. To facilitate this, the US committed to providing Vietnam with technical aid and capacity building programs. This side agreement, thus, added a higher layer of enforceability that goes beyond the basic TPP labor chapter, and that involves US officials in Vietnam to a deeper extent. Clearly, though, upon the US' withdrawal from the partnership, the side agreement became void, weakening the overall enforceability of the labor system. Without the US acting as a watchdog for implementation and enforcement, the labor commitments binding Vietnam became overall less robust and credible.

In the EVFTA, the labor clauses are part of the broader TSD Chapter, which emphasizes the EU's focus on sustainability, including labor rights, environmental protection, and corporate social responsibility. The EVFTA hence underscores worker protection as part of a larger framework for fostering social development. Concerning the labor obligations imposed under the EVFTA, here too the EU mandates adherence to the ILO framework. Not only does it require respect, promotion and implementation of the ILO Declaration, but it also asks the parties to 'make continuous and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO Conventions'.[423] Vietnam committed to align its domestic labor laws with the ILO norms, implementing new legal reforms allowing independent trade unions. However, the timeframe and the enforcement mechanism entailed by this chapter are less rigid compared to those stipulated in the US-Vietnam agreement under the TPP. Rather, the EVFTA relies on collaboration, and it redresses violations of labor clauses

[423] EUVFTA, Chapter 13, Art. 13 (4) (3) (a).

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through dialogue, consultations, aid and, if necessary, the involvement of a Panel of experts. The agreement does not envisage any form of direct trade sanctions linked to labor provisions. Notwithstanding, following pressure from the EU, Vietnam proceeded to ratify ILO Convention No. 98 on the right to organize and collective bargaining in 2019, and ILO Convention No. 105 on the abolition of forced labor in 2020. ILO Convention No. 87 on freedom of association is yet to ratified, and its subject matter remains a controversial topic in Vietnam.

Given these elements, many differences between the US and the EU emerge. First of all, the US kept Vietnam under a particular spotlight by signing a bilateral agreement through exchange of letters whereby Vietnam agreed to comply with stricter labor standards. Second, the US made its labor provisions enforceable, while the EU opted for a more promotional approach based on institutional dialogue. Last, it appears that the US has adopted a more tailored approach to Vietnam as a partner, putting a specific focus on reducing the Vietnamese government's monopoly on trade unions and into shifting the landscape towards greater adherence to the ILO. On the other hand, the EU went for a one-size-fits-all approach, and Vietnam was placed under the EU's broader sustainable development agenda.

- How do the negotiating styles of the EU and the US differ in terms of negotiating the labor chapter in these agreements, and in what ways did these approaches contribute to stronger or weaker labor obligations in the final texts?

The EU and the US have widely different negotiating styles, especially for what concerns their approach to labor chapter negotiations. Eventually, these differences have generated varying degrees of labor protection in the final texts of the instruments concluded with Vietnam. The negotiating style of the US is more aggressive and prescriptive, prioritizing binding commitments and

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enforceable standards. This style is reflected in the bilateral side agreement binding the US and Vietnam, which is enforceable, sets tight due dates and entails financial sanctions upon Vietnam's non-compliance. Given that the US views the inclusion of labor rights into trade agreements as of paramount importance, dispute resolution mechanisms and sanctions get highly pressured during the negotiation phase. Moreover, the US tends to underpin labor commitments under the rationale of fearing unfair competition from developing countries with weaker labor standards. In this light, they apply considerable political pressure on their partners to enforce US-imposed higher standards. Overall, this aggressive approach is successful in conditioning US market access to labor reforms. On the other hand, the EU approach to negotiations is much more cooperative and it is based on dialogue between the parties. While requiring adherence to international labor frameworks, the EU prioritized consultations and capacity building over punitive sanctions and enforcement mechanisms. During the negotiations, the EU thus tends to push for domestic institutional reforms and long-term mutual interactions, fostered through mechanisms such as the DAG and involving civil society in the process. For the EU, labor obligations are framed in a broader scenario of sustainable development, hence they form an integral part of economic growth.

The impact of these different negotiating styles flows directly into the labor obligations. The US obtained stronger labor clauses with Vietnam thanks to its stricter stance. However, the US-Vietnam partnership is not equipped with very sophisticated methods for involving civil society and, generally speaking, with complex institutions for monitoring the agreement. In contrast, the EVFTA entails great civil society participation and a multi-layered institutional setup, but its labor chapter is scarcely enforceable. While Vietnam is committed to comply with the labor standards stipulated in both agreements, the non-binding nature of the labor obligations contained in the EVFTA make its consequences less credible.

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Non-compliance under the TPP leads to more credible threats than non-compliance under the EVFTA. Therefore, this has led to slower progress in certain labor-related fields, most notably concerning the independence of trade unions.

- Was the power asymmetry between parties in terms of negotiating capacity a driver in the final result of the trade agreements?

While the power asymmetries between the parties are certainly a key factor in driving certain results, the EU and the US could have equally pushed for certain compromises and obtained the same concessions from Vietnam. Surely, the latter was in a weaker bargaining position. In both negotiations, Vietnam was at a relative disadvantage compared to its counterparts due to its smaller economic weight and its disproportionate need for accessing its trading partners' markets. This power asymmetry implies that Vietnam had small leeway to dismiss demands for labor reforms. On the other hand, the EU and the US were at a comparative advantage. The US, being the largest economy party to the TPP, had great leverage over Vietnam, which was exploited to the fullest. Given that the US could allow or deny access to its market, and that Vietnam relies strongly on some key exports such as textile products, the US was empowered to demand high labor standards. As a consequence, Vietnam had to accept thus request as it is so dependent on the economic benefits granted by the US. On the other hand, the EU's less confrontational stance gave Vietnam broader leeway to reframe the labor chapter to its advantage. Specifically, Vietnam managed to achieve a more gradual transition to the new labor regime. While the EU holds notable power asymmetries compared to Vietnam, and even though the European market is just as crucial for Vietnam to export its goods, the EU's promotional approach to labor obligations prevented it from extracting the same outcomes that the US had. The EU stressed long-term engagement with the partners over short-term compliance, believing this is the most effective way to achieve its larger sustainable

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development agenda. However, while this collaborative approach may work for keeping the partnership flourished in the future (this is yet to be established, though), it surely did not work in imposing strict labor standards on Vietnam in a more immediate timeframe. By refraining from leveraging the power asymmetries in the negotiations, the EU only obtained vague and non-enforceable labor obligations. On the other hand, by exploiting the power asymmetries between the negotiating partners, the US managed to achieve stricter and binding labor commitments. Both negotiators sticked to their traditional negotiating styles, which differ greatly, even though they were in similar positions compared to Vietnam and could have thus obtained analogous outcomes. While the parties could have both been very ambitious, only the US took the chance to do so – and succeeded, thanks to its distinctively prescriptive negotiating style. While the power asymmetry with Vietnam was surely a key factor in this success, the same power asymmetry would have been benefitted the EU too, but the latter chose not to leverage it.

- Could the EU have adopted a stricter approach, similar to the US', to obtain better results, or was there something holding the EU back from leveraging its power to achieve stricter labor standards?

In theory, the EU could have adopted a stricter approach similar to the US, demanding more immediate and enforceable labor reforms. Given the power asymmetry separating the EU and Vietnam, the latter would have likely complied with these demands in order to be able to gain access to the lucrative EU market, which is pivotal for Vietnam's exports. From Vietnam's point of view, in fact, the commercial aspects of this agreement were so pivotal that it would have compromised on many labor topics just to be able to access the European market. However, the EU chose to stick to its traditional negotiating methods and opted for a cooperative, capacity-building model. It was immediately apparent that the EU prioritized long-term partnerships and sustainable development, believing that

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gradual reform through dialogue would ultimately be more effective than being stricter on enforcement in the immediate timeframe. While this approach might result in slower labor improvements, it reflects the EU's philosophy of fostering inclusive development rather than imposing external conditions through punitive measures. In sum, the EU could have applied a stricter approach during the negotiations, and it would have probably succeeded in obtaining its desired results from Vietnam in terms of labor obligations. This is because Vietnam's utmost priority were the commercial aspects of the agreements, hence they were willing to compromise on all other aspects and give greater concessions on the labor side. However, switching to a more aggressive approach would have meant being inconsistent with its own overall strategy on sustainability and departing greatly from its own prescriptions. It is hard to conceive that the EU would create such inconsistencies within its own system just to obtain stronger outcomes on one single agreement, thereby creating a dangerous precedent for future negotiations.

- From Vietnam's point of view, what were Vietnam's key priorities in the labor negotiations of the agreements, and how did Vietnam perceive the differences in the EU's and US's approaches to these negotiations, particularly in terms of issues prioritized, political pressure, and willingness to compromise?

From Vietnam's perspective, the labor chapters in the TPP and EVFTA presented several challenges and opportunities. Vietnam's key priorities and perceptions of the US and EU approaches varied, particularly in terms of the issues prioritized, the level of political pressure exerted, and the willingness to come to a compromise. Among its priorities, Vietnam definitely listed economic growth. The country's primary objective in both negotiations was obtaining preferential access to the US and EU markets, hence all of its efforts were directed towards the commercial provisions of the agreements. Minimizing the potential

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disruption generated by the labor reforms imposed by the trade-plus provisions was of secondary importance. Clearly, Vietnam's leadership was cautious about loosening control of the Communist Party over trade unions, but this was a minor concern compared to the economic aspects of the agreement. Moreover, thanks to the gradual implementation it obtained for labor matters, its export industries were safeguarded from radical disruptions.

Vietnam perceived the US approach as highly demanding and it recognized the political pressure it was exerting during the negotiations. Above all, the US were seen by Vietnam as uncompromising on labor rights, which fit Vietnam's preference scheme as well as long as preferential commercial benefits were granted. Vietnam thus had little leeway to maneuver the US demands and accepted them as they were conditional on market access, which was vital for Vietnam's export-driven economy. On the other hand, Vietnam perceived the EU as more cooperative and less politically confrontational, allowing it to make the requested reforms at a more manageable pace. Vietnam found the EU as more willing to accept trade-offs on labor matters and knowing that immediate sanctions were off the table left less tensions in Vietnam. Overall, given that the EU places labor obligations within a broader frame of sustainable development, this aligned them more with Vietnam's larger economic growth perspectives.

- How effective have these agreements been in promoting Vietnam's compliance with labor standards? What challenges have the partners faced in making the labor obligations effective in Vietnam?

The labor chapters in the EVFTA and in the TPP have played a significant role in pushing Vietnam towards compliance with international labor standards, particularly those set by the ILO. However, their effectiveness in promoting full compliance and the impact on Vietnam's domestic labor policies have been mixed, with gradual progress but also significant obstacles. As mentioned above,

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ILO Conventions No. 98 and 105 have been ratified following the commitments under the EVFTA. Despite promises to do so, however, ILO Convention No. 87 is yet to be ratified by Vietnam, which is postponing it due to its controversial nature in the state (i.e., this Convention covers the right to organize). It is to be noted that this ratification happened following the EVFTA, and not under US pressure (indeed, the US mandates adherence to the ILO Declaration only, and the commitments with Vietnam were not in force anymore by the time of the ratifications anyways).

These steps forward have also been taken on the domestic level. Following the entry into force of the EVFTA, Vietnam has passed a reform of its Labor Law Code in 2019 aligning its national norms to international standards. This reform entails the right of workers to form and join independent trade union, as mandated by both the EVFTA and the TPP, and stronger worker protection in terms of working hours, paid overtime, and health and safety at the workplace. However, it has been argued that these policies are just cosmetic, particularly those concerning independent trade unions, and that they are not actually implemented. The TPP and the EVFTA, though, both encompassed the idea of gradual change, especially knowing that these topics are particularly sensitive for Vietnam and considering its centralized governmental structure. Therefore, changes in the trade union structure were expected to be incremental from day one. Both the EU and the US were highly aware that the VCGL, a state-controlled entity, was the only recognized trade union and that the Vietnamese government was doubtful on whether it could loosen control over it. As of now, despite the implementation of new reforms which act as symbolic changes, independent trade unions exist more in legal theory rather than in widespread practice, and ensuring their operational freedom remains a challenge. Independent unions are still in the early stages of development, and their ability to negotiate effectively with employers and engage in collective bargaining is limited by the lack of institutionalized procedures and

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support. The same goes for enhanced worker protection: while Vietnam has implemented mechanisms to strengthen the enforcement of labor norms, e.g., inspection systems and whistle-blowing mechanisms, enforcement remains inconsistent, especially in rural areas and within certain sensitive industries like manufacturing.

Overall, Vietnam seems to have responded well to the labor clauses in the two trade agreements. These commitments align with Vietnam's broader strategy of integrating into the global economy, as adherence to labor standards is fundamental for securing favorable relationships with major counterparts. On the other hand, though, Vietnam remains hesitant to fully embrace labor reforms on freedom of association. The government continues to exert significant control over labor organizations, and political concerns over independent unions remain a stumbling block. The government's approach has been gradual and suspicious, trying to balance international goals with domestic political preferences. Vietnam's political system is structured so as to prioritize stability and control, hence labor activism, when independent of state control, is politically controversial. However, lack of political will is not the only hindrance to compliance with the labor chapters included in trade agreements. Among the other obstacles that Vietnam faces, we find inadequate resources devolved to the labor sector, limited awareness among workers, and a lack of independent institutions. Political resistance is, however, the most significant barrier to compliance, as the Communist Party of Vietnam still maintains control over labor organizations, which hinders a fully independent labor movement. On a broader (and more positive) note, the inclusion of labor obligations in the EVFTA and TPP has boosted Vietnam's reputation as a trading counterpart. These commitments have increasingly attracted foreign investment by underscoring that Vietnam is on a path to raising national labor standards, which is evermore paramount for multinational companies tackling corporate social responsibility practices. The

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EVFTA, in addition, has provided Vietnam with preferential access to the EU market, which has increased growth and development. For what concerns civil society, the labor provisions in these agreements have generated larger awareness among workers about their rights. Civil society in Vietnam has become more involved in safeguarding labor rights, contributing to raising awareness and supporting workers, even though gradually. Such impacts are all significant, even though incremental, for aligning Vietnam on with the international labor regime. Despite the good news, much work is still necessary to achieve full compliance and ensure that these reforms are effectively enforced.

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6. CONCLUSION

After having analyzed both from a theoretical and from a practical perspective the different features and implications of the EU and US' approaches to labor obligations in trade agreements, this thesis will end with some closing remarks on the comparison. The juxtaposition of the EU and US methods to address the trade-labor nexus, analyzed through the lens of the trade agreements concluded with Vietnam, highlights several fundamental differences in their respective strategies, especially for what concerns choices in terms of enforcement mechanisms. Indeed, while the EU highly stresses the inclusion of labor rights within a broader sustainability agenda, providing its trading partners with cooperative and capacity-building programs to facilitate compliance, the US model, as is particularly shown under the TPP framework, leans toward a more enforcement-driven stance, with the credible threat of trade sanctions as a leverage to draw compliance with labor standards. The analysis of the respective approaches to the negotiation and drafting of trade agreements with Vietnam illustrates how these divergent strategies affect not only the implementation of labor provisions but also the broader political and economic relationships tying the two parties. Moreover, the case study on Vietnam also shows how the negotiation phase is crucial for generating the desired outcomes, and the way the partners behave affects the counterpart's willingness to strike trade-off. Indeed, the case study has shown that, only the EU had been stricter in formulating ambitious labor requirements, Vietnam would have been willing to follow up on those – however, given the EU's demure attitude, Vietnam managed to obtain lower worker protection standards in the FTA. In this light, this comparative analysis has underscored the importance of context-sensitive approaches to labor chapters in preferential trade agreements, where both incentives for compliance

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and enforceable mechanisms are fundamental for fostering long-term and meaningful change in working standards. Ultimately, balancing trade and labor interests remains a complex challenge that necessitates ongoing dialogue, flexibility, and a deeply rooted commitment to the protection of worker rights in an increasingly interconnected global economy. The following paragraphs will delve deeper into some final reflections to navigate the complexity of the EU-US comparison and, lastly, they will conclude the work with some overarching considerations on the trade-labor linkage.

6.1 Lessons Learned: Final Remarks on the Eu vs. Us Comparison

This thesis has attempted to summarize the main differences between the EU and US approaches to drafting labor obligations contained in their respective preferential trade agreements with third countries. However, the two standpoints present similarities as well. Indeed, generally speaking, both the EU and the US mandate adherence to the ILO framework, they both create institutional *fora* dedicated to carrying out cooperation activities between the parties, and they both foster inter-governmental dialogue before recurring to actual dispute settlement mechanisms. Ultimately, both the EU and the US set the final goal to prevent the lowering of domestic labor rights in order to attract foreign investment and trade (i.e., the so-called 'race to the bottom' phenomenon). However, these aspects are common to both the EU and the US only at face value as, when going deeper than mere surface level, even the features shared between the two entities appear more divergent than they look.

First, the US and the EU differ in their overall conception of labor obligations. On the one hand, the EU conceives worker protection as one pillar of the broader 'sustainable development' concept, which entails many different dimensions (i.e., most prominently, environmental and social concerns) and that are all encompassed in the TSD chapters. On the other hand, the US sees no such

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connection and keeps environmental, and labor chapters separate from one another. These different conceptions generate different obligations: while the EU's trade agreements contain clauses mandating monitoring and review of the sustainability impacts of the instrument (thereby including both environmental and labor-related outcomes), the US' FTAs only mandate the reporting of labor questions arising between the parties to the agreement, especially within their domestic contexts.[424] This divergence in the broader way labor requirements are thought of signifies great separation between the EU and the US, that reflects in the different ways they structure the main body of their trade agreements and in the way they word the substantive obligations therein contained. Concerning the latter, there is a second great difference between the EU and US approaches, and that regards adherence to the ILO framework. Such issue has already been widely analyzed in previous chapters, but at its very bottom stands the fact that the US only references the 1998 ILO Declaration, which only sets out minimal standards of worker protection, while the EU mandates ratification and implementation of all the ILO core Conventions. To supply for such lack, the US is stricter in requiring compliance with, and enforcement of, domestic labor laws. This is primarily due to the fact that the US' relationship with the ILO is quite inconsistent, and the US itself is not a party to all of ILO's core Conventions, hence it cannot mandate adherence to those to its trading counterparts. This also explains why, contrary to EU practice, the US does not entail a monitoring role for the ILO in the implementation of labor obligations.[425] In addition, the EU approach is broader also in terms of covering a wider range of labor rights, as EU-negotiated TSD Chapters contain obligations on health and safety in the workplace, supply chain due diligence, and acceptable conditions of work. The US does not include such ambitious rights in its labor obligations, but rather

[424] Harrison, 2019.
[425] Velluti, 2020.

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stresses efforts to adapt and improve national labor systems. A third difference separating the EU and the US is the institutional framework they set up. While the former envisages a multi-layered and complex structure to address disputes, the latter's scaffolding is a bit simplified. The rationale behind this might simply be that, given that the US envisages and actual dispute settlement mechanisms at the end of the litigation procedure while the EU does not, the EU needs a more sophisticated institutional set up to address and resolve disputes amicably. On the other hand, the US does not need as many soft law steps for settling litigation, because it foresees a binding mechanism at the end of the process that is going to solve the dispute in any case. The US system is, thus, more enforceable (hence, more effective). However, there is still one point to assign in favor of the EU: namely, that it foresees wide and meaningful civil society intervention in the monitoring and enforcement of the TSD Chapter. On the opposite end of the spectrum, the US basically does not involve civil society at all in the oversight of labor charters, and they do not build institutional mechanisms devoted to listening to civil society's voice and embedding it into the system, contrary to EU's practice.

More than anything else, the primary discrepancy that has emerged from this analysis is enforcement methods. While disputes arising from labor chapters in trade agreements are initially handled similarly, i.e., through state-to-state consultations and other soft law proceedings aimed at reaching an amicable settlement, the two approaches then diverge completely. Generally speaking, the US approach has often been labeled as conditional, meaning that compliance with labor obligations is inextricably tied to economic consequences (usually intended as financial sanctions or benefits and incentives).[426] On the other end of the spectrum lays the EU, which instead prefers a so-called promotional approach to

[426] ILO, 2013.

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enforcement, entailing that labor obligations are tied to institutional frameworks for dialogue, monitoring, aid and cooperation, rather than to economic consequences.[427] Another way to label these two divergent approaches is 'soft unilateralism', to define the EU method, and 'aggressive unilateralism', to describe the US standpoint.[428] A concrete example that mirrors this opposition is the different reaction of the two parties to the Rana Plaza tragedy. This event took place in April 2013, when in Bangladesh an eight-story garment factory building collapsed, killing over 1100 workers and injuring more than 2500, exposing unsafe working conditions in the global textile sector, especially in developing countries. Following this tragedy, the US suspended trade befits to Bangladesh as a consequence for not satisfying the labor standards mandated in the program; on the other hand, the EU kept Bangladesh as a beneficiary of its preferential arrangements and launched the Bangladesh Sustainability Compact, i.e., a capacity building initiative to strengthen worker protection in Bangladeshi territory. While this instance is not explicative of enforcement mechanisms *strictu sensu*, it mirrors very closely the *modus operandi* of the EU and the US. For what specifically concerns avenues for redress of disputes, as the previous chapters showed, the US envisages an arbitration tribunal endowed with the capacity to issue binding sanctions to settle a dispute, while the EU only foresees a Panel of experts that can publish a non-binding report clarifying the matter and proposing a resolution. These two radically different approaches are what set the EU and the US most apart, and what have characterized their systems the most both in scholarly literature and in actual cases. The implications of the enforcement choices of the EU and the US are reflected both in the negotiation and in the implementation stages and, as analyzed above, have great rebounds in terms of the effectiveness of their respective preferential trade agreements.

[427] *Ibid*.
[428] Velluti, 2020.

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6.2 Conclusion

The introduction of labor concerns into trade agreements has, since the very beginning, caused plenty of debate and just as much turmoil within the international community. This work has analyzed the history and rationales behind the trade-labor nexus, assessing why and on what basis the inclusion of worker protection standards within agreements of commercial nature is justified under international law. The idea that trade and labor should go hand in hand is buttressed by many different rationales, among others, human rights, fair and equitable development, protectionism and redressing the negative externalities generated by globalization.[429] However, this ceaseless speculation between experts and the lack of consensus on one single overarching rationale convincing all the main international actors has led to poor enforcement of the trade-labor linkage and, most notably, to a continuous rebound between the WTO and the ILO on who should take the lead on the issue. Eventually, the two international organizations failed to take charge of the trade-labor linkage, and it remained up to states to enforce worker protection standards within their commercial agreements. Following this analysis on the trade-labor nexus at large, this work proceeded by comparing the EU and US approach to labor obligations in trade agreements. Both standpoints have been analyzed under the following aspects: history of their respective paths to the integration of labor commitments in preferential trade agreements; wording and scope of the labor provisions; institutions and procedures entailed in the labor chapters to ensure monitoring and enforcement of the obligations therein contained; and, last, all the enforcement-related issues that hinder proper compliance with the labor clauses. All in all, the main differences that have surfaced concern enforceability of labor provisions.

[429] For a thorough discussion of these values, see Kolben K., 'A New Model for Trade & Labor? The Trans-Pacific Partnership's Labor Chapter and Beyond?' (2017) *49 New York University Journal of International Law and Politics* 1063.

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Indeed, the two actors embrace opposite approaches to the issue of enforcement: on the one hand, the EU does not make its TSD chapters enforceable, but it builds a solid and complex institutional framework designed to address cooperation, dialogue and technical aid; on the other hand, the US are capable of issuing sanctions against parties that do not comply with labor obligations, but are not endowed with sophisticated institutions handling soft ways to redress disputes before recurring to arbitration. These two standpoints give rise to different pros and cons: the EU is always consistent across political sides, but it is quite weak in the negotiation and enforcement phases; on the contrary, the US is a very strong negotiator and is endowed with credible enforcement threats, but its political volatility gives rise to a leapfrogging phenomenon whereby agreements are periodically renegotiated or suspended due to political will, thereby annulling their effects. Following this qualitative analysis, the thesis ends with a practical hands-on examination of a case that mirror said different approaches perfectly. Indeed, the main practical implications of these opposite approaches have been analyzed in a case study, namely, how the EU and the US have handled negotiations with Vietnam in the attempt to draft a trade agreement (i.e., the EU-Vietnam FTA for the former, which is now in force, and the TPP for the latter, which was not ratified by the US eventually). This case study highlights one specific aspect of the comparison: namely, that the negotiation phase is pivotal to obtain tangible results in terms of labor commitment, and that the EU refrains from leveraging power asymmetries in negotiations to the point that it obtains little results. On the other hand, the US appears much more aware of its advantaged position vis à vis its trading partners and exploits this to obtain stronger commitments in the labor chapter. Being able to require pre-ratification conditionality and being well aware of the commercial benefits it offers, the US eventually managed to obtain a quite strict (and effective!) labor chapter. On the other hand, the EU opted for softer negotiation methods, resulting in weaker

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obligations. Interviews with stakeholders reveal, however, that Vietnam would have been willing to compromise more on worker standards to still be able to conclude the FTA with the EU, as its final goal was merely preferential access to the European market. Therefore, this case study reveals that an *ex ante* stricter approach to worker protection standards is more effective in terms of generating more ambitious labor chapters. On the other hand, the US was not perfect in carrying out TPP negotiations. In reality, the Trump administration decided to withdraw from the agreement as soon as the early days of the preferences, thereby voiding all the efforts made during the negotiations. The situation as it is today, thus, is the following: there is one weak agreement in force, i.e., the EU-Vietnam FTA, and a strong agreement has been revoked, i.e., the US-Vietnam partnership within the TPP framework. This leaves one open question: in labor chapters in international trade agreements, is it more advantageous to prioritize consistency across political spheres, even if this compromises the ultimate effectiveness of individual agreements; or is it better to focus on a few strong agreements that might achieve tangible results but are at greater risk of being withdrawn due to political sensitivity and changes in government? Answering this question is outside the scope of this thesis and it probably lacks any definite answer; however, it is safe to say that each approach is rooted onto different historical backgrounds, it entails different perks and risks and, as such, might be equally valid.

In conclusion, the effectiveness of labor provisions in trade agreements is still today hard to assess. In the absence of consistent empirical evidence and, above all, lacking successful jurisprudence on the matter, it is impossible to definitely tell whether labor chapters have improved working standards all over the world, or if they are just there as cosmetic provisions with mere symbolic value. Notwithstanding such uncertainty, labor chapters are still (and ever more) employed and invoked by the greatest international actors. Initiatives of international cooperation on this matter prosper, and there is widespread

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consensus that capacity-building programs have broadly succeeded. Effectiveness has often resulted from the threat of litigation, pressure coming from the power asymmetries between the negotiators, and improved communication between governments. Usually, the inclusion of labor obligations in trade agreements translates into the implementation of domestic labor law reforms, or into the ratification and implementation of ILO Conventions. Further research might hence focus on assessing these impacts empirically, especially considering how the different trends generated over time have given rise to different outcomes. Moreover, policy analysis studies could delve deeper into the effectiveness of the reforms prompted by the accession to a trade agreement containing given labor clauses. Qualitative studies on international relations might even explore how the EU and US' trading partners have received pressures to abide by labor obligations under trade conditionality, and how Western-imposed rules in this context have affected developing countries.

Overall, it is important that the international community finally comes together to agree on the importance of proper enforcement of the trade-labor nexus, and that it finds an appropriate international forum where this issue is addressed, harmonized and regulated. Only through such unity can these complex international questions be answered, and only through sustained combined efforts can a positive impact on the global community be made.

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