Economic Globalisation and States' Regulatory Space
The Protection of Labour Rights in EU Free Trade Agreements

INAUGURAL-DISSERTATION

zur

Erlangung des Grades einer/eines Doktorin/Doktors des Rechts

am Fachbereich Rechtswissenschaft

der

Freien Universität Berlin

vorgelegt von Thibaud Bodson

Doktorand in Berlin

2020

Erstgutachter: Professor Dr. Helmut Aust

Zweitgutachter: Professor Tomer Broude

Tag der mündlichen Prüfung: 16 Dezember 2020

Table of Contents

TABLE OF CONTENTS 3

1. INTRODUCTION 9

2. REGULATORY SPACE FOR LABOUR LAW 22
   - 2.1. Definition of regulatory space for labour law 23
     - 2.1.1. The defining characteristics of regulatory space 23
     - 2.1.2. The determinants of regulatory space for labour law 27
     - 2.1.3. The definition of regulatory space for labour law handled in this dissertation 33
   - 2.2. Definition of the distribution of competences between the EU and its Member States for labour-related matters in trade agreements 40
     - 2.2.1. The internal and external division of competences 40
     - 2.2.2. The EU competences for labour-related matters in trade agreements 43
     - 2.2.3. The design of labour provisions and the "regulation of the levels of social protection-threshold" 48

3. LABOUR COMMITMENTS IN EU TRADE AGREEMENTS 56
   - 3.1. Methodological clarifications 58
     - 3.1.1. The identification of the clauses defining labour commitments 58
     - 3.1.2. The analysis of the labour commitments' legal character 62
   - 3.2. Clauses defining the rights to regulate 69
   - 3.3. Clauses defining commitments towards minimum levels of protection 76
     - 3.3.1. Commitments towards internationally recognised standards and agreements 77
     - 3.3.2. Commitments towards the core labour standards 83
     - 3.3.3. Commitments towards full and productive employment and decent work for all 92
     - 3.3.4. Commitments towards the implementation of ILO Conventions 99
   - 3.4. Clauses defining commitments towards the enhancement of the levels of protection 105
     - 3.4.1. Commitments towards high levels of labour protection 106
     - 3.4.2. Commitments towards the improvement of the levels of protection 112
     - 3.4.3. Commitments towards the ratification of ILO Conventions 117
     - 3.4.4. Commitments towards the approximation of the law to EU practices 125
   - 3.5. Clauses defining commitments towards upholding the levels of protection 129
     - 3.5.1. Commitments not to fail to enforce labour laws 130
     - 3.5.2. Commitments not to lower the levels of protection 141
   - 3.6. Findings relating to the analysis of labour commitments in EU trade agreements 147

4. COOPERATION MECHANISMS IN EU TRADE AGREEMENTS 157
   - 4.1. Methodological clarifications 158
   - 4.2. The agreements' provisions on cooperation in matters of labour rights 160
     - 4.2.1. Cooperation in the Trade and Sustainable Development chapters 161
     - 4.2.2. Cooperation in the Regulatory Cooperation chapters 165
   - 4.3. Cooperation activities undertaken by the Parties 169
     - 4.3.1. Cooperation activities under the Trade and Sustainable Development chapters 169
     - 4.3.2. Cooperation activities under the Regulatory Cooperation chapters 179
   - 4.4. Findings relating to the analysis of cooperation mechanisms in EU trade agreements 181

5. CONCLUSIONS 186

KURZÜBERSICHT 199

ANNEXES 1: RELEVANT PROVISIONS OF THE TEN COVERED EU FTAS 203

ANNEXES 2: ANNEX OF THE COMMITMENT TOWARDS THE APPROXIMATION OF THE LAW TO EU PRACTICES OF THE EU-UKRAINE FTA 216

BIBLIOGRAPHY 219

List of abbreviations:

AG	Advocate General
ATTAC	Association pour la Taxation des Transactions Financières et pour l'Action Citoyenne
BIT	Bilateral Investment Treaty
CAFTA-DR	The Dominican Republic-Central America FTA
CCP	Common Commercial Policy
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEO	Chief Enforcement Officer
CETA	Comprehensive Economic and Trade Agreement
CPP	Trans-Pacific Partnership Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSF	Civil Society Forum
CSR	Corporate Social Responsibility
CTSD	Committee on Trade and Sustainable Development
CJEU	Court of Justice of the European Union
CSO	Civil Society Organisation
DAG	Domestic Advisory Group
DSU	Dispute Settlement Understanding
EESC	European Economic and Social Committee
EFTA	European Free Trade Association
EU	European Union
EUSFTA	EU-Singapore Free Trade Agreement
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GCR	Global Competitiveness Report
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IIA	International Investment Agreement
ILC	International Labour Conference
ILC*	International law Commission*
ILO	International Labour Organisation

IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
ITUC	International Trade Union Confederation
NAFTA	North American Free Trade Agreement
NAALC	North American Agreement on Labour Cooperation
NGO	Non-Governmental Organisation
PTA	Preferential Trade Agreement
QM	Qualified Majority
RCF	Regulatory Cooperation Forum
RSK	Republic of South Korea
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SCM	Subsidies and Countervailing Measures agreement
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPs	Trade Related Aspects of Intellectual Property
TRIMs	Trade Related Aspects of Investment Measures
TSD	Trade and Sustainable Development
TULRAA	Trade Union and Labor Relations Adjustment Act
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade And Development
UNGA	United Nations General Assembly
UNUDHR	United Nations Universal Declaration for Human Rights
USMCA	United States-Mexico-Canada Free Trade Agreement
VCLT	Vienna Convention on the Law of Treaties
WEF	World Economic Forum
WTO	World Trade Organisation

To the Other,

To the completely other,

1. Introduction

> **'A little bit everywhere, voters now tend to reject the status quo […]. Many have lost confidence not only in their Governments, but in global institutions — including the United Nations. Fear is driving the decisions of many people around the world. We must understand their anxieties and meet their needs, without losing sight of our universal values. It is time to reconstruct relations between people and leaders — national and international; time for leaders to listen and show that they care, about their own people and about the global stability and solidarity on which we all depend. And it is time for the United Nations to do the same: to recognize its shortcomings and to reform the way it works. […] The United Nations must be ready to change.'**[1]

Thus was Secretary-General-designate António Guterres' diagnosis on the peoples of the world's reliance on the United Nations (**the UN**) – the international organisation he was about to lead. Peoples have lost confidence in the UN and in its ability to respond to the challenges it faces. Therefore, the UN must reinvent itself.

Peoples' increasing defiance vis-a-vis international institutions is not peculiar to the UN and to the specific governance model it conveys. A growing body of studies characterises the early 21st century as a period of backlash against "the global." Scholars concerned with fundamental rights and freedoms say that universal human rights are currently put under tremendous pressure.[2] Those with more general interest in public international law note a widening mistrust against the authority of this specific branch of law.[3] Researchers focussing on adjudicative bodies highlight a dangerous tendency to bash international courts.[4] Those studying the administration of social systems point to a surge of suspicion against various forms of global governance.[5] Arguably, these are all expressions of a common

[1] Secretary-General-designate António Guterres' remarks to the General Assembly on taking the oath of office on 12 December 2016. https://www.un.org/sg/en/content/sg/speeches/2016-12-12/secretary-general-designate-ant%C3%B3nio-guterres-oath-office-speech (last consulted on 15/06/2020).

[2] Vinjamuri, Leslie. "Human Rights Backlash." In *Human Rights Futures*. Edited by Jack L. Snyder, Leslie Vinjamuri and Stephen Hopgood, 114–34. Cambridge: Cambridge University Press, 2017. Posner, Eric A. *The Twilight of Human Rights Law*. Oxford University Press, USA, 2014.

[3] Alter, Karen J. "The Contested Authority and Legitimacy of International Law: The State Strikes Back." 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204382. Koskenniemi, Martti. International Lawyers and the Backlash against Global Rule, Thomas Franck Lecture at the Freie Universität Berlin, 11. February 2019. Helmut P. Aust, "The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective," in *The Double-Facing Constitution*, ed. Jacco Bomhoff, David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2020).

[4] Mikael R. Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," *International Journal of Law in Context* 14, no. 2 (2018); Eric Voeten, "Liberalism, Populism, and the Backlash Against International Courts," 2017, https://global.upenn.edu/sites/default/files/voetenpaper.original.pdf.

[5] Bernard Hoekman et al., "Revitalizing multilateral governance at the world trade organization: report of the high-level board of experts on the future of global trade governance" (2018), https://www.bertelsmann-stiftung.de/en/publications/publication/did/revitalizing-multilateral-governance-at-the-world-trade-organization/; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press, 2018).

concern about the loss of state sovereignty and the widespread lack of confidence in policy choices taken far away from domestic capitals.

Economic globalisation has not been spared by this rise of criticism against *the global*. In fact, one may even argue that it figures among the most prominent domains of public affairs for which large discontentment is manifested. Complaints have targeted the World Trade Organisation's (**the WTO**) liberalisation policies,[6] the International Monetary Fund's (**the IMF**) structural reforms and conditionality packages,[7] and the excesses of capitalism and finance deregulation, among others. Protests against these organisations and the economic policies they incarnate have been held in Buenos Aires and in Santiago, in Genoa and in Athens, and in Seattle and in New York.[8] A recurrent critique against economic globalisation pertains to its effects on peoples' social conditions. In this regard, the Free Trade Agreements (**FTAs**) burgeoning in many different places in the world in recent years have become a straightforward target. Civil society organisations (**CSOs**) have argued that the conclusion of new trade agreements imparts that 'peoples will have to pay an unprecedented price for the erosion of the production standards, the consumer protection, the labour rights, the level of wages […];'[9] that the trade rules FTAs establish 'favour the interests of international corporations, to the detriment of workers' rights;'[10] and, that trade agreements 'put […] social, environmental and labour

[6] Blustein, Paul. *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambitions, and the Great Shambles of the World Trade System*. Public Affairs, 2009. Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York and London: W.W. Norton, 2011).

[7] Stiglitz, Joseph E. *Globalization and Its Discontents*. New York Norton, 2002; Alexander E. Kentikelenis, Thomas H. Stubbs, and Lawrence P. King, "IMF Conditionality and Development Policy Space, 1985–2014," *Review of International Political Economy* 23, no. 4 (2016). For a defence of austerity measures see: Alberto Alesina, Carlo Favero and Francesco Giavazzi, *Austerity: When It Works and When It Doesn't* (Princeton University Press, 2019).

[8] For a discussion of the evolution in the demands raised by social movements see: Tomer Broude, "From Seattle to Occupy: The Shifting Focus of Social Protest," in *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times*, ed. Daniel Drache and Lesley A. Jacobs (Cambridge: Cambridge University Press, 2014).

[9] Association pour la Taxation des Transactions Financières et pour l'Action Citoyenne (**ATTAC**), Kampagne Handelsabkommen. Translation by the author of an excerpt of the following passage: 'Die neuen Freihandelsabkommen werden uns als gigantisches Wachstumsprogramm verkauft, sei es TTIP, CETA, JEFTA oder das EU-Mercosur-Abkommen. Bezahlen müssen es die BürgerInnen mit einem beispiellosen Abbau von Produktionsstandards, Verbraucherschutz- und ArbeitnehmerInnenrechten, Lohnniveaus, Umwelt- und Sozialauflagen, ja sogar unserer demokratischen Rechtsstaatlichkeit'
https://www.attac.de/kampagnen/handelsabkommen/kampagne-handelsabkommen/
(last consulted on 15/06/2020).

[10] OXFAM, Declics 17, report by Chloé Zollman, March 2014. Translation by the author of an excerpt of the following passage: 'Bangladesh, Italie, Cambodge… les catastrophes qui se sont récemment succédées mettent le doigt sur une évidence : les règles commerciales en vigueur favorisent les intérêts des multinationales, au détriment des droits des travailleurs. Doit-on y voir une fatalité ?'
https://www.oxfammagasinsdumonde.be/blog/article_dossier/travail-decent-les-droits-des-travailleurs-mis-en-jeu/#.XvmfHedCTIU (last consulted on 15/06/2020).

standards under pressure,'[11] in addition to other critiques.[12] A recent *Eurobarometer Survey* entitled "Europeans' attitude on trade and EU trade policy" has attempted to measure the public perception regarding EU FTAs' impact on social conditions. Asked about the 'benefits of signed trade agreements,' 15% of the respondents declared that trade agreements 'limit the ability of their country to pass new laws which would contradict these agreements in order to protect workers, the environment, health or education.'[13] More specifically, the belief that the FTAs concluded by the EU limit the autonomy of the Member States to adopt their own regulation in social matters came as the first response in Austria (25%) and as the second in Italy and in the Czech Republic (18% each), right after the belief that FTAs 'benefit businesses more than consumers and workers.' The latter came as the most cited response in 13 out of the then 28 EU Member States.[14] By and large, this survey puts figures on the concern that economic globalisation affects peoples' social conditions. It sheds light on the existing mistrust towards trade agreements as well as on the perception that FTAs limit states' abilities to pass new laws relating to the protection of workers.

The scientific literature has addressed several aspects of the relationship between trade agreements and the protection of labour rights. To begin with, it has assessed the effects of trade liberalisation on labour rights. In this regard, there is a large body of empirical research on the link between the opening of markets and the evolution of the levels of labour protection.[15] While some studies point at a

[11] Netzwerk Gerechter Welthandel, Kampagne Gegen Ceta, Jefta and Co. Translation by the author of an excerpt of the following passage: 'FREIHANDELSABKOMMEN... wie TTIP oder CETA stellen den Wert des „Freihandels" über die Werte sozialer und ökologischer Regeln. Sonderklagerechte für Investoren gefährden demokratische Handlungsfreiheiten; öffentliche und gemeinnützige Dienstleistungen sowie Sozial-, Umwelt- und Arbeitsstandards geraten unter Druck. Dagegen haben in den vergangenen Jahren Millionen Menschen demonstriert – und die handelspolitischen Debatten in Deutschland und der EU verändert.'
https://www.gerechter-welthandel.org/wp-content/uploads/2018/07/Flyer_Freihandelsabkommen_NGW-Juni2018.pdf (last consulted on 15/06/2020).

[12] The website Bilaterals.org offers many critical discussions of the effects of trade agreements on workers' rights. See: https://bilaterals.org/?-labour-&lang=en (last consulted on 15/06/2020).

[13] Respondents were asked about their view on trade agreements such as those concluded by the EU with Canada, Japan or Mexico. They could choose between seven different answers: (1) 'they strengthen the EU's position in the world as an economic power'; (2) 'they benefit businesses more than consumers and workers'; (3) 'they help to create jobs in the EU and bring more choice and lower prices for consumers and businesses'; (4) 'they limit the ability of their country to pass new laws which would contradict these agreements in order to protect workers, the environment, health or education'; (5) 'they do not make any difference to the EU, or to the businesses, consumers or workers'; (6) 'none'; (7) 'does not know'. See: EU Commission, Special Eurobarometer 491, Europeans' attitude on trade and EU trade policy, 2019, p. 59.

[14] Note that overall 22% of the questioned persons responded that trade agreements 'benefit businesses more than consumers and workers'. See: EU Commission, Special Eurobarometer 491, Europeans' attitude on trade and EU trade policy, 2019, p. 59.

[15] This empirical research has gone hand in hand with more theoretical work on the relationship between legal regimes in a context of open markets. See for instance: Anthony Ogus, "Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law," *International & Comparative Law Quarterly* 48, no. 2 (1999); Kyle Bagwell, Petros C. Mavroidis, and Robert W. Staiger, "It's a Question of Market Access," *American Journal of International Law* 96, no. 1 (2002); Claudio M. Radaelli, "The Puzzle of Regulatory

negative relation between trade liberalisation and labour rights protection,[16] others underline that trade liberalisation is associated with an average improvement of labour rights protection in the concerned countries.[17] Still other studies show the co-existence of both positive and negative linkages at the same time.[18] As a matter of consequence, the effects of trade liberalisation on labour rights remain largely disputed.[19] Second, scholars have also discussed the implications of trade and investment agreements for states' regulatory space.[20] Hence, studies have looked at the effects of the GATT and the WTO agreements on states' regulatory space in general,[21] as well as on states' capacities to regulate in specific policy domains.[22] Regarding trade agreements' implications for states' regulatory

Competition," *Journal of Public Policy* 24, no. 1 (2004); Anne Peters, "The Competition Between Legal Orders," *International law research* 3, no. 1 (2014).

[16] See for instance: Dani Rodrik, "Has Globalization Gone Too Far?," *Challenge* 41, no. 2 (1998); Mosley, Layna, and Saika Uno. "Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights." *Comparative Political Studies* 40, no. 8 (2007): 923–48.

[17] See for instance: Neumayer, Eric, and Indra de Soysa. "Trade Openness, Foreign Direct Investment and Child Labor." *World development* 33, no. 1 (2005): 43–63. Neumayer, Eric, and Indra de Soysa. "Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis." *World development* 34, no. 1 (2006): 31–49.

[18] See for instance: Häberli, Christian, Marion Jansen, and José-Antonio Monteiro. "Regional Trade Agreements and Domestic Labour Market Regulation." In *Policy Priorities for International Trade and Jobs*, 287. This research contrasts with the studies referred to in the previous footnotes in that it does not look at fundamental labour standards. Instead, it assesses the evolution of the protection of three non-fundamental labour rights depending on the conclusion of Regional Trade Agreements (**RTAs**). They conclude that there is a negative relation between the conclusion of RTAs and the protection of these rights. They identify this phenomenon only in high-income countries and following the conclusion of RTAs with other high-income countries. In low- and middle-income countries, the studied standards have always improved over time.

[19] For similar conclusions on the existence of diverging relationships between market opening and labour standards, see: Ferdi de Ville, Jan Orbie, and Lore van den Putte, "TTIP and Labour Standards," 2016. Note that these diverging relationships are not necessarily irreconcilable. Indeed, studies often look at the labour situation in different sets of countries, in different periods of time, for different sets of labour rights etc. so that their findings are generally limited to very specific cases and do not presume on the relationship in other situations.

[20] Note that there is also an impressive body of research on the effects of International Investment Agreements (**IIAs**) on the states' regulatory space. See for instance: Caroline Henckels, "Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP," *Journal of International Economic Law* 19, no. 1 (2016); Tomer Broude, Yoram Z. Haftel, and Alexander Thompson, "The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts," *Journal of International Economic Law* 20, no. 2 (2017). Tomer Broude, Yoram Z. Haftel, and Alexander Thompson, "Who Cares About Regulatory Space in BITs? A Comparative International Approach," in *Comparative International Law*, ed. Anthea Roberts et al. (New York, NY: Oxford University Press, 2018). Thompson, Alexander, Tomer Broude, and Yoram Z. Haftel. "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design." *International organization* 73, no. 4 (2019): 859–80. In the last article, Thompson, Broude and Haftel look at textual changes in about 3000 IIAs. The authors analyse how ISDS experiences have affected the states' decision to adjust their treaties' provisions in order to regain regulatory space. They conclude that exposure to investment claims is associated with the renegotiation of IIAs towards greater regulatory space or with the termination of the agreement in question.

[21] See for instance: Wagner, Markus. "Regulatory Space in International Trade Law and International Investment Law." *U. Pa. J. Int'l L.* 36 (2014): 1.

[22] With respect to development policies, see for instance: Kevin P. Gallagher, "Globalization and the Nation-State: Reasserting Policy Autonomy for Development," in *Putting Development First: The Importance of Policy Space in the WTO and IFIs*, ed. Kevin Gallagher (London: Zed Books, 2005). ; Hamwey, Robert. "Expanding National Policy Space for Development: Why the Multilateral Trading System Must Change." University Library of Munich, Germany, 2005. Abugattas, Luis, and Eva Paus. "Policy Space for a Capability-Centered Development Strategy for Latin America." In *The Political Economy of Hemispheric Integration*, 113–43. Springer, 2008. Note in this context

space in matters of labour rights protection more specifically, this policy area has been largely overlooked in the scientific literature. Authors have restricted themselves to highlighting – with the necessary caution – that trade agreements 'potentially [limit] the policy choices of governments and their ability […] to address environmental and development challenges related to sustainable growth and full employment;'[23] that '[labour] standards are one of the areas for which it is feared […] that a [FTA] might lead to a race-to-the-bottom;'[24] and that risks of social dumping linked to the conclusion of trade agreements 'lead to concerns over wage suppression and reductions of labor protections in the "North".'[25] However, no comprehensive assessment of the implications of the regime established by trade agreements on regulatory space for labour law has been undertaken to date. Third, as a consequence of the proliferation of labour provisions in trade agreements in recent years,[26] scholars have also dedicated increasing attention to the study of this emerging legal practice. More specifically, research on labour provisions was originally framed in reference to the multilateral trading system. Indeed, until the second half of the 1990s, the debate on labour provisions largely focussed on the GATT/WTO rule book. Two questions were raised with more insistence: does the international regime for trade contain provisions in which labour standards-based exceptions to the trading rules can be justified?[27] And more fundamentally, is it relevant to include an explicit labour clause in the

---

that the broadening of the agenda at the GATT/WTO negotiation rounds to beyond-the-borders barriers to trade coupled with the progressive enlargement of the organisation's membership to emerging economies led to the expression of concerns on the ability of these countries to regulate in policy area crucial to their development. With respect to health policies, see for instance: Meri Koivusalo, Ted Schrecker, and Ronald Labonté, "Globalization and Policy Space for Health and Social Determinants of Health," in *Globalization and Health: Pathways, Evidence and Policy*, ed. Labonté Ronald, Ted Schrecker, Corinne Packer, Vivien Runnels, Routledge studies in health and social welfare 4 (London [u.a.]: Routledge, 2012).

[23] Donna McGuire and Christoph Scherrer, "Developing a labour voice in trade policy at the national level" (Global Labour University Working Paper, 2010), 3.

[24] References omitted. The authors refer to the TTIP negotiations between the EU and the United States. In this regard, they also note that '[in] the heated debate on TTIP, the possible effects of the agreement on labour protection play an important role. While there is concern that TTIP might weaken labour protection in the EU, there is also hope that it could lead to upward change in transatlantic and worldwide labour protection.' Ville, Orbie and van den Putte, "TTIP and labour Standards," 9.

[25] Gregory Shaffer, "Retooling Trade Agreements for Social Inclusion," *UNIVERSITY OF ILLINOIS LAW REVIEW*, 2019, 34.

[26] While 7.3 % of the trade agreements in force in 1995 included some form of labour provision, their proportion raised to 28.8 % in 2016. International Labour Office, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (Geneva, 2017), 11. Note that this increase is even more significant considering the dramatic augmentation of FTAs since 1995. While there were less than 100 FTAs in 1994, more than 300 FTAs are now registered at the WTO. On this dramatic increase in the number of FTAs see: Clemens Boonekamp, "Regional Trade Agreements and the WTO," in *Future of the Global Trade Order*, ed. Carlos A. P. Braga and Bernard Hoekman (2016)..

[27] Bagwell, Kyle, and Robert W. Staiger. "The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues." *The Journal of Economic Perspectives* 15, no. 3 (2001): 69–88; Bagwell, Kyle, Petros C. Mavroidis, and Robert W. Staiger. "It's a Question of Market Access." *American Journal of International Law* 96, no. 1 (2002): 56–76; Schutter, Olivier de. *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards*. Bloomsbury Publishing, 2015.

international regime for trade?[28] Following difficulties to push forward the reform agenda at the WTO, a handful of countries progressively adjusted their trade liberalisation strategy towards the adoption of Preferential Trade Agreements (**PTAs**). This move allowed for the integration in bilateral and regional trade agreements of matters for which no consensus existed at the multilateral level, thus opening a window of opportunity for the inclusion of explicit labour provisions. The United States of America has undertaken pioneering work in matters of labour rights protection and international trade. The North America Agreement on Labour Cooperation (**the NAALC**), a side agreement to the North American Free Trade Agreement (**the NAFTA**), both entering into force on 1 January 1994, was indeed the first comprehensive regime of labour rights protection attached to a trade agreement since the failed attempt to adopt the 1948 Havana Charter establishing the International Trade Organisation.[29] The United States continued to include labour provisions in their FTAs on a quasi-automatic basis.[30] Recently, it revamped its approach to labour rights protection through the conclusion of the United States-Mexico-Canada Agreement (**the USMCA**), the trade agreement replacing the NAFTA.[31] With respect to the EU, the first inclusion of a developed system of labour rights protection in a trade agreement had to wait until the provisional application of the EU-CARIFORUM agreement, in October 2008.[32] Since the 2010s, the EU FTAs systematically include articulate labour

[28] Steve Charnovitz, "The Influence of International Labour Standards on the World Trading Regime: A Historical Overview," *International Labour Review* 126, no. 5 (1987) ; Jagdish Bhagwati, "Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues," *The World Economy* 18, no. 6 (1995); Drusilla K. Brown, "Labor Standards: Where Do They Belong on the International Trade Agenda?," *The Journal of Economic Perspectives* 15, no. 3 (2001); Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime," *European Journal of International Law* 15, no. 3 (2004); Robert Howse, Brian Langille, and Julien Burda, "The World Trade Organization and Labour Rights: Man Bites Dog," *INTERNATIONAL STUDIES IN HUMAN RIGHTS* 84 (2006).

[29] The Havana Charter contained a relatively succinct provision explicitly referring to the promotion of labour standards. Art. 7 §1 of the Havana Charter reads as follows: '[…] 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." For a discussion of the missed opportunity following the non-adoption of the Havana Charter, see: Schutter, Olivier de. *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards*. Bloomsbury Publishing, 2015. Note that references to labour standards linked to the conclusion of trade agreements have a much older history. For a discussion of the state of the art towards the end of the 19th and the early 20th century see: Michael Huberman, ed., *International Labor Standards and Market Integration Before 1913*: *A Race to the Top?* (2002); Charnovitz, "The influence of international labour standards on the world trading regime".

[30] For a good analysis of the labour protection regime under US trade agreements see: Lance Compa, "Labor Rights and Labor Standards in Transatlantic Trade and Investment Negotiations: An American Perspective," *The Transatlantic Trade and Investment Partnership (TTIP): Implications for labor. Munchen: Rainer Hampp Verlag*, 2014; Mary Jane Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements* (2016).

[31] The USMCA entered into force on July 1, 2020. Notably, the USMCA contains some innovations regarding working conditions in the car industry. Hence, 40 to 45 % of the content of a vehicle must be made by workers earning at least $16/hour in order to qualify for duty-free treatment on the market of USCMA contracting parties. See: USMCA, Chapter 4, Appendix, Article 7.

[32] The CARIFORUM group brings together the following countries: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis,

protection regimes. As a matter of fact, studies on labour rights' protection in EU FTAs are recent. These studies have addressed new and fascinating legal questions at a sustained pace. On this backdrop, they have attempted to categorise the various features included in labour provisions;[33] to assess labour provisions' impact on trade flows and the risk that they would be used for protectionist purposes;[34] to evaluate labour provisions in light of their capacity to promote labour rights,[35] to champion civil society involvement,[36] and to compel Parties in breach of their labour commitments to adopt practices in conformity with treaties.[37]Alternative models of labour chapters have been

Suriname, Trinidad and Tobago, and the Dominican Republic. In fact, FTAs previously concluded by the EU already included labour provisions. Their scope of application was however very narrow and was generally limited to the mutual recognition by the contracting Parties of a principle of non-discrimination in employment towards their nationals and of their right to access the host country's social security schemes. See for instance art. 64-65 of the EU-Tunisia Association Agreement of 1998. See: Lorand Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements," in, *Global Governance Through Trade*. Lore van den Putte and Jan Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions," *International Journal of Comparative Labour Law and Industrial Relations* 31, no. 3 (2015).

[33] Ebert, Franz Christian, and Anne Posthuma. *Labour Provisions in Trade Arrangements: Current Trends and Perspectives*. ILO, 2011; Lazo Grandi, Pablo. "Trade Agreements and Their Relation to Labour Standards: The Current Situation." Issue Paper: ICTSD EPAs and Regionalism Series, 2009. Bartels, Lorand. "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements." In, *Global Governance Through Trade*. Bartels, Lorand. "The EU's Approach to Social Standards and the TTIP." *The Transatlantic Trade and Investment Partnership (TTIP) Negotiations between the EU and the USA*, 2015, 83. For a general discussion of labour commitments in EU PTAs see: Bodson, Thibaud. How do EU Free Trade Agreements protect workers?, Green European Journal, 28 August 2019, available on https://www.greeneuropeanjournal.eu/how-do-eu-free-trade-agreements-protect-workers/ (last consulted on 06/02/2020).

[34] International Labour Office. "Assessment of Labour Provisions in Trade and Investment Arrangements." Studies on Growth with Equity, ILO, Geneva, 2016; Ebert, Franz Christian, and Anne Posthuma. *Labour Provisions in Trade Arrangements: Current Trends and Perspectives*. ILO, 2011; Jonas Aissi et al., "Assessment of labour provisions in trade and investment arrangements" (International Labour Office, Research Department, 2016). Kamata, Isao. "Regional Trade Agreements with Labor Clauses: Effects on Labor Standards and Trade." 2014; Céline Carrère, Marcelo Olarreaga, and Damian Raess, "Labor Clauses in Trade Agreements: Worker Protection or Protectionism?," 2017.

[35] Postnikov, Evgeny, and Ida Bastiaens. "Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements." *Journal of European Public Policy* 21, no. 6 (2014): 923–40; International Labour Office. "Assessment of Labour Provisions in Trade and Investment Arrangements." Studies on Growth with Equity, ILO, Geneva, 2016; Aissi et al., "Assessment of labour provisions in trade and investment arrangements". James Harrison et al., "Governing Labour Standards Through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters," *JCMS: Journal of Common Market Studies* 57, no. 2 (2019); Hradilová, Kateřina & Svoboda, Ondřej, "Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness," *Journal of World Trade* 52, no. 6 (2018).

[36] Orbie, Jan, Deborah Martens, and Lore van den Putte. "Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation." *Centre for the Law of EU External Relations (CLEER)* 3 (2016): 1–48. Martens, Deborah; den Putte, Lore Van; Oehri, Myriam; Orbie, Jan (2018): Mapping variation of civil society involvement in EU trade agreements: a CSI index. In: *European Foreign Affairs Review* 23 (1), S. 41–62. Orbie, Jan, Lore van den Putte, and Deborah Martens. "Civil Society Meetings in EU Free Trade Agreements: The Purposes Unravelled." In *Labour Standards in International Economic Law*, 135–52. Springer, 2018.

[37] Bartels, Lorand. "The EU's Approach to Social Standards and the TTIP." *The Transatlantic Trade and Investment Partnership (TTIP) Negotiations between the EU and the USA*, 2015, 83. Marx, Axel; Ebert, F.; Hachez, Nicolas; Wouters, Jan (2017): Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements.

suggested[38] and in 2017-2018 the EU Commission even organised a wide-ranging and fundamental discussion on its approach to labour provisions, questioning their design and their implementation.[39] Finally, labour provisions in EU FTAs are about to face a critical moment as the first dispute settlement procedure under the labour chapter of an EU trade agreement, triggered in December 2018 between the EU and the Republic of South Korea, is pending, and its outcome will surely provide new material to assess the provisions' capacity to protect workers.[40]

Thus, the scientific literature has addressed several important issues regarding trade agreements and the protection of labour rights. It has assessed the effects of trade liberalisation on labour rights. It has discussed some of the implications of trade agreements for states' regulatory space. It has reviewed various aspects of labour provisions in trade agreements. Yet, it has not engaged with the study of how labour provisions respond to the concerns that trade agreements drive countries to undercut domestic levels of protection and, that trade agreements hinder states' adoption of higher labour standards for fear of legal remedies or to protect the economy's competitiveness. In other words, the scientific literature has not considered how labour provisions address the concerns that trade agreements affect states regulatory space for labour law**.** However, a decade after they have first been included in a trade agreements concluded by the EU, labour provisions have reached a certain degree of maturity.[41] With

[38] Markus Krajewski and Rhea T. Hoffmann, "Alternative Model for a Sustainable Development Chapter and Related Provisions in the Transatlantic Trade an Investment Partnership (TTIP)," *Commissioned by The Greens/European Free Alliance in the European Parliament. Available at: reinhardbuetikofer. eu/wp…/Model-SD-Chapter-TTIP-Second-Draft-July_final. pdf*; Peter-Tobias Stoll, Henner Gött, and Patrick Abel, "A Model Labour Chapter for Future EU Trade Agreements," in *Labour Standards in International Economic Law* (Springer, 2018).

[39] See the round of consultations opened by the EU Commission in summer 2017 in which the Commission services asked all interested stakeholders to comment on a reform of its approach to labour rights protection in EU FTAs. This round of consultations was concluded by the publication of a position paper by the Commission in February 2018. See: Non paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11.07.2017, available on: https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf (last consulted on 02/02/2020); and 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, 26.02.2018, available on: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (last consulted on 02/02/2020). For a comment on the Commission's positions, see: Harrison, James, Mirela Barbu, Liam Campling, Franz Christian Ebert, Deborah Martens, Axel Marx, Jan Orbie, Ben Richardson, and Adrian Smith. "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda." *World Trade Review* 18, no. 4 (2019): 635–57.

[40] For more information see the newspaper article by Thibaud Bodson, "Accord UE-Corée du Sud : 'Bruxelles enclenche une procédure de protection des travailleurs'", *Le Monde*, 08/01/2019, available on : https://www.lemonde.fr/idees/article/2019/01/08/accord-ue-coree-du-sud-bruxelles-enclenche-une-procedure-de-protection-des-travailleurs_5406117_3232.html (last consulted on 06/02/2020) and the blogpost by Thibaud Bodson, Compliance with Labour Obligations Under EU-Korea FTA's Trade and Sustainable Development Chapter, 23/07/2019, available on the following international litigation blog: http://international-litigation-blog.com/compliance-with-labour-obligations-under-eu-korea-fta/ (last consulted on 06/02/2020).

[41] For a discussion of the evolution of labour provisions in EU FTAs see: Ebert and Posthuma, *Labour provisions in trade arrangements*; van den Putte and Orbie, "EU bilateral trade agreements and the surprising rise of labour provisions".

the regime of labour rights protection' coming of age, one can wonder whether it appropriately addresses the concern of regulatory space loss. On this backdrop, this dissertation aims to answer the following question:

> How do labour provisions in EU FTAs reshape the contracting Parties' regulatory space for labour law?

Thus, this dissertation considers how labour provisions address the enduring fear that trade agreements affect states' abilities to protect workers. In doing so, it aims to shed light on the EU response to this specific aspect of the backlash against economic globalisation.

To answer the research question, this dissertation reviews the labour provisions included in the EU FTAs of the third generation. Third generation FTAs constitute the most recent model of trade agreements concluded by the EU.[42] Consequently, ten agreements that have entered into force as of July 2020 are analysed. These are: the EU-Republic of South Korea (**the EU-RSK**) agreement,[43] the EU-Central America agreement,[44] the EU-Peru-Colombia-Ecuador agreement,[45] the EU-Ukraine agreement,[46] the EU-Moldova agreement,[47] the EU-Georgia agreement,[48] the EU-Canada agreement (**the CETA**),[49] the EU-South African Development Community (**the EU-SADC**) agreement,[50] the EU-

[42] The GATT and the different agreements concluded during the GATT negotiation rounds which deal with the reduction of tariffs and of quotas are the so-called 'first generation agreements'. Other agreements including provisions relating to beyond-the-border barriers to trade are considered as second-generation agreements. Finally, third generation agreements are recent FTAs covering a much broader diversity of policy areas, such as intellectual property, public procurement, sustainable development, etc. For a discussion of this typology see: Leblond, Patrick, and Crina Viju-Miljusevic. "EU Trade Policy in the Twenty-First Century: Change, Continuity and Challenges." *Journal of European Public Policy* 26, no. 12 (2019): 1836–46. For a slightly different typology accounting for only two generations of FTAs, see: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, p. 4-5.

[43] The EU-RSK FTA has been provisionally applied since July 2011. It is fully in force since July 2015.

[44] This EU-Central America FTA was signed on 29 June 2012. It has been provisionally applied since August 2013 with Honduras, Nicaragua and Panama, since October 2013 with Costa Rica and El Salvador, and since December 2013 with Guatemala.

[45] The EU-Peru-Colombia-Ecuador FTA was signed on 26 July 2012. It is provisionally applied since August 2013.

[46] The EU-Ukraine FTA was signed on 29 May 2014. It is provisionally applied since January 2016.

[47] The EU-Moldova FTA is in force since 1 July 2016.

[48] This EU-Georgia FTA is in force since 1 July 2016.

[49] The CETA FTA was signed on 30 October 2016. It is provisionally applied since 21 September 2017.

[50] The EU-SADC FTA is in force since 5 February 2018. The SADC brings together 16 countries: Angola (not applied yet), Botswana (provisionally applied since 10 October 2016 and in force since 05 February 2018), Comoros (not applied yet), Democratic Republic of Congo (not applied yet), Eswatini (in force since 5 February 2018), Lesotho (in force since 5 February 2018), Madagascar (not applied yet), Malawi (not applied yet), Mauritius (not applied yet), Mozambique (in force since 5 February 2018), Namibia (provisionally applied since 10 October 2016 and in force since 5 February 2018), Seychelles (not applied yet), South Africa (not applied yet), Tanzania (not applied yet), Zambia (not applied yet) and Zimbabwe (not applied yet).

Japan agreement, and the EU-Singapore agreement.[51] The labour provisions contained in these agreements are included in the so-called Trade and Sustainable Development chapters (**the TSD chapters**).[52] Among the different elements included in the TSD chapters, the clauses determining labour commitments – i.e. the clauses which bind the Parties to the achievement of certain labour-related conducts or results – and those establishing cooperation mechanisms in matters of labour rights are most relevant for this study. Indeed, they define the obligations and the cooperation activities that have potential implications for the Parties' regulatory space in matters of labour rights protection. Each of these two elements will be discussed in separate chapters of this dissertation.

To assess the labour commitments included in the TSD chapters of the ten covered EU FTAs, this dissertation undertakes a doctrinal analysis. More specifically, it draws on the provisions' text, the relevant case law, and the literature to consider how these commitments shape the Parties' regulatory space for labour law. To this end, this dissertation focusses on three decisive features: (1) the obligations included in the labour commitments ; (2) their scope of application ; and, (3) their degree of precision.[53] These three elements give form to the *legal character* of the labour commitments, thus determining their capacity to shape the Parties' regulatory space. The methods adopted for the analysis of labour commitments are further developed in *Section 3.1. Methodological clarifications*.

Regarding cooperation mechanisms in matters of labour rights protection, this dissertation first reviews the legal framework provided in the EU FTAs for cooperation in matters of labour rights protection. This sets the context for the consequent analysis of the cooperation activities undertaken by the Parties. Second, it studies the cooperation activities as such. This assessment is based on a review of the yearly reports on cooperation activities prepared by the Committees on Trade and Sustainable Development (**the CTSD**), the inter-governmental body in charge of monitoring the application of TSD chapters under the EU FTAs. Here again, the methods adopted for the analysis of

[51] The EU-Singapore FTA entered into force on 21 November 2019.

[52] Note that TSD chapters contain provisions relating to the promotion of the three dimensions of sustainable development, namely the social, the environmental and the economic dimensions. The principle of sustainable development is generally attributed to the Brundtland report of 1987. For a discussion of the origin and development of this principle see: Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm," *European Journal of International Law* 23, no. 2 (2012).

[53] There are several approaches as to which factors constitute the legal character of a norm. On this subject see for instance: Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. "The Concept of Legalization." *International organization* 54, no. 3 (2000): 401–19; Daniel Bodansky, "Legally Binding Versus Non-Legally Binding Instruments," in *Towards a Workable and Effective Climate Regime*, ed. Barrett, Scott, Carlo Carraro and Jaime de Melo (VoxEU eBook, 2015); Lavanya Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," *Journal of Environmental Law* 28, no. 2 (2016). This discussion will be further developed in *Section 3.1. Methodological clarifications.*

cooperation mechanisms in matters of labour rights protection are further explained in *Section 4.1. Methodological clarifications*.

Overall, the methods adopted for the analysis of labour provisions in EU FTAs allow for several outcomes. First, the methods make possible a refined understanding of the legal constraints that the labour commitments impose on the contracting Parties and thus on the way they shape their regulatory space for labour law. Second, they allow for the tracking of features of the cooperation activities undertaken by the Parties and, in doing so, provide a good sense of the mechanisms by which these activities may have implications for the Parties' regulatory space in matters of labour rights protection. However, the methods adopted in this dissertation do *not* allow for conclusions to be drawn on causal relationships between specific cooperation activities and regulatory outcomes. Moreover, the methodological approach adopted in this research does *not* make it possible to quantify with precise measurement the effect of the labour commitments and of the cooperation activities on the Parties' regulatory space. Thus, while this research benefits from the strengths peculiar to doctrinal and textual analysis, namely to offer a qualitative in-depth discussion of legal provisions and cooperation reports, this discussion does not allow for a refined quantification of possible variation in regulatory spaces.[54]

This dissertation contributes to the existing literature in at least five different ways. To begin with, it aims to offer the first discussion of the implications of labour provisions for the Parties' regulatory space in matters of labour rights protection and of their capacity to address the fear of regulatory space loss in this specific policy domain.[55] Second, little academic work has been dedicated to a legal

[54] On the benefits and the limitations of computer v. human coding, Morin et al. argue that '[while] computers can easily and accurately identify environment-related provisions within one or more texts, human coding remains more appropriate for identifying and interpreting sometimes ambiguous norms within complex, structured texts and relating them to one another. This is because lexicon-based approaches struggle with the many-to-many relationships words and concepts like norms often have that humans, who parse semantics with comparative ease, can distinguish'. Jean F. Morin, Joost Pauwelyn, and James Hollway, "The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements," *Journal of International Economic Law* 20, no. 2 (2017): 366. In turn, Puig et al. write that '[while] machines are better than humans at spotting patterns across large amounts of texts (which is why we use them in plagiarism detection software for instance), they are worse than humans at resolving interpretive ambiguities. Human coders are thus not going to be completely replaced any time soon, but computers and artificial intelligence are beginning to play a larger role in legal document analysis'. Sergio Puig, Joost Pauwelyn and Wolfgang Alschner. "The Data-Driven Future of International Law" Published on July 25, 2017 on https://www.ejiltalk.org/the-data-driven-future-of-international-law/ (last consulted on the 22/03/2019).

[55] In the same sense Gheyle et al. note that 'literature on the impact of deep and comprehensive EU agreements with respect to policy space are very rare.' Gheyle, Niels and Deborah Martens, *Understanding the Debate About Policy Space: From the WTO to EU FTAs*,

analysis of the regime of labour rights protection provided in EU FTAs. The existing studies limit themselves to brief comments on some aspects of some provisions, in some agreements.[56] *Chapter 3 Labour Commitments in EU Trade Agreements* offers the first comprehensive and in-depth legal analysis of the regime of labour rights' protection in EU FTAs.[57] Third, the EU approach to the protection of labour rights in its FTAs is often characterised as a "cooperative approach," in contrast to the "sanction-based approach" handled by the United States. Notwithstanding the importance of identifying the most effective strategies to protect labour rights in trade agreements, no evaluation of the cooperation approach privileged by the EU has yet been undertaken. [58] *Chapter 4 Cooperation mechanisms in EU trade agreements* provides the first study assessing the contribution of cooperation activities to the protection of labour rights. Fourth, there is a widespread debate on the design of labour provisions in EU FTAs, which includes, inter alia, discussions on the relevance of providing labour commitments with stronger formulations as well as the possibility of imposing sanctions under TSD chapters.[59] Surprisingly, no study has drawn a link yet between the distribution of competences between the EU and its Member States and the design of the TSD chapters. *Section 2.2. Defining the EU competences in matters of labour policies* bridges this gap and investigates the relationship between the distribution of competences and the workers' protection regime as designed in EU FTAs. Last but by no means least, the discussion of regulatory space in a context of economic globalisation often overlooks important normative questions and generally assumes that the more regulatory space

https://www.researchgate.net/publication/308300010_Understanding_the_debate_about_policy_space_from_the_WTO_to_EU_FTAs, 9.

[56] Lorand Bartels has publishes several articles with fascinating analyses of some provisions of the TSD chapters in specific EU FTAs. See for instance: Bartels, Lorand. "The EU's Approach to Social Standards and the TTIP." *The Transatlantic Trade and Investment Partnership (TTIP) Negotiations between the EU and the USA*, 2015, 83; Stoll, Peter-Tobias, Henner Gött, and Patrick Abel. "A Model Labour Chapter for Future EU Trade Agreements." In *Labour Standards in International Economic Law*, 381–430. Springer, 2018; Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017. See also: Stoll, Gött and Abel, "A Model Labour Chapter for Future EU Trade Agreements".

[57] For an acknowledgment of the absence of any such systematic and in-depth legal analysis of labour provisions see the recent article by June Namgoong, "Two Sides of One Coin, the US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP," *International Journal of Comparative Labour Law and Industrial Relations* 35, no. 4 (2019): 486.

[58] The lack of assessment of cooperation activities under TSD chapters is also noted in: Martens, Deborah, den Putte, Lore Van, Myriam Oehri, and Jan Orbie. "Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index." *European Foreign Affairs Review* 23, no. 1 (2018): 41–62; Postnikov, Evgeny, and Ida Bastiaens. "Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements." *Journal of European Public Policy* 21, no. 6 (2014): 923–40; Martens, Deborah, den Putte, Lore Van, Myriam Oehri, and Jan Orbie. "Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index." *European Foreign Affairs Review* 23, no. 1 (2018): 41–62. CSOs have also called for the assessment of the cooperation activities in light of their contribution to the protection of labour rights. (Statement by the Ukrainian DAG chair at the CSF of the EU-Ukraine DCFTA, organised in Brussels on 7 November 2019. Meeting attended by the author.)

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

a country has, the better it is for labour rights protection. This straightforward assumption may be too simplistic however. *Section 2.1. Defining regulatory space for labour law* provides for a discussion on the normative stakes of regulatory space in matters of labour rights protection and proposes an innovative conceptual framework for assessing regulatory space for labour law.

This dissertation is structured as follows: *Chapter 2 Regulatory space for labour law* sets the analytical framework for this research. It begins with a definition of the concept of regulatory space for labour law. In this regard, it is argued that states' regulatory space for labour law is defined by several factors. Then, it addresses normative questions linked to regulatory space by engaging in a definition of the position adopted in this dissertation with respect to the most appropriate degree of regulatory space for labour law. Finally, it sheds light on the EU margin of action when it negotiates trade agreements. In this regard it analyses the distribution of competences between the EU and its Member States and observes that a so-called "regulation of the levels of social protection-threshold" plays a crucial role for the design of labour provisions. Once the analytical framework is set, the dissertation engages with the analysis of the regime of labour protection provided in EU FTAs. *Chapter 3 Labour commitments in EU trade agreements* undertakes the analysis of a dozen clauses included in the covered TSD chapters. This analysis shows that labour commitments, which define the rights and obligations in matters of labour rights protection provided in the EU trade agreements, have different degrees of *legal character* with some of them being more constraining for the Parties than others. Moreover, it also points out that several commitments at the core of the regime of labour rights protection provided in the EU FTAs are in fact commitments already taken up by the Parties under other legal instruments. Then, *Chapter 4 Cooperation mechanisms in EU trade agreements* conducts a review of the cooperation activities in matters of labour rights protection undertaken by the Parties under the EU FTAs. This review sheds light on how the contracting Parties and other stakeholders have made use of cooperation mechanisms in order to promote labour rights protection. It also identifies a set of cooperation practices which may have implications for the different factors defining states' regulatory space for labour law. Finally, the *Conclusion* revisits the analyses of the labour commitments and of the cooperation mechanisms undertaken in this dissertation and presents some policy recommendations in order to improve the regime of labour rights protection under EU trade agreements.

2. Regulatory space for labour law

When asked what *philosophy* was about, the French philosopher Gilles Deleuze and the French psychanalyst Felix Guatarri responded that philosophy's primary task was to create *concepts*. Concepts allow to approach chaos – to bring order to it. Concepts make it possible to capture the multiplicity shaping systems. Concepts give consistency to the *virtual*, i.e. they represent not yet actualised capabilities. Concepts tame the forces constituting bodies. Deleuze and Guatarri contrasted *philosophy* with *science*.[60] To the authors, science gives reference to systems. It determines the conditions within which the latter operate.[61] It studies the concretisation of capabilities. It measures the materialisation of forces. Hence, both authors saw philosophy and science as different modes of thought which are complementary to each other's and without hierarchical relation.

The recent *Eurobarometer survey* "Europeans' attitude on trade and EU trade policy" puts figures on the longstanding concern that trade agreements limit states' ability to pass new regulation on the protection of workers.[62] By using the concept of "regulatory space for labour law," this dissertation aims to capture the multiplicity of factors shaping states' capacities to pass regulation. By referring to the concept of *regulatory space for labour law*, this dissertation intends to determine the conditions within which the labour law-making process takes place. In short, this dissertation uses the concept of *regulatory space for labour law* as an instrument to approach the regime of labour rights protection provided in EU FTAs. This concept is both practical and complex. It is practical to "visualise" how various factors shape the environment within which states conduct regulatory activities. Yet it is complex. As we will see, these factors can be of different types. They can affect varying features of the regulatory process. And they can broaden and reduce states' regulatory space all at once. This chapter aims to clarify this complex concept in order to facilitate its use throughout the remaining of the dissertation. To do so, it attempts to answer two questions: (1) What is *regulatory space for labour law* about? (2) What are the EU competences in matters of labour policy?

These two questions will be addressed consecutively. *Section 2.1. Defining regulatory space for labour law* begins with a discussion of the various characteristics associated with the concept of regulatory space in general. Then, it zooms in on regulatory space for labour law more specifically and reviews the main factors affecting the making of labour legislation.[63] Finally, it presents the definition of

[60] In fact, in their book *Qu'est-ce que la philosophie?* the authors undertake a comparison between philosophy, science and arts. Gilles Deleuze and Félix Guattari, *Qu'est-Ce Que La Philosophie?* (Minuit, 2013).
[61] Deleuze and Guattari, *Qu'est-ce que la philosophie?*, 21.
[62] See: EU Commission, Special Eurobarometer 491, Europeans' attitude on trade and EU trade policy, 2019, p. 59.
[63] The terms "factors" and "determinants" will be used as synonyms in the remaining of this dissertation.

regulatory space for labour law that will be handled in this dissertation for the assessment of the labour provisions included in EU trade agreements. As will be shown later, assessing labour provisions in EU FTAs solely on the basis of their implications for states' regulatory space for labour law does not entirely do justice to the EU. To be fair, this assessment must be accompanied by a definition of the Union's competences in matters of labour policies. Only then can one understand the extent to which the EU is able to address this regulatory space altogether. Therefore, *Section 2.2. Defining the EU competences in matters of labour policies* aims to shed light on what the EU's margin of action in matters of labour rights protection in its trade agreements. This section first distinguishes between the internal and the external distribution of competences with respect to labour policies. Then, it discusses the EU competences for labour-related matters in its trade agreements more specifically.

Ultimately, this chapter's objective it to present the analytical framework used for the study of the labour provisions' implications for states' regulatory space. The challenge it takes up is to propose to the reader a conception of regulatory space for labour law that accounts for the complexity of this specific branch of law, and that offers a practical way to understand the various channels by which labour provisions can have implications on states' regulatory space.

2.1. Definition of regulatory space for labour law

The concept of regulatory space for labour law is a key element in this dissertation's attempt to understand the effects of labour provisions on states' ability to pass labour regulation. This section aims to define this concept. To do so, it begins by discussing the characteristics that the literature generally associate with regulatory space in general (*Section 2.1.1*), Then, it focusses on regulatory space for labour law more specifically and identifies the different factors influencing the making of labour law (*Section 2.1.2*.). Finally, it presents the analytical approach to regulatory space for labour law that is adopted in this research (*Section 2.1.3*.).

2.1.1. The defining characteristics of regulatory space

Various understandings of the concept of regulatory space have been handled in the literature. These different acceptations develop along two partly connected features: (1) the set of factors considered to determine states' regulatory space; and (2) the actors considered to take part in the regulatory process. Although definitions of regulatory space may vary according to these two dimensions, they all share a common core, namely they deal with the regulator's margin of action to adopt regulation in various policy domains. This margin of action may be different from state to state and can be best conceived of as oscillating on a continuum limited on the one side by the regulator's absolute freedom to adopt the regulation it sees fit and, and on the other side by the regulator being bound by certain

factors imposing a definite regulatory outcome.[64] Between these two poles, numerous degrees of regulatory space are practicable and correspond indeed to various combinations of factors and actors.

To begin with, scholars have highlighted a variety of factors in order to define regulatory space. Most commonly, states' regulatory space has been characterised in reference to legal determinants, i.e. the applicable international commitments. Accordingly, research has looked at how the legal provisions in international treaties affect the countries' ability to adopt the regulation they see fit. There is indeed a wealth of literature focusing on the extent to which the WTO agreements limit countries' regulatory space;[65] looking at IIAs' implications for the Parties' capacities to regulate;[66] or considering how the conditionality approach handled by the World Bank and the IMF limit the beneficiary states' regulatory space.[67] Next to the legal determinants, some studies have also analysed other factors shaping countries' regulatory space. In this regard, they have looked at elements such as the domestic institutional environment; the organisational capacities of states; the available resources in terms of budget or expertise; the infrastructures peculiar to the countries; the authority of the regulators; the faculty to access crucial information amongst others.[68] The broad variety of constraints that can shape states' regulatory space has led scholars to undertake further categorisations. For instance, some have distinguished between *de jure* and *de facto* constraints on states' regulatory space. While *de jure*

[64] For a similar analogy see: Tomer Broude, Yoram Z. Haftel, and Alexander Thompson, "Who Cares About Regulatory Space in BITs? A Comparative International Approach," in *Comparative International Law*, ed. Anthea Roberts et al. (New York, NY: Oxford University Press, 2018).

[65] See for instance: Kevin Gallagher, ed., *Putting Development First*: *The Importance of Policy Space in the WTO and IFIs* (London: Zed Books, 2005); Hamwey, "Expanding national policy space for development: Why the multilateral trading system must change"; UNCTAD, *Global Governance and Policy Space for Development,* Trade and development report 2014 (New York, NY: United Nations, 2014).

[66] See for instance: Wagner, "Regulatory space in international trade law and international investment law"; Broude, Haftel and Thompson, "The Trans-Pacific Partnership and Regulatory Space"; Broude, Haftel and Thompson, "Who Cares about Regulatory Space in BITs? A Comparative International Approach"; Thompson, Broude and Haftel, "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design" Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP".

[67] See for instance: Chapter VI on *International finance and policy space* of: *UNCTAD, Global governance and policy space for development.;* Stiglitz, *Globalization and its Discontents*; Peter S. Heller, *Understanding Fiscal Space,* IMF Policy Discussion Papers Policy Discussion Paper No. 05/4 (Washington, D.C: International Monetary Fund, 2005), http://elibrary.imf.org/view/IMF003/07648-9781451975635/07648-9781451975635/07648-9781451975635.xml.

[68] Studies considering this second set of factors have highlighted the following elements: (i) recurrent cases of countries' "limited-statehood", i.e. of incomplete governance structure, where states cannot take decisions in parts of their territory or in certain policy area (see for instance: Risse, "Limited statehood: A critical perspective"); (ii) the implications of the modes of interaction between states and non-state actors on the countries' regulatory space (see for instance: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, USA, 1992); Colin Scott, "Analysing Regulatory Space: Fragmented Resources and Institutional Design," *Public law*, 2001); (iii) the positive effets of pro-poor and environment-friendly programmes on socio-economic policies in developing countries (see for instance: Abugattas, Luis, and Eva Paus. "Policy Space for a Capability-Centered Development Strategy for Latin America." In *The Political Economy of Hemispheric Integration*, 113–43. Springer, 2008.)

regulatory space pertains to the regulatory space as defined by legal determinants, *de facto* regulatory space is associated with the regulatory space that other determinants allow for.[69] Some have also make the distinction between constraints emanating from the international "exogenous" level, and those linked to the domestic "endogenous" level.[70] While constraints arising from the exogenous level are typically those resulting from the adoption of international treaties,[71] constraints emanating from the endogenous level regularly include other factors such as the organisational capacities of states, and the infrastructures peculiar to a country.[72] Overall, the first dimension along which the conceptions of regulatory space differ relates to the set of factors these definitions consider.

Second, the different understandings of regulatory space handled in the literature also diverge according to the actors considered to take part in the regulatory process. In this respect, Morgan and Yeung have identified three main categories of regulatory theories: (i) the public interest theories of regulation; (ii) the private interest theories of regulation; and (iii) the institutionalist theories of regulation.[73] While the public and the private interest theories lay the accent on public authorities and

[69] For a discussion of both forms of regulatory space, see: Jörg Mayer, "Policy Space: What, for What, and Where?," *Development Policy Review* 27, no. 4 (2009): 377--378.

[70] For a clear discussion on the distinction between these two levels of regulatory space, see: Hamwey, "Expanding national policy space for development: Why the multilateral trading system must change". Note that some scholars have challenged the strict distinction between exogenous and endogenous constraints altogether. For instance, it has been argued that international treaties are the extension of domestic decisions and constitute nothing else than the mere expression of states' autonomy. In this sense, see: Joel P. Trachtman, "Review Essay: The Antiglobalisation Paradox - Freedom to Enter into Binding International Law Is Real Freedom," *The World Economy* 36, no. 11 (2013)

[71] However, other international constraints on states' regulatory space exist. This is for example the case of market forces, non-binding international decisions (e.g. advisory opinions of the International Court of Justice (**the ICJ**), resolutions of the United Nations General Assembly (**the UNGA**)), and international political pressures.

[72] Note that legal determinants at the domestic level can also constrain states' regulatory space. It is for instance the case in federal structures where competences may be shared between the national and regional authorities. Interestingly, some studies have attempted to conceptualise the relationship between exogenous and endogenous constraints. These studies have underlined several elements, such as: (i) markets integration following from the conclusions of international economic agreements restricts policy space through a reduction of the available instruments at home and through the reduced effectiveness of these instruments; (ii) tariffs reductions consequent to international trade agreements divest countries from revenues that could be otherwise used to finance public policies, thus affecting their available resources and their capacity to provide for more elaborate welfare policies; and (iii) trade agreements allow for the harmonisation and coordination of issues in order to limit the negative externalities of policy decisions taken abroad on the effectiveness of domestic policy instruments. For a discussion of these relationships between exogenous and endogenous constraints, see: Meri Koivusalo, Ted Schrecker, and Ronald Labonté, "Globalization and Policy Space for Health and Social Determinants of Health," in *Globalization and Health: Pathways, Evidence and Policy*, ed. Labonté Ronald, Ted Schrecker, Corinne Packer, Vivien Runnels, Routledge studies in health and social welfare 4 (London [u.a.]: Routledge, 2012), 109; UNCTAD, *Global governance and policy space for development*, 47. Hamwey, "Expanding national policy space for development: Why the multilateral trading system must change"; Mayer, "Policy space: what, for what, and where?".

[73] Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge: Cambridge University Press, 2007). For a comment on Morgan and Yeung's typology of regulatory theories in the specific field of employment regulation, See: Cristina Inversi, Lucy A. Buckley, and Tony Dundon, "An Analytical Framework for Employment Regulation: Investigating the Regulatory Space," *Employee Relations* 39, no. 3 (2017).

private actors respectively, as the actors in charge of the regulatory process, institutionalist theories consider that the regulatory process is jointly conducted by public and private actors. In accordance with this classification, certain studies on regulatory space have put the emphasis on public authorities and have looked at their ability to regulate in specific policy domains. This is typically the case for the studies on trade and investment agreements' effects on countries' ability to adopt the regulation they see fit.[74] Other studies have focused on the role of private actors in the regulatory process. For example, some research has analysed how firms and transnational corporations set private regulatory systems and other voluntary Corporate Social Responsibility (**CSR**) standards.[75] Finally, still other studies have highlighted how complex networks of state and non-state actors influence regulatory outcomes.[76] In this regard, it is interesting to note that the concept of regulatory space was first coined to represent the situation in which state and non-state actors involved in the regulatory process interact and, indeed, share a common regulatory space.[77] Overall, the second dimension along which the various conceptions of regulatory space diverge relates to the actors considered to take part in the regulatory process.

Thus, the different understandings of regulatory space cover a variety of factors and highlight different actors. This diversity is well captured in the 2014 United Nation Conference on Trade and Development's (**the UNCTAD**) report on *Global Governance and Policy Space for Development* which states,

[74] Studies concerned with trade and investment agreements' impact on states' regulatory space broadly focus on the legal leeway these instruments leave to public authorities. See for instance : Suzanne A. Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements," *Journal of International Economic Law* 13, no. 4 (2010); Wagner, "Regulatory space in international trade law and international investment law"; Spears, "The quest for policy space in a new generation of international investment agreements".

[75] In their typology of employment regulation, Inversi et al. qualify these norms as "unilateral-rules". See, Inversi, Buckley and Dundon, "An analytical framework for employment regulation: investigating the regulatory space".

[76] See for instance: L. Hancher and M. Moran, "Organizing Regulatory Space," in *A Reader on Regulation*, ed. Robert Baldwin, Colin Scott and Christopher Hood, Oxford readings in socio-legal studies (Oxford: Oxford University Press, 1998); Colin Scott, "Analysing Regulatory Space: Fragmented Resources and Institutional Design," *Public law*, 2001; Inversi, Buckley and Dundon, "An analytical framework for employment regulation: investigating the regulatory space". These studies have focused on the diversity of players taking part in the regulatory process, the type of relationship they entertain and how this contributes to shaping public policies. Scott writes in this regard, 'The regulatory space approach draws our attention to the multiplicity of actors who do, or have the potential to, participate in public policy making, and the dispersed nature of public policy power because of the fragmented possession of key resources.' Scott, "Analysing regulatory space: fragmented resources and institutional design" (The COVID 19-pandemy did not allow me to retrieve the journal references of this quotation as the FU library was closed, and the journal only existed in print copy. Therefore, I join the URL of the website on which I downloaded the pdf of this article: https://researchrepository.ucd.ie/handle/10197/6785, p. 10).

[77] See: Hancher and Moran, "Organizing Regulatory Space".

> **'[…] while national policies are obviously affected by the extent of policy space available, as determined by the external context, they are also − and still fundamentally − the result of domestic forces. These include, among others, politics and the political economy that determine the power and voice of different groups in society, domestic expertise and capacities, the nature of institutions and enforcement agencies, the structure of the polity (e.g. degree of federalism), and prevailing macroeconomic conditions. Even when policymakers have full sovereign command over policy instruments, they may not be able to control specific policy targets effectively.'**[78]

On this backdrop, the coexistence in the scientific literature of narrow and broader understandings of regulatory space may be as much the consequence of deliberate choices pertaining to the studies' research design, as the upshot of dogmatic positions vis-à-vis the constituting features of regulatory space or, more trivially, the result of a lack of awareness of the panoply of determinants defining countries' regulatory space. Before this panoply of elements characterising regulatory space in general, it is the question of what determinants are most relevant in the definition of regulatory space for labour law in particular.

2.1.2. The determinants of regulatory space for labour law

The existing conceptions of regulatory space diverge according to the factors and the actors they consider. The present section draws on this observation and undertakes to define regulatory space for labour law more specifically.[79] To do so, it discusses the determinants that influence the making and the transformation of labour law at the domestic level. This discussion is an essential prerequisite to gain a clear view on the features influencing labour law upon which labour provisions in EU trade agreements may have implications. In this regard, five elements have been identified in the literature as most decisive for the making of labour law: (1) the labour market's characteristics; (2) the institutional framework in place; (3) the available resources; (4) the applicable international commitments; and (5) the prevailing ideology.[80] While this set of determinants casts a wide net on the factors influencing the making of labour law, the importance and the role plaid by each of them may vary across legal cultures.

---

[78] UNCTAD, *Global governance and policy space for development*, 47.. Note that policy space and regulatory space are understood as synonyms.

[79] This dissertation handles the terms "labour law" in a generic fashion to cover all forms of labour norms edited by the legislative and the executive powers, as well as where relevant by social partners.

[80] Note that there are few explicitly analysing labour law at the hand of the concept of regulatory space altogether. Examples of such studies are: Inversi, Buckley and Dundon, "An analytical framework for employment regulation: investigating the regulatory space"; Tony Dundon et al., "Employer Occupation of Regulatory Space of the Employee Information and Consultation (I&C) Directive in Liberal Market Economies," *Work, employment and society* 28, no. 1 (2014).. Both works handle a narrow understanding of regulatory space, where this concept refers to a "space of interaction" between state and non-state actors (cfr. the institutionalist theories of regulation, see *Section 2.1.1*.).

First, the orthodox approach regards a country's labour law as closely linked to its labour market's characteristics – i.e. the supply and demand of labour in a given market.[81] According to this approach, labour law constitutes an attempt to correct labour market failures. For instance, regulations concerned with workers organisations and collective bargaining are meant to address collective action problems; regulations setting a minimum wage are seen as a correction to bargaining power inequality; active employment policies are considered to tackle unemployment in certain segments of the population; regulations establishing consultative institutions are understood to respond to issues connected to information asymmetry.[82] Thus, the characteristics of a given labour market are considered to constitute a key determinant for the making of labour law at the domestic level. Yet, this orthodox understanding has been increasingly criticised for not doing justice to the complexities of the regulatory process in matters of labour law and other factors have been studied.[83]

Second, the institutional environment has also been progressively recognised as an important determinant of labour law. To be sure, the gradual involvement of the social partners in the design of labour legislation has had repercussions both, on the procedure for the adoption of labour law as well as on its substance.[84] Studies have highlighted that social partners' participation and the resulting (power-)relationship between state and non-state actors influence the labour law-making procedure.[85] Unsurprisingly, the specific role played by employees organisations and CSOs has caught much

[81] For a discussion of labour law as a response to market failures, see: Alan Hyde, "What Is Labour Law?," in *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, ed. Brian Langille and Guy Davidov (Oxford, Portland, OR: Hart Publishing, 2006); Hugh Collins, "Justifications and Techniques of Legal Regulation of the Employment Relation," in *Legal Regulation of the Employment Relation*, ed. Hugh Collins, Paul L. Davies and Roger Rideout (Kluwer law international, 2000).

[82] For examples on how labour law is generally conceived as responding to labour market failures, see: Judy Fudge, "Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law," in Davidov; Langille, *The Idea of Labour Law*.. For a discussion of how labour provisions in trade agreements relate to labour market imperfections, see: Ludo Cuyvers, "The Sustainable Development Clauses in Free Trade Agreements of the EU with Asian Countries: Perspectives for ASEAN?," *Journal of Contemporary European Studies* 22, no. 4 (2014).

[83] For a critique of the orthodox approach to labour law, see: Inversi, Buckley and Dundon, "An analytical framework for employment regulation: investigating the regulatory space"; Fudge, "Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law"

[84] Bob Hepple, "Factors Influencing the Making and Transformation of Labour Law in Europe," in Davidov; Langille, *The Idea of Labour Law*.. In this chapter, Hepple presents the findings of an ambitious study on the making and the transformation of labour law. This study has identified four pivotal factors: (1) workers' movements and civil society; (2) economic development; (3) the 'nature' of the state and; (4) ideology. Hepple's chapter is based on the work of the European Comparative Labour Law group. This group analysed the labour legislation of European states over the 20th century. Their research has been compiled in two edited volumes: Bob A. Hepple, ed., *The Making of Labour Law in Europe*: *A Comparative Study of Nine Countries up to 1945,* Studies in labour and social law (London: Mansell, 1986); Hepple, Bob, Bruno Veneziani, ed., *The Transformation of Labour Law in Europe A Comparative Study of 15 Countries 1945–2004* (Hart Publishing, 2009).

[85] Inversi, Buckley and Dundon, "An analytical framework for employment regulation: investigating the regulatory space," 294. These authors champion an understanding of regulatory space for labour law that encompasses both labour-market and institutional determinants.

attention. In this regard, several elements have been pointed to as having implications for the substance of labour law. This includes the type of relationship the state and trade unions entertain; the de-politization of workers representations; and the merger of trade unions at the national and at the international levels.[86] The common observation is that state and non-state actors have different resources and different weights in the labour law-making process, and that this influences regulatory outcomes.[87] Finally, scholars have also attempted to quantitatively assess the relationship between domestic institutions and labour law. For instance, it has been shown that the level of development of the domestic institutions is positively linked with the level of workers' rights protection.[88] Overall, these various studies underline both the gradual involvement of new actors in the labour law-making process and the relevance of the institutional environment as a key determinant for the making of labour law.

Third, the available resources constitute another factor determining labour law. Indeed, advanced regimes of labour law not only require the financial resources necessary to sustain more costly social policies,[89] they also call for resources in terms of appropriate expertise and trained working force for the design, the monitoring and the enforcement of these policies. In this regard, it has been shown that the dramatic improvement of the working conditions over the past 150 years in western Europe went hand in hand with the economic development of countries,[90] and that different periods of

[86] For a discussion of the influence of these elements on labour law-making, see: Hepple, "Factors Influencing the Making and Transformation of Labour Law in Europe".

[87] See: Hancher and Moran, "Organizing Regulatory Space"; Scott, "Analysing regulatory space: fragmented resources and institutional design"; Inversi, Buckley and Dundon, "An analytical framework for employment regulation: investigating the regulatory space".

[88] Layna Mosley and Saika Uno, "Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights," *Comparative Political Studies* 40, no. 8 (2007). The authors find that a country's level of democracy is a strong correlate of labour rights. They explain that by the fact that more democratic regimes offer more opportunities for workers to demand protection.

[89] The costs associated with higher levels of protection lie at the basis of studies on the so-called "race to the bottom in labour standards". According to the race to the bottom-hypothesis, the protection of labour rights entails certain costs which countries may prefer to cut in order to improve their overall competitiveness. As a consequence, countries are likely to be driven in a downwards dynamic in labour rights protection, hence the name *race to the bottom*. For a clear explanation of the race to the bottom-hypothesis see: David Charny, "Regulatory Competition and the Global Coordination of Labor Standards," *Journal of International Economic Law* 3, no. 2 (2000); Bagwell, Mavroidis and Staiger, "It's a question of market access". Note that some authors have challenged the assumption that higher levels of labour rights protection necessarily entail higher costs. On this topic, see: Charny, "Regulatory competition and the global coordination of labor standards"; Hyde, "The International Labor Organization in the Stag Hunt for Global Labor Rights", p. 164.

[90] Michael Huberman, *Odd Couple*: *International Trade and Labor Standards in History* (Yale University Press, 2012).. The author assess the evolution of the following labour rights over the 20th century: the reduction of working hours, the reduction in child labour, the progressive establishment of working holiday schemes, the reduction in forced labour, etc. On the same topic, see also: Robert J. Flanagan, *Globalization and Labor Conditions*: *Working Conditions and Worker Rights in a Global Economy* (Oxford University Press, 2006).

economic development were characterised by different evolutions of the labour law regime.[91] In fact, the link between a country's available resources and the protection of (labour) rights also lies at the basis of the obligation included in article 2(1) of the 1966 International Covenant on Economic Social and Cultural Rights (**the ICESCR**) according to which '[each] State Party to the present Covenant undertakes to take steps […] *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant […].'[92] As such, this commitment recognises that the implementation of the rights included in the Covenant[93] requires a certain amount of resources and, therefore, links the "scope" of the obligations it contains to the countries' available resources. In the same line, several studies have highlighted that the promotion of labour rights largely relies on the availability of the sufficient *capacities* by the concerned stakeholders.[94] For instance, it has been shown that governments' financial constrains often impede their capacities to enforce domestic law.[95] Moreover, the capacities in question are not only those of

[91] For instance, a parallel has been drawn between successive periods of the economic development, such as the industrial revolution, the adoption of the Fordist model of production, the post Fordist service-based and information-technology-based society on the one hand, and the creation as well as the adaptation of the labour law regimes to these developments on the other hand. See: Hepple, "Factors Influencing the Making and Transformation of Labour Law in Europe," 36..

[92] Emphasis added by the author. Art. 2 of the ICESCR. For a discussion of the meaning of the terms 'to the maximum of its available resources', see: Olivier de Schutter, *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar, 2013).. With respect to the terms "available resources" and "minimum obligations", point 10 of the *Maastricht guidelines on violations of economic, social and cultural rights* provides that '[in] many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.' In the same vein, the 1998 ILO Declaration states that '[the international labour conference recalls]: (a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of *their resources* and fully in line with their specific circumstances;' Emphasis added by the author. 1998 ILO DECLARATION pt. 1(a)'. See: https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (last consulted on 04/07/2020). Finally, article 22 of the United Nations Universal Declaration for Human Rights (**the UNUDHR**) adopted in 1948 already links the social, economic and cultural rights to "the organization and the resources of each State". It provides indeed that '[everyone], as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.

[93] See: art. 6 of the ICESCR which recognises the right to work; art. 7 of the ICESCR which recognises the right to just and favourable conditions of work; and art. 8 of the ICESCR which recognises trade unions-related rights.

[94] See for instance: Jonas I. AISSI, Rafael PEELS, and Daniel SAMAAN, "Evaluating the Effectiveness of Labour Provisions in Trade Agreements: An Analytical and Methodological Framework," *International Labour Review* 157, no. 4 (2018), https://doi.org/10.1111/ilr.12125; Franz C. Ebert, "Labour Provisions in EU Trade Agreements: What Potential for Channelling Labour Standards-Related Capacity Building?," *International Labour Review* 155, no. 3 (2016), https://doi.org/10.1111/j.1564-913X.2015.00036.x.

[95] On this topic, *Bourgeois et al.* argue that 'the labour laws and constitutions of the (central American) countries are comparable to ILO core labour standards but governments have lacked the capacity to enforce their labour

the states but also those of the social partners and other CSOs. Indeed, these organisations need sufficient resources in order to meaningfully engage in the labour law making, monitoring and enforcement process.

Fourth, as the example of the ICESCR points at, international commitments constitute a fourth factor determining labour law at the domestic level. A relatively important number of international treaties define the contracting states' available margin of action to legislate and implement regulations in labour-related matters. Next to the ICESCR, it is also the case of the numerous Conventions adopted in the framework of the International Labour Organisation (**the ILO**);[96] of the Convention on the Right of the Child;[97] of the Convention on the Elimination of all Forms of Discrimination against Women (**the CEDAW**),[98] amongst others.[99] When adopting these different treaties, states commit to achieve certain regulatory outcomes and/or to undertake determined conducts in matters of labour rights protection. The effects of international commitments on states' labour law making activity are complex however. Indeed, while international commitments can be considered to set rules limiting countries' regulatory space, these rules have also as consequence to coordinate policies, thus protecting states' regulatory space from the negative externalities of political decisions adopted in other countries. As a commentator has put it 'multilateral rules and disciplines enable a coordinated response to cross-border disturbances and prevent policymakers in countries that can have a disproportionately large impact on the evolution of other economies from adopting discriminatory or beggar-thy-neighbour policies […].'[100] Thus, international treaties can be considered to frame states' labour law making

laws due to financial constraints'. Jacques Bourgeois, Kamala Dawar, and Simon J. Evenett, "A Comparative Analysis of Selected Provisions in Free Trade Agreements," *DG Trade, Brussels: European Commission*, 2007, 34..

[96] The Conventions are binding upon the ratifying Parties. These Conventions include the Core Conventions, the Governance Conventions and other up-to-date Conventions. See the website of the ILO: https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (last consulted on 12/06/2020).

[97] Art. 32 of this Convention recognises the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

[98] Art. 11 of the CEDAW provides for an obligation to eliminate discrimination against women in the field of employment.

[99] For a discussion of various international treaties protecting labour rights, see: Christine Kaufmann, *Globalisation and Labour Rights*: *The Conflict Between Core Labour Rights and International Economic Law* (Bloomsbury Publishing, 2007).

[100] Mayer, "Policy space: what, for what, and where?," 377.. Note that factors pertaining to international economics can also affect the available regulatory space in matters of labour rights protection. Indeed, in a world with varying degrees of market integration, social policies adopted at home are often decided with an eye on the macro socio-economic context. The Global Competitiveness Report (GCR) published annually by the World Economic Forum (WEF) offers a telling example of how economic actors apprehend the role of standards in the global economy and of how regulatory competition takes place indeed. One of the main features of the GCR is its consolidated ranking of countries according to several key aspects. Among these aspects, labour market indicators, such as *redundancy costs*, *hiring and firing practices*, *cooperation in labour-employer relations*, *flexibility of wage determination* etc. figure prominently. See the website of the WEF:

activity both by setting rules to which countries have (decided) to abide to, and by offering tools of policy coordination to limit potential negative externalities.

Fifth, the prevailing ideology has also been identified as a determining factor for the making of labour law. Indeed, socialist, social democrat, liberal, and neoliberal ideologies, among others, handle different approaches with respect to the role that should be given to labour law. For instance, whether collective rights should be acknowledged or not; what function to grant to social concertation; and how to articulate the protection of workers with labour market considerations, are issues that are addressed differently under these various world views. As some authors argue, the liberal constitutional state of the industrial revolution was prone to laissez-faire ideas and it is through social protests that labour law was first established. Then, labour law changed with the welfare state conceptions on economic growth, rising levels of employment and of living standards. Most recently, the neo-liberal state champions the disengagement of public authorities from the market, mistrusts the regulation of labour relations through collective procedure and adopts a more minimalist conception of the role of labour law altogether.[101] Thus, the prevailing ideology can be considered to set the intellectual framework within which labour law making is discussed and designed.

Overall, the answer to the question of which factors and actors influence the making of labour law at the domestic level includes five elements: (1) the labour market-determinant; (2) the institutional determinant; (3) the resources-determinant; (4) the legal determinant; and (5) the ideology-determinant. The effects of each determinant on regulatory outcomes are not always easy to single out and are often difficult to systematise. For example, while a strict regime of dismissal in a certain country may be linked to the presence of a strong workers' representation, a similar regime may exist in other countries with relatively weaker trade unions.[102] On the backdrop of the review of the defining characteristics of regulatory space in general and of regulatory space for labour law in particular, the

http://reports.weforum.org/global-competitiveness-report-2018/competitiveness-rankings/#series=GCI4.C.08.01 (retrieved on 9 July 2019). See also: Hirst, Paul, Grahame Thompson, and Simon Bromley. *Globalization in Question: The International Economy and the Possibilities of Governance, Fully Revised and Updated*. Cambridge: Thompson Polity Press, 2009. 226. UNCTAD, *Global governance and policy space for development*, 43.

[101] Hepple, "Factors Influencing the Making and Transformation of Labour Law in Europe," 37–39. For a contestation of this understanding of neoliberalism see: Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2020).

[102] For a discussion of how the 2007-2008 financial crisis has affected EU Member States' labour law regimes see: Isabelle Schömann, "Réformes Nationales Du Droit Du Travail En Temps De Crise: Bilan Alarmant Pour Les Droits Fondamentaux Et La Démocratie En Europe," *Revue Interventions économiques. Papers in Political Economy*, no. 52 (2015).

next section undertakes to settle the definition of regulatory space for labour law that will be further adopted in this dissertation.

2.1.3. The definition of regulatory space for labour law handled in this dissertation

The definition of regulatory space handled in this dissertation is both informed by the different determinants of regulatory space for labour law identified in the previous section, and guided by the research question's attention for the implications of labour provisions for the Parties' regulatory space. Therefore, this dissertation adopts a definition of regulatory space for labour law that considers the various factors and actors relevant for the labour law-making process. Thus, when analysing how the labour provisions shape countries' regulatory space for labour law, this dissertation not only looks at what countries must and must not do under the relevant law – i.e. the legal determinant –, but also at the implications of the labour provisions for the other four determinants of labour law. Ultimately, this approach allows for an assessment of labour provisions that is sensitive to the multifactorial nature of labour law. This treatment has the advantage to provide for a comprehensive and yet nuanced account of the different ways in which EU FTAs can shape states' regulatory space.

On this backdrop, regulatory space for labour law is defined in this dissertation as the state's margin of action when legislating and implementing labour regulation, where this margin of action is considered in light of the determinants specific to the making of labour law, namely: (1) the labour market-determinant; (2) the institutional determinant; (3) the resources-determinant; (4) the legal determinant; and (5) the ideology-determinant.

While the set of determinants identified in this research casts a wide net on the factors influencing the making of labour law, the importance and the role plaid by each of them may vary across legal cultures. The plurality of regimes that results from these different configurations raises the question of whether one of them should be considered better than the others and should therefore be universally striven for. Given the diversity of legal cultures and of philosophical conceptions of a "good society," this dissertation does not contend that a certain regime of labour law is superior and should consequently be adopted and applied everywhere. Instead, it aims to define the optimal framework – i.e. the optimal regulatory space for labour law – within which each regulator should adopt the labour laws that correspond best to the domestic preferences. This framework is sketched by a specific understanding of how the determinants of labour law should be customised, thus leading to the definition of normative targets for each determinant. Thus, rather than putting forward a specific regime of labour law, this work considers that it is more appropriate to identify the optimal framework within which

each regulator can define its preferred legislation. The following paragraphs present the dissertation's normative position with respect to each determinant of labour law.

First, with respect to the labour market-determinant, this dissertation considers in accordance with the 2006 UN Declaration that 'an employment strategy that aims to promote full, freely chosen and productive employment, […] should constitute a fundamental component of any development strategy. […] Macroeconomic policies should, inter alia, support employment creation.'[103] In other words, this dissertation adopts the view that countries' employment strategies should aim at *full employment*. Thus, countries should take appropriate measures in order to address the existing failures in their labour market and to strive towards full employment.

Second, regarding the institutional determinant, various arrangements of the institutional setting are possible. Before this diversity of arrangements, this dissertation considers *tripartism* essential. More specifically, tripartism is understood as a cooperation process, where state authorities, representatives of the employers and representatives of the workers jointly engage in consultation and in co-decision.[104] Thus, by involving the parties directly concerned in the labour relationship, tripartism guarantees labour law's democratic legitimacy. In this regard, seasoned scholars have claimed that '[the] defence of tripartism […] is not only in terms of outcome but also in terms of process. An opportunity for participation by stakeholders in decisions over matters that affect their lives is a democratic good independent of any improved outcomes that follow from it.'[105] Accordingly, tripartism has been adopted by the ILO both for internal procedures as well as for the adoption of its Conventions and Resolutions.[106] Most importantly, tripartism has been endorsed in one of the so-called "ILO Governance (priority) Conventions" which has been ratified by a remarkably large number of countries.[107] Hence, this dissertation considers that countries need to take appropriate measures in order to guarantee and enhance tripartism.

---

[103] See, pt. 6 of the 2006 UN Declaration.

[104] The understanding of tripartism handled in this dissertation remains deliberately broad so as to leave countries some margin of appreciation to adjust tripartism to their domestic preferences. This goes along with the ILO conception of tripartism according to which 'the ILO supervisory bodies do not prescribe any particular form or level of collective bargaining, which should be a matter of choice for the bargaining parties' Tham, Joo-Cheong and Ewing, K. D., "Labour Clauses in the TPP and TTIP: A Comparison Without a Difference?," *Melbourne Journal of International Law* 17, no. 2 (2016): 31, Available at SSRN: https://ssrn.com/abstract=2892982..

[105] Ayres and Braithwaite, *Responsive regulation: Transcending the deregulation debate*, 82..

[106] In her book *Qu'est-ce qu'une bonne représentation?* Louis asks the question 'how does a good representation look like?' In her answer to this question the tripartite approach adopted by the ILO is key. See: Marieke Louis, *Qu'est-Ce Qu'une Bonne Représentation? L'organisation Internationale Du Travail De 1919 À Nos Jours* (Dalloz, 2016).

[107] More than 150 ILO Member States have ratified Convention C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). As such Convention C144 figures among the most ratified ILO Conventions. See the website of the ILO:

Third, with respect to the resources-determinant, the principle set in article 2 (1) of the ICESCR is used as a guideline. Accordingly, states have to undertake steps *to the maximum of their available resources* to ensure the promotion, the monitoring and the enforcement of their domestic labour regulation. More specifically, the design and the implementation of labour law requires a tremendous amount of resources be them financial, relating to expertise, and trained manpower, amongst others. This implies that, where necessary, states must increase their resources to improve the regime of labour rights protection and to address failures in labour rights implementation. This also includes providing social partners and CSOs with appropriate support. Thus, this dissertation considers that countries must take appropriate measures in order to guarantee and enhance available resources for all actors involved in the labour law making, monitoring and enforcement process.

Fourth, as for the legal determinant, this dissertation endorses the "Sao Paulo Consensus" adopted at eleventh conference of the UNCTAD in 2004[108] and later reaffirmed in the 2006 UN Declaration.[109] Under the *Sao Paulo Consensus*, it is for each country to define, in accordance with its needs and circumstances, the balance between the benefits of accepting international commitments and the constraints posed by the loss of sovereignty.[110] Thus, countries determination of the appropriate level

https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312289 (last consulted on 20/06/2020). Note that next to the eight ILO Fundamental Conventions recognising the most important labour standards, the four ILO Governance (priority) Conventions define basic governance principles for the labour law making process. These four Conventions are: C081 - Labour Inspection Convention, 1947 (No. 81) (+ P081 - Protocol of 1995 to the Labour Inspection Convention, 1947); C122 - Employment Policy Convention, 1964 (No. 122); C129 - Labour Inspection (Agriculture) Convention, 1969 (No. 129); C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). See: https://www.ilo.org/dyn/normlex/en/f?p=1000:12000:::NO (last consulted on 20/06/2020).

[108] The UNCTAD counts 192 members. The declarations concluding each conference (organised every four years) are adopted by consensus. These declarations are political instruments and are not formally binding upon the UNCTAD members.

[109] While the 2006 UN Declaration is not formally binding upon the UN Member States, it can be considered as an authoritative reference for the definition of the full and productive employment and decent work for all standards.

[110] In this respect both instruments state that,

> **'[…] the increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, that is to say the scope for domestic policies, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations. *It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space*. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for an appropriate balance between national policy space and international disciplines and commitments.'**

Emphasis added by the author. Paragraph 8 of the Sao Paulo Consensus adopted at UNCTAD XI held in Sao Paulo 13-18 June 2004 and paragraph 23 of the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work. With respect to the trade-off between the benefits of accepting international

of regulatory space should be guided by their needs and circumstances. Moreover, this dissertation considers that the margin of discretion recognised to countries by the *Sao Paulo Consensus* should be limited with respect to the core labour standards identified in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (**the 1998 ILO Declaration**).[111] Indeed, these standards are inherent to human beings' dignity and constitute the equal and inalienable rights of all members of the human family. As such they should be guaranteed anytime and anywhere.[112] Finally, this dissertation also contends that, within the limits set by their needs and circumstances, countries should attempt to improve their levels of social protection. On this backdrop, the normative position adopted in this research with respect to the legal determinant includes three elements: (i) it is to each country, in accordance with its needs and circumstances, to strike the right balance between national regulatory space and international disciplines and commitments ; (ii) countries' margin of discretion should be limited with respect to the core labour standards ; and (iii) within the limits set by their needs and circumstances, countries should attempt to improve their levels of protection.

Finally, regarding the ideology-determinant, this dissertation is sympathetic to socio-liberal views. Accordingly, it recognises that under certain conditions[113] international trade may generate substantial welfare gains. On this backdrop, it considers that it is countries' moral and (in certain cases, also) legal responsibility both to channel these gains to the benefits of those most in need, and to address the negative externalities of international trade.[114]

---

commitments and the constraints posed by the loss of sovereignty, the 2006 UN Declaration further specifies that 'in the context of globalization, countries need to devise policies that enable them to pursue both economic efficiency and social security and develop systems of social protection with broader and effective coverage, *which should be guided by each country's needs and circumstances* […].' (Emphasis added by the author). Pt. 19 of the 2006 UN Declaration.

[111] The core labour standards included in the 1998 ILO Declaration cover the following domains: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. For more information with respect to these standards, see: https://www.ilo.org/declaration/lang--en/index.htm (last consulted on 20/06/2020).

[112] In this regard the 1998 ILO Declaration recalls that 'these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.' Pt. 1 (b) of the1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.

[113] For a discussion of this technical matter see: Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, 62–63.

[114] For an interesting discussion of the general role of FTAs, see: Jagdish Bhagwati, *In Defense of Globalization* (Oxford University Press, 2004).. In this book, Bhagwati argues that economic globalisation has a strong human face. While I share the author's general observations on the effects of trade liberalisation for the livelihood of billions of people and on the general improvement in working conditions, I do not embrace his view that international agreements should not mingle with labour standards and other social issues. In fact, international trade has proven to have negative externalities for different policy domains, including social, environmental, health, etc. policies and these negative externalities need to be addressed.

Overall, the normative references adopted in this dissertation give shape to the optimal framework within which countries should adopt their preferred regime of labour law. The strength of the references embraced in this work surely lie in them being recognised in widely adopted international instruments. *Figure 1* below offers a conceptual representation of possible variations in countries' regulatory space according to the normative references defined for the different determinants of labour law.

FIGURE 1: CONCEPTUAL REPRESENTATION OF THE REGULATORY SPACE FOR LABOUR LAW

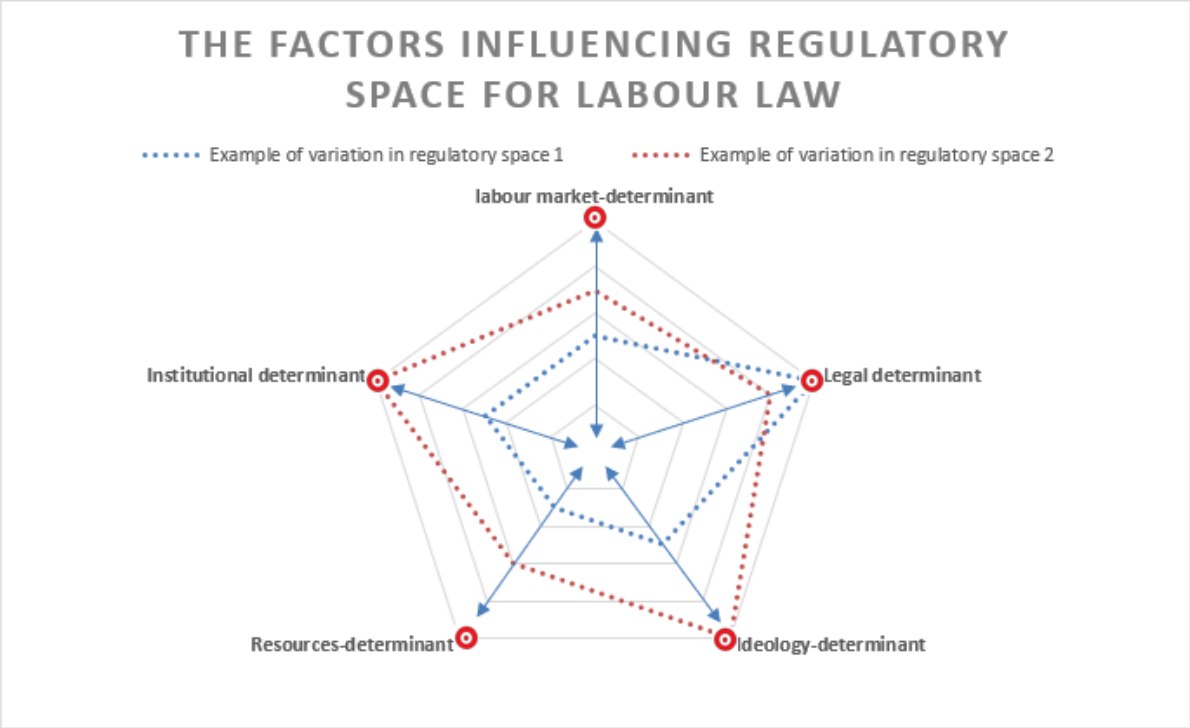


Figure 1 displays countries' regulatory space for labour law at the hand of pentagonal shapes where each corner represents a different determinant. The localisation of these corners occurs according to a simple rule : the closer a policy measure to the normative references identified in this research, the closer the corresponding corners to the normative targets represented on the figure. Thus, corners move to the outside whenever a policy measure is adopted which positively responds to the normative targets. At the end, a pentagon's growing surface points to a country's better actualisation of the determinants of labour law according to the corresponding normative references. For instance, if a country decides to increase its available resources for the enforcement of labour law through the hiring of additional inspectors, this entails a slide of the resources-determinant corner to the outside, thus indicating an increase in its regulatory space, all other things being equal. The localisation of the

corners according to a country's actual implementation of the determinants of labour law ultimately gives shape to a pentagon whose surface represents the country's regulatory space for labour law.

With respect to the analysis of labour provisions undertaken in this dissertation, these provisions may potentially have three types of effects on states' regulatory space for labour law. First, labour provisions can have as consequence to *not* reshape the Parties' regulatory space. This would be represented in a status quo of the pentagon. Second, labour provisions can entail the reshaping of the Parties' regulatory space in a negative way. This would be represented by an average slide of the corners towards the inside and the consequent shrinking of the pentagon surface. Third, labour provisions can have as result to reshape the Parties' regulatory space in a positive way. This would be represented by an average move of the corners towards the outside and the consequent growth of the pentagon surface. Thus, the pentagon approach to regulatory space for labour law makes clear that labour provisions should strive for an increase in the regulatory space in the form of an adjustment of each determinant towards the normative references defined in this work. Visually, this would correspond to corners moving to the outside.

Finally, two important caveats have to be made. First, the pentagon approach does *not* allow for a numeric quantification of the variations in regulatory space. Rather, it is presented in order for the reader to have a clearer understanding of the "mechanics" of regulatory space handled in this work. Thus, this dissertation does *not* ambition to measure the effects of labour provisions on regulatory space for labour law. Instead, it aims to highlight their potential implications in terms of increase, decrease or status quo of the Parties' regulatory space. Second, the pentagon approach displays an understanding of regulatory space that is very specific and indeed diverges from the most widespread conception of regulatory space. The latter has generally three characteristics: (i) it is determined by the sole legal determinant; (ii) more regulatory space is means more freedom for the state to regulate ; and (iii) it is assumed that more freedom for the state to regulate is a "positive development." The multifactorial approach adopted in this dissertation and represented at the hand of the pentagon approach offers a more comprehensive and more nuanced understanding of regulatory space for labour law. According to this understanding, regulatory space is something more complex than the mere *legal* freedom to regulate and *more* regulatory space means a *better* configuration of the space within which labour regulation is adopted.[115] Ultimately, the pentagon approach should offer to the

[115] Ultimately, this approach shows that regulatory space should not only be characterised by a "surface" which can be quantified, but also by a certain quality of its "occupation". For a discussion where regulatory space is handled in terms of surface see : Hamwey, "Expanding national policy space for development: Why the multilateral trading system must change". The accent on regulatory space's *occupation* corresponds to the approach privileged by the institutionalist theories of regulation. According to these theories, the relationship

reader a conception of regulatory space for labour law that accounts for the complexity of this specific branch of law, and that offers a practical way to understand the various channels by which labour provisions can have implications on states' regulatory space.

To conclude, rather than to put forward a specific regime of labour law, this work considers that it is more appropriate to identify the optimal framework within which each regulator can define its preferred legislation. The optimal framework defined in this dissertation is one where full employment, tripartism, the availability of relevant resources, the protection of minimum standards and attempts to improve the current levels of protection, as well as policies addressing the negative externalities of international trade are guaranteed. This ideal framework amounts to a political system that would not have much to envy to Thomas More's island of *Utopia*. Ultimately, it is the authorities' responsibility to modify their socio-economic system according to this optimal framework. The actual configuration they adopt determines the space within which regulators can choose their preferred regulatory outcomes. Overall, the identification of five determinants as forming the regulatory space for labour law and of normative references linked to each of these determinants leads to a reformulation of the research question in the following two questions :

> How do the labour provisions in EU FTAs address the determinants of labour law? And, how do labour provisions' implications for the determinants of labour law correspond to the normative references defined in this research?

Assessing labour provisions in EU FTAs on the basis of whether or not they address the determinants of labour law, let alone in a manner that conforms the identified normative references, does not entirely do justice to the EU, however. To be fair, this assessment must be accompanied by a clarification of the Union's competences in matters of labour rights. Only then can we gain a better understanding of the extent to which the EU can address these determinants altogether.

---

between relevant stakeholder is key to understand regulatory outcomes. As the "mothers" of the concept of regulatory space put it, '[…] precisely because it is a space it is available for occupation. […] [Because] it is a space it can be unevenly divided between actors: there will, in other words, be major and minor participants in the regulatory process'. Hancher and Moran, "Organizing Regulatory Space," 153. In the same vein, Inversi et al. state that '[the] space-occupancy can be unevenly allocated between the parties, according to the existing power relations and mobilisation of resources at different (transnational, national, sectoral or workplace) levels.' (references omitted), Inversi, Buckley and Dundon, "An analytical framework for employment regulation: investigating the regulatory space," 294. See also: Scott, "Analysing regulatory space: fragmented resources and institutional design".

2.2. Definition of the distribution of competences between the EU and its Member States for labour-related matters in trade agreements

To fully grasp how labour provisions in EU trade agreements can shape countries' regulatory space for labour law, it is crucial to have a clear understanding of the distribution of competences between the EU and its Member States in matters of labour policies. Indeed, the distribution of competences is likely to have implications for the EU capacity to negotiate labour provisions in trade agreements with other countries. Therefore, this section aims to shed light on the EU fundamental treaties distribution rules in matters of labour policies. To this end, it first distinguishes between the internal and the external division of competences between the EU and its Member States (*Section 2.2.1*.). As we will see, much confusion on the distribution of competences relates to the fact that there is no perfect parallelism between the internal and external division of competences, so that a policy matter may fall in different categories of competences depending on whether it is treated internally or in an international agreement. Then, it reviews the EU competences for labour-related matters in its preferential trade agreements more specifically (*Section 2.2.2*.). As we will see, recent case law of the Court of Justice of the European Union (**the CJEU**) has brought important clarifications in this regard. Finally, it discusses the implications of the divisions of competences for the design of labour provisions in EU trade agreements (*Section 2.2.3*.). This discussion highlights that, depending on their design, labour provisions may fall within different categories of competences. Furthermore, it shows that the procedure for the adoption of treaties is decisive for the design of labour provisions. Overall, the second analytical clarification undertaken in this chapter pertains to the definition of the EU's competences for labour law.

2.2.1. The internal and external division of competences

The question of the division of competences with respect to labour rights protection in EU trade agreements is far from evident. Indeed, the fundamental treaties, setting the rules for the distribution of competences between the EU and its Member States, allow for diverging interpretations in this respect.[116] To be sure, one can consider that these different interpretations partly result from the fact

[116] As highlighted by divergences between the positions adopted by seasoned commentators and *Opinion 2/15* of the CJEU the question of whether labour provisions in EU FTAs fall under the EU exclusive competence or the competences shared between the EU and its Member States was rather unclear. Indeed, in her Opinion, *AG Sharpston* considered that some of the labour provisions included in the EU-Singapore FTA fall under the shared competences. See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, para. 570. In the same vein, Bartels writes, 'It is envisaged that those parts of the agreement within EU competence will be provisionally applied once these parts of the agreement are approved by the European Parliament (Art 30.7.3 CETA). *However, these parts do not include those discussed in (the Trade and Sustainable Development chapter), which almost certainly will need to be ratified by national parliament*s.' (emphasis added by the author) In: Lorand Bartels, "Human rights, labour standards and environmental standards in CETA," 2017 (fn. 2). However, as we will see, *Opinion 2/15* of the CJEU eventually defined that these labour provisions fall under the EU exclusive competences. For an interesting discussion of the distribution of

that the *internal division of competences* – i.e. the distribution of competences between the EU and its Member States for policy matters internal to the EU market – does not fully correspond to the *external division of competences* – i.e. the distribution of competences for the conclusion of international agreements. The lack of perfect parallelism between the internal and the external division of competences implies that a policy matter may fall in different categories of competences depending on whether it is subject to internal or external treatment. [117]

With respect to the internal division of competences, article 4(2)(b) of the Treaty on the Functioning of the European Union (**the TFEU**) provides that social policy, for the aspects defined in the Treaty, belongs to the competences shared between the EU and its Member States.[118] Given that labour policy is considered a sub-category of social policy, it constitutes, as a matter of principle, a shared competence.[119] When exerting the legislative functions related to shared competences, the EU must respect the principles of subsidiarity and of proportionality. According to the subsidiarity principle, the EU can only exert legislative functions with respect to shared competences when the objective of the intended action cannot be sufficiently achieved by Member States, and provided that it is better accomplished at Union level. Moreover, the proportionality principle provides that, when exerting shared competences, the EU cannot go beyond what is necessary to achieve the objectives of the Treaties.[120] Finally, not all labour-related elements belong to the shared competences. Indeed, some

competences between the EU and its Member States in matters of labour policies prior to the 2009 Lisbon Treaty, see: Jan Orbie, Hendrik Vos, and Liesbeth Taverniers, "EU trade policy and a social clause: A question of competences?," *Politique européenne*, no. 3 (2005).

[117] The three possible categories of competences are: the EU exclusive competences; the competences shared between the EU and its Member States; and the exclusive competences of the Member States. Competences which are neither conferred to the Union exclusively, nor shared between the Union and its Member States remain under the exclusive competence of the member states. See article 5 of the TEU.

[118] This article is an extension of article 2(2) of the TFEU as it lists in an exhaustive manner the competences shared between the EU and its Member States.

[119] More specifically, the regime for labour policy is mainly established under Title IX (articles 145-150 of the Treaty on the Functioning of the European Union (**the TFEU**)) and Title X (articles 151-161 of the TFEU) of the TFEU, which deal with employment and social policy respectively. Article 153 of the TFEU constitutes the central competence rule of this regime and establishes the procedure for enacting labour legislation. As such, it lists the labour-related matters that belong to the shared competences. This includes, inter alia: *(a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated;* and *(e) the information and consultation of workers*. Note that the EU fundamental Treaties contain other provisions relating to labour law, namely those on the freedom of movement of workers (Art. 45 et. Seqq. of the TFEU), on the principle of equal pay for women and men (art. 157 of the TFEU) and on the Council competence to take appropriate action to combat discrimination (art. 19 of the TFEU). Moreover, they give legal force to the Charter of Fundamental Rights (art. 6(1) TEU). For a discussion of the distribution of competences in matters of labour rights protection see: Gregor Thüsing, *European Labour Law* (Nomos Verlagsgesellschaft mbH & Co. KG, 2013), 8, 14-15..

[120] For a definition of these principles, see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020 (last consulted on 20/06/2020). The subsidiarity and the proportionality principles are enounced in art. 5 of the Treaty on the European Union (**the**

matters are excluded from this category and remain under Member States' exclusive competences. This includes matters pertaining to the pay, the right of association, the right to strike, and the right to impose lock-outs.[121]

The categorisation of labour-related matters under the internal division of competences may be different from that under the external division of competences. This can be the case in several situations. First, it can occur when labour-related matters are included in an international agreement and provided that they fulfil a set of conditions demonstrating a certain "attachment" to a matter falling under the exclusive competence of the EU. In this situation labour-related matters belong to the exclusive competences of the EU.[122] With respect to labour provisions in EU trade agreements, the fact that the Common Commercial Policy (**the CCP**) is an exclusive competence of the Union[123] may thus entail a requalification of these provisions as falling under the EU exclusive competences.[124] Second, labour-related matters may also belong to the exclusive competences of the EU when they are included in an international agreement that corresponds to one of the three following situations: (1) when its conclusion is provided for in a legislative act of the Union; (2) when its conclusion is necessary to enable the Union to exercise its internal competence; or (3) when its conclusion may affect common rules or alter their scope. These three situations are foreseen in article 3(2) of the TFEU which codifies the CJEU case law on the EU implied external exclusive competences established prior to the conclusion of the Lisbon Treaty.[125]

TEU) and in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

[121] Article 153(5) TFEU.

[122] Article 3(1) of the TFEU. This corresponds to the so-called "absorption doctrine" adopted by the CJEU. According to this doctrine the 'dominant or essential objective of an agreement 'absorbs' the other substantive legal bases which are pursuing objectives of a subsidiary or ancillary nature'. (*sic*) Reference omitted. Sieglinde Gstöhl and Dirk de Bièvre, *The Trade Policy of the European Union* (Macmillan International Higher Education, 2017), 63.

[123] Article 3(1)(e) of the TFEU.

[124] In her Opinion, *AG Sharspton* stated that 'the Court has accepted that EU acts that also pursue objectives that are not purely economic (for example, social, environmental or humanitarian objectives) may fall within the scope of the common commercial policy.' Opinion of *AG Sharpston* in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992. pt. 481. In the same paragraph *AG Sharspton* presents a list of the relevant case law.

[125] For a clear discussion of this jurisprudence see: Marcus Klamert, *New Conferral or Old Confusion? The Perils of Making Implied Competences Explicit and the Example of the External Competence for Environmental Policy* (TMC Asser Institute, 2011); Thomas Verellen, "Het Hof Van Justitie En Het EU-Singapore Handelsakkoord, of De Kunst Van Het Koorddansen Advies 2/15," *SEW: Tijdschrift voor Europees en Economisch Recht,* Uitgeverij Paris, 9–10,
https://limo.libis.be/primoexplore/fulldisplay?docid=LIRIAS1854979&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1. (last consulted on 27/02/2020).

Thus, whereas the internal division of competences disposes that labour-related matters belong, as a matter of principle, to the competences shared between the EU and its Member States, they can belong to the exclusive competences of the EU when they are included in an international agreement, and provided that the fall under one of the above-mentioned situations. If they are included in an international agreement but fail to correspond to one of these situations, then labour related-matters are part of the same category of competences as under the internal division of competences, namely the competences shared between the EU and its Member States. On the backdrop of this distinction between the internal and the external division of competences, it is the question of whether labour provisions in EU trade agreements correspond to one of the situations allowing for their re-qualification in the category of EU exclusive competences?

2.2.2. The EU competences for labour-related matters in trade agreements

The inclusion of labour provisions in EU international agreements raises issues as to the category of competences in which these provisions should be considered to fall. Do labour provisions in EU FTAs belong to the competences shared between the EU and its Member States, or to the EU's exclusive competences? This question, admittedly formulated in broader terms, was raised in the framework of the conclusion of the EU-Singapore FTA (**the EUSFTA**). Negotiations on the conclusion of a trade and investment agreement between the EU and Singapore were launched in March 2010 and completed in October 2014.[126] These negotiations gave shape to a so-called "new generation FTA," thus including matters that go beyond the traditional reduction of customs duties and of non-tariff barriers to trade, such as intellectual property, public procurement, sustainable development, among others.[127] In the face of the diversity of areas treated in the EUSFTA, the EU Commission and the EU Parliament shared the opinion that the whole of the agreement should be considered to fall under the EU exclusive competences.[128] For their part, the EU Council and the Member States considered that while most matters treated under the agreement should be understood to belong to the EU exclusive competences, some matters, including those relating to the protection of labour rights, fell under the competences shared between the EU and its Member States, while still others belonged to the

[126] The EUSFTA was signed on 19 October 2018 and entered into force on 21 November 2019.
[127] CJEU, Opinion 2/15, 16 May 2017, at pt. 17.
[128] CJEU, Opinion 2/15, 16 May 2017, at pt. 18. Until the *Opinion 2/15* it was highly disputed whether deep integration agreements concluded by the EU could be considered as a pure Union agreement or as a mixed agreement. In the case of the CETA, EU Commission President Junker decided to consider it as a mixed agreement despite his belief that it was a pure Union agreement. On this point see: Marc Bungenberg, "Die Gemeinsame Handelspolitik, Parlamentarische Beteiligung Und Das Singapur-Gutachten Des EuGH," in *Die Welt Und Wir: Die Aussenbeziehungen Der Europäischen Union*, ed. Stefan Kadelbach, 1. Auflage, Schriften zur Europäischen Integration und internationalen Wirtschaftsordnung Band 42 (Baden-Baden: Nomos, 2017), 140–41.

exclusive competences of the Member States.[129] Considering these diverging views, the Commission decided in July 2015 to bring the issue before the CJEU.[130] The Court was asked to give its opinion on the following question,

> **'Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,**
>
> **1. which provisions of the agreement fall within the Union's exclusive competence?**
>
> **2. which provisions of the agreement fall within the Union's shared competence? and**
>
> **3. is there any provision of the agreement that falls within the exclusive competence of the Member States?'[131]**

The CJEU answered the question in its *Opinion 2/15 of the 16 May 2017*. With respect to the labour provisions included in the EUSFTA, the assessment conducted by the CJEU develops in three steps.

First, the Court endeavoured to identify the main object of the agreement. In this regard it observed that '[in] the light of the subject matter and objectives of the envisaged agreement, which, as stated in Articles 1.1 and 1.2 thereof, consist in 'establish[ing] a free trade area' and 'liberalis[ing] and facilitat[ing] trade and investment between the Parties', it should be examined at the outset to what extent the agreement's provisions fall within the exclusive competence of the European Union […] relating to the common commercial policy.'[132] In other words, the Court strived to assess whether the "absorption doctrine" applies in the case of the EUSFTA.

Second, the Court thus undertook to examine whether the treaty's provisions could be attached to the CCP. Regarding labour provisions more specifically, the CJEU looked at the EU's fundamental Treaties in search of legal bases linking sustainable development to the CCP.[133] In this framework, the Court noted that article 207 (1) of the TFEU provides that 'the Common Commercial Policy shall be conducted in the context of the principles and the objectives of the Union's external action.'[134] Moreover, it

[129] CJEU, Opinion 2/15, 16 May 2017, pt. 19-27. For the Council and the Member States' position on labour-related matters specifically, see: pt. 22 of the Opinion.
[130] In fact, labour provisions have systematically been included in EU FTAs since the entry into force of the EU-Korea agreement in 2011 (on this matter, see *Section 3.1*.). These provisions have always been applied *ab initio* – i.e. without requiring the consent of national parliaments. In other words, until the EUSFTA the categorisation of labour provisions under the exclusive competences of the EU was never overtly challenged.
[131] CJEU, Opinion 2/15, 16 May 2017, pt. 1.
[132] (*sic*) CJEU, Opinion 2/15, 16 May 2017, pt. 32.
[133] Labour-related matters are indeed treated under *Chapter XIII on Trade and Sustainable Development* of the EUSFTA. The Court begins its evaluation of the TSD Chapter at point 139 of the Opinion. The points 142 to 146 of the Opinion are dedicated to the analysis of the link between sustainable development policies and the EU CCP.
[134] CJEU, Opinion 2/15, 16 May 2017, pt. 142.

observed that these principles and objectives refer to various policy areas linked to sustainable development.[135] From this analysis the CJEU concluded that 'the objective of sustainable development henceforth forms an integral part of the common commercial policy.'[136] This conclusion does not imply however, that labour provisions are *per se* absorbed by the CCP and, as a matter of consequence, fall under the EU exclusive competences. This would be the case only if these labour provisions demonstrate a "specific link to trade."[137] Previous CJEU case-law has indeed established that,

> **'[it] is also common ground that the mere fact that an act of the European Union, such as an agreement concluded by it, is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade'.[138]**

Thus, the third step undertaken by the Court was to investigate whether the labour provisions included in the EUSFTA demonstrate a "specific link to trade." This specific link requires more than mere 'implications for international trade.' Indeed, the Court considers that to "specifically" relate to international trade this act: (1) must be 'essentially intended to promote, facilitate or govern trade;' and (2) must have 'direct and immediate effects on trade.' These conditions are cumulative and constitute what has been referred to as the "link-to-trade-test."[139]

---

[135] Article 21 (1) and (2) of the TEU. However, the Court does not make the link between sustainable development and labour rights protection explicit. Indeed, while article 21(1) and (2) of the TEU link the principles and the objectives of the Union's external action to "human rights" and "sustainable economic, social and environmental development *of developing countries*" (emphasis added by the author), it does not expressly relate to labour-related matters. In other words, article 21 of the TEU indirectly refers to labour policies in two different ways. First, through a reference to human rights. Some labour rights may indeed be considered to constitute human rights. Second, through a mention of sustainable development. Though the latter is exclusively linked to sustainable development *of developing countries*. In her opinion AG Sharpston adopted a different position and argued that these legal bases 'are not relevant to resolving the issue of competence' See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, pt. 495. Aseeva notes with respect to the opposition between the *AG Sharpston* Opinion and the Court's Opinion with respect to the interpretation of the of the link between the CCP and the EU's external policy: 'L'essence du contraste de l'avis de la Cour avec les conclusions de l'Avocat général pour notre exposé est la suivante. La CJUE a confirmé qu'un développement majeur du droit communautaire primaire après Lisbonne est que les dispositions relatives aux objectifs spécifiques de la PCC sont directement liées à ceux de l'action extérieure de l'UE en général, notant que ceux-ci, comme l'indique l'article 21(2)f) TUE concernent notamment le développement durable.' In : Anna Aseeva, "Retour vers le futur la politique étrangère de l'Union européenne, le commerce international et le développement durable dans l'avis 2/15," *Revue juridique de l'environnement* 42, no. 4 (2017): 788–89, https://www.cairn.info/revue-revue-juridique-de-l-environnement-2017-4-page-785.htm..

[136] CJEU, Opinion 2/15, 16 May 2017, pt. 147.

[137] CJEU, Opinion 2/15, 16 May 2017, pt. 155.

[138] CJEU, Case C-414/11, *Daiichi Sankyo Co. Ltd*, 18 July 2013, pt. 51. The *Daiichi Sankyo Co. Ltd* case primarily dealt with the question of whether a certain provision of the TRIPs Agreement establishing the framework for patent protection could be understood to fall within the exclusive competence of EU Member States.

[139] CJEU, Opinion 2/15, 16 May 2017, pt. 37-38.

With respect to the first condition[140] – i.e. that the act[141] must be 'essentially intended to promote, facilitate or govern trade' – the Court reviewed the provisions of the TSD chapter and noted their recurrent references to the obligations included in various international agreements, typically the ILO instruments.[142] From these observations, it concluded that '[…] Chapter 13 *governs* that trade by ensuring that it takes place in compliance with [the international agreements to which it refers] and that no measure adopted under them is applied so as to create arbitrary or unjustifiable discrimination or a disguised restriction on such trade.'[143] Thus, the Court considered that the labour provisions fulfil the first condition of the *link-to-trade-test*.

With respect to the second condition the CJEU stated that 'Chapter 13 is also such as to have direct and immediate effects on that trade.'[144] The Court's assessment is based on two elements. First, it provided that,

> **'[such] effects result, first, from the commitment of the Parties, stemming from Article 13.1.3 of the envisaged agreement, on the one hand, *not to encourage trade by reducing the levels of social and environmental protection in their respective territories below the standards laid down by international commitments* and, on the other, *not to apply those standards in a protectionist manner.'*[145]**

Second, the CJEU stated that,

> **'the provisions laid down in Chapter 13 […] are such as to have direct and immediate effects on trade between the European Union and the Republic of Singapore *since they reduce the risk of major disparities between the costs of producing goods and supplying services in the European Union, on the one hand, and Singapore, on the other, and thus contribute to the participation of EU entrepreneurs and entrepreneurs of the Republic of Singapore in free trade on an equal footing.'*[146]**

---

[140] CJEU, Opinion 2/15, 16 May 2017, pt. 148 to 156.

[141] In the *Opinion 2/15*, the Court considers that *the provisions of the EUSFTA* can be viewed as "acts" in the sense of the *Daiichi Sankyo Co. Ltd* case. Accordingly, each provision of the EUSFTA should be assessed in light of the link-to-trade-test in order to define whether or not it can be attached to the EU CCP. Overall, one can consider that the terminology adopted by the CJEU is rather unfortunate. Indeed, it uses four different terms to refer to one and the same thing. At point 17 of its Opinion, it uses to word "provision"; then, referring to the Daiichi jurisprudence it uses the word "act"; at point 37 of its Opinion it employs the term "component" and finally at point 38 of its Opinion it uses the word "commitments."

[142] CJEU, Opinion 2/15, 16 May 2017, pt. 149-150.

[143] CJEU, Opinion 2/15, 16 May 2017, pt. 156. (Emphasis added by the author).

[144] CJEU, Opinion 2/15, 16 May 2017, pt. 157 to 161.

[145] CJEU, Opinion 2/15, 16 May 2017, pt. 158. (Emphasis added by the author)

[146] CJEU, Opinion 2/15, 16 May 2017, pt. 159. (Emphasis added by the author) Interestingly, in the procedure leading to the *Opinion 2/15*, the Council and the Member States submitted observations to the Court in which they considered that the provisions concerning, *inter alia*, the protection of the environment and social protection, included in Chapter 13 on Trade and Sustainable Development of the EUSFTA, 'fall within the competences shared between the European Union and the Member States in those fields' given that 'those provisions have *no specific link with international trade*.' CJEU, Opinion 2/15, 16 May 2017, pt. 22. (emphasis added by the author). On the same matter see also: Opinion of *AG Sharpston* in Opinion procedure 2/15, *EU-*

In other words, the Court demonstrated first the existence of labour provisions' *effects* on trade, and second that these effects are *direct and immediate*. While it supported the former through a reference to the chapter's commitments not to use labour standards for any kind of protectionist purposes, it sustained the latter by observing that labour provisions protect the level the playing field and allow companies to compete 'on an equal footing.' Finally, the Court added that the link between the EUSFTA TSD chapter's provisions and trade between the contracting Parties is *specific*. It justified this assessment by arguing that a contracting Party's non-compliance with the obligations included in the labour provisions authorises the other Party, in accordance with the rule of customary international law codified in Article 60(1) of the 1969 Vienna Convention on the Law of Treaties (**the VCLT**), to terminate or suspend the application of the agreement.[147]

The particular meaning given by the Court to certain terms included in the conditions constituting the *link-to-trade-test* and the relations it makes between these conditions and specific labour provisions are surely disputable.[148] The fact remains that in the *Opinion 2/15* the CJEU considered that the labour provisions included in the EUSFTA constitute an extension of the CCP, thus confirming the absorption doctrine.[149] As such labour-related matters treated in the EUSFTA belong to the exclusive competences

---

Singapore FTA [2016] ECLI:EU:C:2016:992. pt. 475, available on: http://curia.europa.eu/juris/document/document.jsf?text=&docid=186494&pageIndex=0&doclang=EN (last consulted on 01/02/2019).

[147] CJEU, Opinion 2/15, 16 May 2017, pt. 161. Note that *AG Sharpston* adopted a different position. She wrote in her opinion:

> **'491. Thus, Articles 13.3.1, 13.3.3, 13.4, 13.6.2 and 13.6.3 of the EUSFTA essentially seek to achieve in the European Union and Singapore minimum standards of (respectively) labour protection and environmental protection, *in isolation* from their possible effects on trade. Those provisions therefore clearly fall outside the common commercial policy. Unlike the 'essential elements' clauses found in some EU international trade agreements, which impose an obligation to respect democratic principles and human rights, breach of the labour and environmental standards to which those provisions of the EUSFTA refer does not give the other Party the right to suspend trade benefits resulting from the EUSFTA. Articles 13.16 and 13.17 of the EUSFTA do not authorise a Party to suspend trade concessions granted to the other Party if the latter does not comply with commitments under Chapter Thirteen. Furthermore, unlike the special incentive arrangement for sustainable development and good governance under the so-called GSP+ scheme, those provisions are also not aimed at granting Singapore trade concessions provided it meets those standards'.**

(references omitted) (in italic in the text). See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, pt. 491.

[148] In especially, the terms "govern", "direct and immediate effects", "specific" are not defined. One can regret that the Court does not further define what it understands under the terms "to promote, facilitate or govern trade." Indeed, it does not make explicit in which way it considers (1) that ensuring that trade takes place in compliance with the international agreements and (2) that no measure is applied so as to create arbitrary or unjustifiable discrimination or as a disguised restriction on such trade, amount to "governing" trade. See: CJEU, Opinion 2/15, 16 May 2017, pt. 156. This lack of specification leads to confusion and potentially contradicting assessment.

[149] As stated in article 217 of the TFEU.

of the Union and not to the competences shared between the EU and its Member States, as it is the case under the internal division of competences.[150] While the *Opinion 2/15* specifically pertained to the EUSFTA, the relatively standard model of TSD chapters included in the third generation EU FTAs allows to reasonably assume that the conclusions the Court reached regarding the labour provisions are also relevant for the TSD chapters included in other EU FTAs.[151] A handful of implications can be drawn from *Opinion 2/15* for the design of labour provisions in EU FTAs.

2.2.3. The design of labour provisions and the "regulation of the levels of social protection-threshold"

Is it for historical, geographical or socio-ethnic reasons that Belgians seem to not take much pride in their nationality? The rare instances where they underline that they are Belgians is probably in random discussions about chocolate, beer, football (although the latter is highly conjunctural). In fact, one does not talk much about Belgium abroad, altogether. One important exception to this was in 2016 when the Walloon Parliament – one of the Belgium five sub-national parliaments – threatened to reject the CETA, a trade agreement concluded between the EU and its Member States on the one side, and Canada on the other. This dissertation reference to Walloons audaciously venturing into world news, is not made with the intention to talk about the Belgian institutional structure – which, in itself, would probably deserve more attention abroad[152] – but because it underlines a critical aspect of EU FTAs: the content of a trade agreement may affect the procedure applied for its adoption, and the agreement likelihood to be adopted altogether. In the same line, the categorisation-question laying at

[150] In fact, *AG Sharpston* makes a distinction between four types of provisions included in the TSD Chapters. Among these four types, she considers that provisions relating to labour standards protection are necessary to achieve social policy objectives as understood under article 151 of the TFEU. Therefore, she claims that these provisions fall under the competences shared between the EU and its Member States as a result of these articles as well as article 4 (2) (b), 153 and 216 (1) of the TFEU. See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, pt. 502.

[151] In this regard, *AG Sharpston* underlined in her opinion that the conclusions drawn from the present case are limited to the EUSFTA and that it is without prejudice to the repartition of competences in other FTAs. See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at pt. 86. However, some commentators observe the high degree of homogeneity between TSD chapters and argue that the findings of the Court can be relevant for other agreements. In this respect, Verellen writes 'Het heeft belangrijke gevolgen niet alleen voor de overeenkomst met Singapore, maar ook voor die met Canada (de zogenaamde *Comprehensive Economic and Trade Agreement* of 'CETA'), die momenteel ter ratificatie voorligt, en die met Japan (de *EU-Japan Economic Partnership Agreement* of 'EUJEPA'), waarover kortgeleden een politiek akkoord bereikt is.' See: Verellen, "Het Hof van Justitie en het EU-Singapore handelsakkoord, of de kunst van het koorddansen Advies 2/15," 1. PDF version available on: https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1854979&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1 (last consulted on 27/02/2020).

[152] For a discussion of the consociational model adopted in Belgium and in Brussels, see: Feargal Cochrane, Neophytos Loizides and Thibaud Bodson, *Mediating Power-Sharing: Devolution and Consociationalism in Deeply Divided Societies* (Routledge, 2018); Thibaud Bodson and Neophytos Loizides, "Consociationalism in the Brussels Capital Region," in *Power-Sharing: Empirical and Normative Challenges*, ed. Allison McCulloch and John McGarry (Taylor & Francis, 2017).

the origin of *Opinion 2/15* highlights that the distribution of competences is relevant to determine the procedure applicable for the agreements' adoption. The present section digs further into the implications of this observation. In this regard, this dissertation argues that the distinction between exclusive and shared competences is key in order to understand (i) the limits of the EU margin of action when negotiating labour provisions in its FTAs, and (ii) the extent to which the EU can address the determinants of labour law altogether. Ultimately this dissertation shows that procedural considerations constitute an impediment for the adoption of ambitious labour provisions in EU FTAs. The following paragraphs discuss how the distinction between exclusive and shared competences affect the design of labour provisions, indeed.

To begin with, the situation for agreements (or parts thereof) that only include matters falling under the EU exclusive competences is relatively straightforward. They are concluded by the EU alone.[153] The broad lines of the procedure are as following: the Commission submits the negotiated agreement (or the relevant parts thereof) to the EU Parliament who decides by simple majority to adopt or reject it. If approved by the EU Parliament, the agreement (or the relevant parts thereof) is then submitted to the EU Council who decides by qualified majority on its adoption or rejection.[154] If accepted by the EU Council, and provided that is has also been adopted by the other contracting Party/ies, the agreement (or the relevant parts thereof) is ready for application. In contrast, agreements (or parts thereof) that only include matters falling under the competences shared between the EU and its Member States entail situations of "facultative mixity."[155] Facultative mixity allows for the adoption of the agreement

[153] For a discussion of the procedure to adopt trade-related agreements negotiated by the EU, see: Gstöhl and Bièvre, *The trade policy of the European Union*, 56–60..

[154] The qualified majority (**QM**) procedure is applied within the Council for the adoption of decisions in situations relating to Article 16 of the TEU and Article 238 of the TFEU. The QM procedure mixes the requirements (1) that a minimum number of countries vote in favour of a decision and (2) that these countries represent a certain share of the EU population. See: https://eur-lex.europa.eu/summary/glossary/qualified_majority.html (last consulted on 27/02/2020). Note that for the conclusion of agreements in the fields of trade in services, the commercial aspects of intellectual property, and foreign direct investment, the Council must act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. Unanimity also applies for the conclusion of certain agreements in the field of trade in cultural and audio-visual services, and in the field of trade in social, education and health service. See art. 217 (4) TFEU.

[155] Judge Allan Rosas developed the theory of facultative mixity. Rosas conceives of two types of mixity: obligatory and facultative mixity. While obligatory mixity relates to agreements which include both, competences falling under the exclusive or shared competence of the EU and competences falling under the exclusive competence of the Member States, facultative mixity is said of agreements which address matters pertaining to the competences shared between the EU and its Member States, and possibly matters falling under the exclusive competence of the EU. While obligatory mixity requires the adoption of the agreement by both the EU and its Member States, facultative mixity allows for the adoption of the agreement either by the EU alone or by the EU and the Member States jointly. See: Allan Rosas, "Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?," in *The European Union in the World: Essays in Honour of Professor Marc Maresceau*, ed. Inge Govaere et al. (Leiden: Martinus Nijhoff Publishers, 2014) For a comment on the distinction between obligatory and facultative mixity and the argument that the opinion 2/15 respects

(or the relevant parts thereof) either by the EU alone *or* by the EU and its Member States jointly.[156] The decision to choose for one procedure or the other is ultimately a political one, and belongs to the EU Council.[157] In case the agreement (or parts thereof) is subjected to the EU-alone adoption path, the procedure relevant for matters falling under the EU exclusive competences applies. However, if the agreement (or parts thereof) follows the co-decision path, then it must be adopted both by the EU and by each Member State. The latter procedure dramatically increases the number of occasions for this agreement to be rejected[158] – as the Walloon experience almost showed – and is likely to take a long time.[159]

---

facultative mixity, see Thomas Giegerich, "What Kind of Global Actor Will the Member States Permit the EU to Be?," *ZEuS Zeitschrift für Europarechtliche Studien* 20, no. 4 (2017): 417. Aseeva, "Retour vers le futur la politique étrangère de l'Union européenne, le commerce international et le développement durable dans l'avis 2/15," 787, 789; Some commentators have argued that the 2/15 Opinion could be interpreted as dismissing the possibility of facultative mixity. See for instance: Verellen, "Het Hof van Justitie en het EU-Singapore handelsakkoord, of de kunst van het koorddansen Advies 2/15"; Bungenberg, "Die Gemeinsame Handelspolitik, parlamentarische Beteiligung und das Singapur-Gutachten des EuGH"; Laurens Ankersmit, "Opinion 2/15 and the Future of Mixity and ISDS," European Law Blog of 18/5/2017, https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/ (last consulted on 27/02/2020).

[156] For a legal discussion of facultative mixity see: Bungenberg, "Die Gemeinsame Handelspolitik, parlamentarische Beteiligung und das Singapur-Gutachten des EuGH," 139–40 The author writes:

> **'Grundsätzlich bieten geteilte Kompetenzen eine Vertragsabschlussmöglichkeit ausschließlich durch die Unionsorgane, soweit hierfür der politische Wille der Unionsorgane besteht. Gemäß Art. 2 Abs. 2 AEUV können nämlich bei geteilter Zuständigkeit „die Union und die Mitgliedstaaten in diesem Bereich gesetzgeberisch tätig werden und verbindliche Rechtsakte erlassen." Da anschließend festgelegt wird, dass die Mitgliedstaaten ihre Zuständigkeit wahrnehmen, „sofern und soweit die Union ihre Zuständigkeit nicht ausgeübt hat", kann die EU schon nach dem Wortlaut der Vorschrift geteilte Zuständigkeiten auch allein – d.h. ohne mitgliedstaatliche Beteiligung – ausüben. Möglich ist hier allenfalls – was aber gängige Praxis ist –der Abschluss eines fakultativen „Mixed Agreements" mit Beteiligung der Mitgliedstaaten und ihrer Parlamente. Hierauf ist nochmals zurückzukommen.'**

[157] Recall that the Council is constituted of all Member States. *AG Wahl* Opinion of 8 September 2016 in the opinion procedure 3/15 concerning the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, clearly sets that the choice for co-decision in case of an agreement covering shared competences is a political decision. Opinion of AG *Wahl* to CJEU, opinion procedure 3/15, *Marrakesh Treaty,* EU:C:2016:657. See also, Opinion of AG *Sharpston* to CJEU, opinion 2/15, *Singapore Free Trade Agreement,* EU:C: 2016:992, para. 72 et seq.

[158] In other words it dramatically increases the number of *veto players*. In case a country does not ratify the treaty, this treaty does not enter into force and its potential provisional application would also be terminated. See in this regard the statement from the Council, as referred to in the Council minutes, OJ L 11 of 14/1/2017, pp. 11 and 15.

[159] In this regard *AG Sharpston* clearly stated the challenges related to this procedure in her Opinion:

> **'565. A ratification process involving all the Member States alongside the European Union is of necessity likely to be both cumbersome and complex. It may also involve the risk that the outcome of lengthy negotiations may be blocked by a few Member States or even by a single Member State. That might undermine the efficiency of EU external action and have negative consequences for the European Union's relations with the third State(s) concerned. 566. However, the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the Treaties [...].'**

Recent EU trade agreements generally include a mix of EU exclusive and shared competences.[160] As such, these agreements are subjected to the procedure peculiar to facultative mixity.[161] In this regard, it appears that the political will for the EU-alone adoption path has been hitherto lacking, so that these agreements have always been subjected to the co-decision procedure. As a commentator puts it,

> **'[the] Member States have so far insisted on concluding a mixed agreement in all cases of facultative mixity, so that in practice, if not in law, mixity is obligatory where shared competences are involved. This has provoked suggestions that in the future the EU should conclude separate (EU only) free trade agreements and mixed investment agreements, thus ensuring that the former can enter into force more quickly.'[162]**

In the face of the EU Council's decisions to follow the co-decision path, the Commission used various strategies to circumvent the pitfalls raised by facultative mixity.[163] These strategies include the division of the matters under negotiations into several agreements according to the type of competences they relate to,[164] and the provisional application of the parts of the agreement that fall under the EU exclusive competences.[165] With respect to the second strategy, labour provisions were always

Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at pt. 565-566.

[160] For instance, in *the Opinion 2/15*, the CJEU decided that the provisions relating to non-direct investment and to Investor-State Dispute Settlement amongst others fall under the shared competences. See: CJEU, Opinion 2/15, 16 May 2017, pt. 305.

[161] Trade agreements (concluded under article 207 TFEU) and association agreements (concluded under article 217 TFEU) are also traditionally mixed agreements. Association agreements can legally speaking also be concluded by the Union alone. Whereas the conclusion by the EU of trade agreements requires a Council decision adopted by a qualified majority in most cases (art. 207 (a) TFEU), an association agreement can only be concluded upon a unanimous Council decision (art. 2018 (8) (2) TFEU). What is more, association agreement can either be concluded by the Union alone (which imply unanimity within the Council) or as a mixed agreement. In the latter case, it requires the ratification by the EU Member States' parliaments. For a discussion of these various procedures, see: Giegerich, "What Kind of Global Actor Will the Member States Permit the EU to Be?," 410.

[162] Giegerich, "What Kind of Global Actor Will the Member States Permit the EU to Be?," 405.

[163] Gstöhl and Bièvre, *The trade policy of the European Union*, 63..

[164] Some authors have indeed argued in favour of splitting matters into two agreements, one including matters corresponding to the exclusive competence of the EU and one including shared competences and competences exclusive to the Member States. See for instance: Szilárd Gáspár-Szilágyi, "Opinion 2/15: Maybe It Is Time for the EU to Conclude Separate Trade and Investment Agreements," European Law Blog of 20/6/2017, https://europeanlawblog.eu/2017/06/20/opinion-215-maybe-it-is-time-for-the-eu-to-conclude-separate-trade-and-investment-agreements/; Bungenberg, "Die Gemeinsame Handelspolitik, parlamentarische Beteiligung und das Singapur-Gutachten des EuGH".

[165] With respect to the CETA, a commentator notes that,

> **'in light of the length of the ratification process, Article 30.7 of CETA provides for the possibility of applying CETA provisionally. On 28 October 2016, the EU Council of Ministers adopted a decision on CETA's provisional application and requested the European Parliament to give its consent. If the European Parliament also approves the provisional application for the EU, CETA provisions that are within the exclusive competence of the EU apply provisionally. For reasons of clarity, the decision on the provisional application would specify which provisions apply provisionally. Provisional application**

subjected to provisional application. Overall, when negotiating EU FTAs, treaty drafters pay a great deal of attention to the design of labour provisions, if only because it determines the category of competences under which they fall, the applicable adoption procedure, and ultimately the chance of success for the adoption of the provisions in question.

Thus, the specific design of labour provisions has important implications regarding the applicable adoption procedure, and regarding their likelihood to be adopted altogether. On this backdrop, it is crucial to determine where to draw the line between labour provisions falling under the EU exclusive competences and those falling under the competences shared between the EU and its Member States. In this regard, the CJEU stated in the *Opinion 2/15* that:

> **'It is true that the exclusive competence of the European Union referred to in Article 3(1)(e) TFEU cannot be exercised in order to regulate the levels of social and environmental protection in the Parties' respective territory. The adoption of such rules would fall within the division of competences between the European Union and the Member States that is laid down, in particular, in Article 3(1)(d) and (2) and Article 4(2)(b) and (e) TFEU.'**[166]

Thus, the Court gives indications on the type of labour provisions that would fall outside the exclusive competences of the Union. More specifically, it states that the exclusive competences cannot be exercised 'in order to regulate the levels of social protection in the Parties' respective territory.' In doing so, the CJEU defines what this dissertation calls a "regulation of the levels of social protection-threshold." This threshold allows to depart between labour provisions that belong to the EU exclusive competences, and those falling under the shared competences. More specifically, the CJEU argues that this threshold is grounded in the fact that '[article] 3(1)(e) TFEU does not prevail over these other provisions of the FEU Treaty [and that] Article 207(6) TFEU [states] that 'the exercise of the competences conferred … in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States.'[167]

Thus, *the regulation of the levels of social protection-threshold* is key to determine the EU margin of action when it negotiates labour provisions in its FTAs. Indeed, it appears to constitute the line that

---

> **of a treaty is common practice in the EU. There are about 200 international treaties that the EU applies provisionally.'**

(footnote omitted) see: Nils Meyer-Ohlendorf, Christiane Gerstetter, Inga Bach, "Regulatory Cooperation Under CETA," 7. In the meantime, the provisional application of the CETA has been voted by the EU Parliament in February 2017. As of March 2020, procedures for national adoption are still ongoing in more than a dozen EU Member States.

[166] CJEU, Opinion 2/15, 16 May 2017, pt. 164.

[167] CJEU, Opinion 2/15, 16 May 2017, pt. 164.

the Commission cannot cross if it wants to keep these provisions within the realm of EU exclusive competences. As such, this dissertation argues that this threshold has important implications for several aspects of the design of labour provisions in EU FTAs, including: (1) the determination of the labour rights that are protected in EU trade agreements; (2) the wording of the commitments they contain; and (3) the enforcement mechanisms provided with respect to the labour commitments.

First, the determination of the labour rights protected in EU trade agreements is impacted by the regulation of the levels of social protection-threshold.[168] Indeed, trade agreements that establish commitments vis-à-vis labour rights not yet protected in EU Member States legislations can be considered to set new levels of protection on the Member States' territory. As such, these provisions would fall under the competences shared between the EU and its Member States or under the Member States' exclusive competences with all the consequences that it would imply for the definition of the applicable adoption procedure.[169] In this regard, the Court considered in the *Opinion 2/15* that the Parties' mutual recognition of their right to establish their own levels of labour protection, and to adopt or modify accordingly their relevant laws and policies[170] demonstrates that 'it is not the Parties' intention 'to harmonise the labour or environment standards of the Parties'.' [171]

Second, the regulation of the levels of social protection-threshold not only has consequences for the labour rights protected in labour provisions, it also has implications for the formulation of the labour commitments. Typically, the Commission may privilege obligations binding the Parties to the adoption of specific conducts above obligations towards the achievement of certain results. Indeed, while the

[168] Studies assessing the regime of labour rights protection under EU FTAs recurrently tend to ignore this important point and suggest the inclusion of provisions which subject the contracting parties to new commitments and therefore regulate their levels of protection. See for instance *Lukas et al.* who argue without further specification for the inclusion in the following clause in FTAs: 'each Party shall ratify, to the extent that it has not yet done so, and shall effectively implement in its laws and practices, in its whole territory, the respective Priority ILO Conventions on labour inspection, tripartite consultation and employment policy'. Reference omitted, Lukas, Karin, Astrid Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements* (2010), 15.

[169] In that regard, it is interesting to note that the Commission argued in the proceedings before the Court that the TSD Chapter in the EUSFTA 'does not aim to create new substantive obligations concerning labour and environmental protection, but merely reaffirms certain existing international commitments.' See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at pt. 471. This would imply that the reaffirmation of international commitments does not count, in the view of the Commission, as an attempt 'to regulate the levels of social protection.'

[170] Article 13.2.1 of the EUSFTA.

[171] CJEU, Opinion 2/15, 16 May 2017, pt. 165. One may wonder, however, whether the argument raised by the CJEU, according to which the presence of a right to regulate clause indicates that it is not the Parties' intention to regulate the levels of social protection is convincing. As we will see in *Chapter 3*, the Parties' rights to regulate in matters of labour rights protection as been limited in several ways. While most of these limitations do not represent new obligations in the head of the contracting Parties, some of them are.

former compel Parties to undertaking certain efforts regardless of the whether or not legislative changes happen, the latter are more likely to require such changes from the Parties, thus leading to a regulation of the levels of social protection. The same applies for the provisions' degree of precision. Whereas relatively unprecise formulations leave a certain margin of appreciation to the Parties as to the achievements they are compelled to reach, it is less likely to be the case for relatively more determinate clauses.[172] Consequently, unprecise formulations offer some room for interpretation that the Parties can use in order to argue that the commitments in question do not set new levels of protection. The analysis of labour commitments conducted in *Chapter 3* will provide several examples of how the type of obligations and the degree of precision of these clauses have been framed by the regulation of the levels of social protection-threshold.

Third, the design of the enforcement mechanisms linked to labour provisions in the EU FTAs is also determined by the regulation of the levels of social protection-threshold. To remain within the boundaries of the EU exclusive competences these enforcement mechanisms cannot have as consequence to allow for binding decisions, let alone for sanctions, on the interpretation and the compliance with commitments that the Member States have taken up in instruments – typically ILO Conventions –, the ratifications of which fall under the exclusive competence of the EU Member States.[173] This would amount to regulating the levels of protection. In this regard the CJEU acknowledged that,

[172] In its argumentation to the Court, the Commission maintained that article 13.3.3., which provides for the "effective implementation" of certain principles concerning the fundamental rights at work, 'does not justify concluding that Member States should participate in the conclusion of the EUSFTA. That provisions does not prescribe the specific manner in which Singapore and the Member States have to ensure effective implementation of the ILO Conventions that they have ratified.' In other words, the Commission seems to consider that if the provisions had prescribed a specific manner for the effective implementation of the ILO Conventions – i.e. if it had been more specific – then, this provision would have belonged to the competences shared between the EU and its Member States. See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at pt. 473.

[173] In spite of the legal difficulties linked to the distribution of competences between the EU and its Member States, some authors have pleaded for the establishment of strong enforcement mechanisms in the TSD chapter of EU FTAs. See for instance: Krajewski and Hoffmann, "Alternative Model for a Sustainable Development Chapter and related provisions in the Transatlantic Trade an Investment Partnership (TTIP)"; Lukas, Karin, Astrid Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements* (2010). Note that the EU Parliament has also called for strong enforcement mechanisms. Indeed it has demanded that TSD Chapters be covered by FTAs' general dispute settlement mechanism, 'on an equal footing with the other parts of the agreement… to ensure compliance with human rights and social and environmental standards.' European Parliament resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)). P8_TA(2016)0298, para 21(b) and (d). as referred to in: Ciaran Cross, "Legitimising an Unsustainable Approach to Trade: A Discussion Paper on Sustainable Development Provisions in EU Free Trade Agreements," *Berlin: International Centre for Trade Union Rights*, 2017, 2.

> **'the scope of the obligations stemming from the international agreements to which the [Trade and Sustainable Development chapter of the EUSFTA] refers is a matter covered by the interpretation, mediation and dispute settlement mechanisms that are in force for those international agreements. The [EUSFTA] safeguards the application of those external mechanisms by stating in Article 13.16 that its own dispute settlement rules and its own mediation mechanism, set out in Chapters 15 and 16, are not applicable to Chapter 13.'**[174]

Overall, the regulation of the levels of social protection-threshold provided by the CJEU in the *Opinion 2/15* appears pivotal to define the EU margin of action when negotiating labour provisions in its trade agreements. Indeed, this threshold draws a line between the labour provisions that fall under the EU exclusive competences (and that must be adopted by the EU alone) and those that fall under the competences shared between the EU and its Member States (the adoption of which is likely to be subjected to the co-decision procedure). Yet, it is important to emphasise that labour provisions which *do* regulate the levels of social protection in the Parties' respective territory are perfectly allowed in EU FTAs. However, their adoption is likely to face significant procedural challenges. To avoid these challenges the Commission has, so far, preferred to design labour provisions that fall under the EU exclusive competences. However, if it does so it cannot regulate the levels of social protection in the Parties' respective territory. Ultimately, the distribution of competences between the EU and its Member States constitutes a genuine impediment to the adoption of ambitious labour provisions. This is a crucial finding in this dissertation's attempt to understand the implications of labour provisions for the determinants of labour law.

[174] CJEU, Opinion 2/15, 16 May 2017, pt. 154. However, note that the CJEU said that under art. 60(1) of the VCLT a party may suspend the treaty in case of non-respect of the TSD chapter. See: CJEU, Opinion 2/15, 16 May 2017, pt. 161. This seems to be contradictory to pt. 154 of the Opinion.

3. Labour commitments in EU trade agreements

The functions given to trade agreements have developed over time. While trade agreements were first and foremost instruments to open up foreign markets to domestic industries, their role expanded towards becoming tools for the diffusion of domestic norms. Accordingly, in its approach to international trade the EU shifted from the exercise of a *power in trade* to the exercise of *power through trade*, thus rebalancing the use of its economic power to secure access to foreign markets towards the use of its economic power to export its laws, standards and values.[175] Brussels' strategy to hinge upon its market to export its laws, standards and values has reached several domains of public policy. Labour rights protection is one of them.

In fact, the attention for the protection of labour rights in EU trade agreements was progressive. To be sure, the complaint that trade with low labour standards countries is detrimental to workers in high labour standards countries is a longstanding one. However, it is in *the 2006 Global Europe trade strategy*[176] that the EU Commission suggested for the first time to incorporate in EU FTAs provisions promoting both, the protection of the environment and workers' rights. The use of the market power to export labour standards further gained traction in the 2010s with the growing inclusion of TSD chapters in EU FTAs,[177] and the adoption of *the 2015 Trade for All strategy*.[178] In this document the Commission defined three axes for its trade policy: effectiveness, transparency, and values-based

[175] For a discussion of the shift from *power in trade* to *power through trade*, see: Sophie Meunier and Kalypso Nicolaïdis, "The European Union as a Conflicted Trade Power," *Journal of European Public Policy* 13, no. 6 (2006); Axel Marx et al., "Global Governance Through Trade: An Introduction," in, *Global Governance Through Trade*.; Tham, Joo-Cheong and Ewing, K. D., "Labour Clauses in the TPP and TTIP: A Comparison Without a Difference?," 13.

[176] In its "Trade Strategy-document" newly established Commissions set the roadmap in matters of trade policies for the legislature. This document is a political document without proper legal value. As such, it is mainly used as a reference document to present the Commission project in matter of international trade and investment and assess its achievements *ex post*. *The 2006 Global Europe trade strategy* states with respect to labour standards that '[the] key economic criteria for new FTA partners should be market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non-tariff barriers). […] In considering new FTAs, we will need to work to strengthen sustainable development through our bilateral trade relations. This could include incorporating new co-operative provisions in areas relating to labour standards and environmental protection'. EU Commission, *Global Europe: Competing in the world*, (2006), p. 11-12. Document available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ar11022 (last consulted on 25/11/2019).

[177] In fact, labour-related provisions were already included in EU FTAs as early as the mid-1990s. However, the scope of these provisions was very limited and mainly pertained to Parties' mutual recognition of a principle of non-discrimination of their nationals in employment relations as well as to the right of the migrant workers nationals of the contracting parties to access the other country's social security scheme (See for example article 64-65 of the EU-Tunisia Association Agreement (1998)). It is only towards the end of the 2000s that the EU emerged as a leading force in coupling trade agreements with labour rights. More specifically, the 2008 EU-CARIFORUM agreement was the first EU FTA to include a relatively articulate regime of labour rights protection. Part I of the EU-CARIFORUM FTA is entitled Trade Partnership for Sustainable Development.

[178] EU Commission, *Trade for all: Towards a more responsible trade and investment policy,* (2015); Document available on: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1381 (last consulted on the 25/11/2019).

trade. The values-based trade axe was to be primarily implemented through the inclusion TSD chapters in trade agreements, the Commission thus largely putting a label to a practice already in place for several years. Indeed, the 2015 strategy provided that,

> **'[as] FTAs enter into force, the EU will have to make sure that the provisions on trade and sustainable development are implemented and used effectively, including by offering appropriate support through development cooperation. This is a crucial step in bringing about change on the ground. Respecting the commitments on labour rights and environmental protection can be a significant challenge for some of our trading partners. The Commission stands ready to assist trading partners to improve the situation. Coordinating aid and cooperation programmes better in these areas will allow the EU to use the opportunities and leverage a closer trade relationship to promote this value-based agenda.'[179]**

By and large, the Commission has progressively raised the regime of workers' protection as one of the crown's jewel of its FTAs. EU public servants have developed a well-oiled discourse around the benefits of trade agreements and their strong commitments to the protection of labour rights. Most recently, the use of trade agreements to export labour-related values was reaffirmed in the Commission President Von der Leyen's mission statement. In this document, the Commission President stated: '[trade] is not an end in itself. It is a means to deliver prosperity at home and to export our values across the world. I will ensure that every new agreement concluded will have a dedicated sustainable-development chapter and the highest standards of climate, environmental and labour protection, with a zero-tolerance policy on child labour.'[180] The academic attention for labour provisions in EU FTAs has grown with the development of this practice. Surprisingly, there is no comprehensive legal analysis of labour provisions included in the TSD chapters of EU FTAs. What are the rights and obligations contained in this regime? And how do they affect the levels of protection in the contracting Parties' jurisdiction?

This chapter attempts to answer these important questions. On this backdrop, it begins with the identification of the clauses defining labour commitments within the TSD chapters and with a

[179] EU Commission. *Trade for All: Towards a More Responsible Trade and Investment Policy*., 2015, 24. For a recent discussion of the regime provided in EU FTAs and of the EU Commission reform agenda, see: Harrison, James, Mirela Barbu, Liam Campling, Franz Christian Ebert, Deborah Martens, Axel Marx, Jan Orbie, Ben Richardson, and Adrian Smith. "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda." *World Trade Review* 18, no. 4 (2019): 635–57.

[180] Von der Leyen, A Union that strives for more - My agenda for Europe, Mission statement: Political Guidelines for the Next European Commission 2019-2024, 2019, 17. In the same vein, in his 2017 State of the Union Address, Commission President Jean-Claude Juncker announced that '[trade] is about exporting our standards, be they social or environmental standards, data protection or food safety requirements'. European Commission - Speech, President Jean-Claude Juncker's State of the Union Address 2017. Brussels, 13 September 2017, Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165 (last consulted on 09/07/2020).

presentation of the method adopted for their analysis (*Section 3.1. Methodological clarifications*). Then, it reviews the rights and obligations included in these clauses. This review deconstructs piece by piece the regime of labour rights protection provided in EU trade agreements. First, it looks at the provisions acknowledging the Parties' discretion in matters of labour rights protection (*Section 3.2. Clauses defining the rights to regulate*). Second, it analyses the provisions defining obligations to respect certain basic standards (*Section 3.3. Clauses defining commitments towards minimum levels of protection*). Third, it discusses the provisions compelling the Parties to adopt more advanced regimes of protection (*Section 3.4. Clauses defining commitments towards the enhancement of the levels of protection*). Fourth, it reviews the provisions forbidding the Parties to lower the levels of labour protection (*Section 3.5. Clauses defining commitments towards upholding the levels of protection*). And finally, it presents the research findings on how labour commitments included in EU FTAs address the different determinants of labour law (*Section 3.6 Findings relating to the analysis of labour commitments in EU trade agreements*).

3.1. Methodological clarifications

TSD chapters have been added in EU FTAs from the 2010s onwards. Over the years, they have become a standard chapter in EU trade agreements. As a consequence, most recent EU FTAs include a handful of labour related rights and obligations. This section aims both to identify and to categorise the clauses defining these labour related rights and obligations (Section 3.1.1.), and to present the method handled in this dissertation for their analysis (Section 3.1.2.).

3.1.1. The identification of the clauses defining labour commitments

As mentioned in the previous paragraphs, it took some time for the EU to present an articulate approach to labour rights protection in its trade agreements.[181] In fact, the inclusion in EU FTAs of provisions dealing with sustainable development and with labour rights accompanied the EU fundamental treaties modification process, which culminated with the adoption of the Lisbon Treaty in 2009. One of the many modifications contained in the Lisbon Treaty pertains to the linkage it establishes between the EU external policy, of which trade policy is a subpart, and the promotion of a set of norms, including human rights and sustainable economic, social and environmental development.[182] This percolated in the EU trade policy through the inclusion of TSD chapters in the

[181] As mentioned in the *Introduction*, Canada, the US and Mexico were the first countries to link trade liberalisation to the protection of workers' rights with the conclusion in 1994 of the NAALC, a side agreement to the NAFTA. The NAFTA has been recently renegotiated and these negotiations have resulted in a new trade agreement, called the USMCA trade agreement. The USMCA entered into force on July 1, 2020.

[182] Article 21(1)-(2) of the TEU provides indeed that the EU's external policies must respect the principles of 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations

trade agreements.[183] The 2011 EU-RSK FTA was the first agreement to include a TSD chapter. This practice was repeated in all trade agreements concluded subsequently so that, as of June 2020, ten EU FTAs that have fully or partly entered into force include a TSD chapter.[184]

TSD chapters have been drafted according to a relatively stable structure. They contain, inter alia, labour provisions defining commitments, establishing enforcement mechanisms, arranging cooperation between the contracting Parties, setting up an institutional structure for the functioning of the chapter. With respect to labour commitments more specifically, they are generally included in three different provisions appearing in the agreements under the following subheadings:[185] (i) right to regulate and levels of protection; (ii) multilateral labour standards and agreements; and (iii) upholding levels of protection. Thus, these three provisions are present in all TSD chapters and largely regroup the labour commitments included in the EU trade agreements. While these provisions appear in all covered FTAs, at least three aspects distinguish them across these agreements.

First, certain commitments are present in some FTAs and not in others. Indeed, as shown in *Table 1* below, only a limited number of commitments are present in all covered agreements. In fact, out of

---

Charter and international law' and must also pursue a set of objectives, including '[the fostering of] sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'. For a discussion of labour provisions anchorage in the Lisbon Treaties see: Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 17.

[183] TSD chapters are a typical feature of EU third generation FTAs. Now a handful of countries such as Canada, Chile, and EFTA countries systematically include relatively developed regimes of labour rights protection in their trade agreements. For a discussion of the approach adopted by these countries in matters of labour rights protection in their FTAs, see: Lazo Grandi, "Trade agreements and their relation to labour standards".

[184] While TSD chapters cover both the labour and environment-related aspects of sustainable development, this dissertation focuses on the first element. Thus, the EU-RSK FTA was the first agreement to include a TSD chapter. It partly entered into force in 2011. Then, nine other FTAs have followed. These agreements and their date of full or partial entry into force are: the EU-Central America FTA (2013) ; EU-Colombia-Peru-Ecuador FTA (2013, for Colombia and Peru and 2017, for Ecuador) ; EU-Ukraine FTA (2016); EU-Georgia FTA (2016); EU-Moldova FTA (2016); EU-Canada FTA (2017) ; EU-SADC FTA (2018) ; EU-Japan FTA (2019); and EU-Singapore FTA (2020). Note that the EU-Vietnam FTA entered into force on the 1 August 2020. This agreement is however not discussed in this dissertation. Other agreements, such as the EU-Mercosur FTA have already been signed and are still awaiting adoption by the relevant authorities to enter into force. Some other FTAs are in course of negotiation. This is for example the case of the EU-Mexico; EU-Australia; EU-New Zealand FTAs.[184] All these agreements include or are meant to include a TSD chapter. For a look at the current state of ratification and negotiation see: http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (last consulted on 15/02/2019).

[185] This dissertation adopts the following terminology: while the term "provision" refers to a whole Treaty article, the word "clause" and "commitment" (both are used as synonyms) are used to indicate the part of a provision. Thus, it considers a clause as a provision's sub-unit or one of its "building blocs." This distinction is justified by the fact that the provisions in EU FTAs generally include several rights or obligations and that this dissertation needs a term which allows to clearly refer to each right or obligation separately. Thus, a clause or a commitment is characterised by a specific right or a specific obligation which distinguishes it from other clauses or commitments. Clauses or commitments may have different lengths. They can constitute a whole paragraph in a provision, a part of a paragraph etc.

the eleven types of labour commitments identified in this dissertation only six of them have been included in all FTAs. Second, the ordering of the commitments may vary across FTAs. This implies two things. On the one hand, commitments towards the same subject matter may be included in different places of a same provision depending on the agreements. On the other hand, commitments towards the same subject matter may be included in different provisions across FTAs.[186] As we will see below, these different localisations may have legal implications. Third, the content of the commitments may change from agreement to agreement. With the exception of labour provisions included in the EU-Georgia and in the EU-Moldova agreements, as well as in the EU-RSK and in the EU-Singapore agreements, which present quasi-identical formulations respectively, all other FTAs handle some variations in the phrasing they adopt.

Considering, the relative mobility of the commitments within the three provisions mentioned above, this dissertation adopts its own typology. This typology regroups the commitments according to cross-cutting characteristics. Hence, the different labour commitments identified in the ten EU trade agreements covered in this research are sorted into four clusters: (1) commitments towards the rights to regulate; (2) commitments towards minimum levels of protection; (3) commitments towards the enhancement of the levels of protection; and (4) commitments towards upholding the levels of protection.[187] Each cluster brings together commitments having similar implications for the levels of labour rights protection.

[186] For example, while the clause called "commitments not to fail to enforce labour laws" has been drafted in the "upholding levels of protection-provision" of all FTAs, the EU-SADC and the EU-Japan agreements include this clause under their "right to regulate and levels of protection-provision."

[187] Other authors have used different typologies. For instance, *Häberli et al.* identify the three following categories: (i) commitment to strive to improve the levels of protection; (ii) commitments not to lower existing levels of protection; and (iii) Commitments to implement the existing domestic standards. See : Häberli, Jansen and Monteiro, "Regional trade agreements and domestic labour market regulation"; In turn, Bartels writes: 'It was therefore no surprise that CETA would, broadly speaking, follow these precedents, which it does by including the following three types of obligations: (a) obligations to implement certain multilateral obligations, (b) obligations requiring the parties not to reduce their existing levels of protection, and (c) best endeavours obligations encouraging the parties to raise their levels of protection of labour and environmental standards.' Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 2.. See also: Bartels, "The EU's approach to social standards and the TTIP," 87. Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 11–12.

TABLE 1: CATALOGUE OF THE LABOUR COMMITMENTS INCLUDED IN THE TSD CHAPTERS OF THE TEN COVERED AGREEMENTS ('X'=PRESENT; 'O'=ABSENT)

		EU - Republic of South Korea (2011)	**EU - Central America** (2013)	**EU - Peru-Colombia-Ecuador** (2013)	**EU – Ukraine** (2016)	**EU - Georgia** (2016)	**EU – Moldova** (2016)	**EU – Canada** (2017)	**EU – SADC** (2018)	**EU – Japan** (2019)	**EU-Singapore** (2020)	Total (/10)
	(1) Rights to regulate	**X**	**x**	**x**	**X**	**x**	**x**	**X**	**X**	**x**	x	10
Commitments towards minimum levels of protection	(2) Commitments towards internationally recognised standards and international agreements	**x**	**x**	**x**	**X**	**x**	**x**	**X**	**X**	**x**	X	10
	(3) Commitments towards core labour standards	**X**	**x**	**x**	**X**	**x**	**x**	**X**	**X**	**x**	X	10
	(4) Commitments towards full and productive employment and decent work for all	**x**	**x**	**x**	**X**	**x**	**x**	**X**	**X**	**x**	X	10
	(5) Commitments towards the implementation of ILO Conventions	**x**	**x**	**o**	**X**	**x**	**x**	**X**	**X**	**x**	x	9
Commitments towards the enhancement of the levels of protection	(6) Commitments towards high levels of labour protection	**x**	**x**	**x**	**X**	**x**	**x**	**X**	**O**	**x**	X	9
	(7) Commitments towards the improvement of the levels of labour protection	**x**	**x**	**o**	**X**	**x**	**x**	**X**	**O**	**x**	X	8
	(8) Commitments towards the ratification of ILO Conventions	**x**	**o**	**o**	**X**	**x**	**x**	**X**	**o**	**x**	X	7
	(9) Commitment towards the approximation of the laws to EU Practices	**o**	**o**	**o**	**X**	**o**	**o**	**O**	**O**	**o**	O	1
Commitments towards upholding the levels of protection	(10) Commitments not to fail to enforce labour laws	**X**	**x**	**x**	**X**	**x**	**x**	**X**	**X**	**x**	X	10
	(11) Commitments not to lower the levels of labour protection	**x**	**x**	**x**	**X**	**x**	**x**	**X**	**X**	**x**	X	10
	Total (/11)	10	9	7	11	10	10	10	7	10	10	

As shown is *Table 1*, not all clauses have been included in all covered FTAs. Their presence or not in a trade agreement responds to negotiations dynamics and political preferences of the contracting Parties. Moreover, the commitments listed in *Table 1* constitute the core of the regime of labour rights

protection provided in the EU most recent FTAs.[188] As such, they include the rights and obligations which determine the Parties' regulatory space for labour law under the covered agreements. Note that other clauses in the TSD chapters include references to labour rights protection. However, these clauses do not establish commitments binding the Parties to the achievement of specific results or conducts. Therefore, they are not included in *Table 1*.[189] Overall, the analysis of labour commitments undertaken in this chapter considers eleven categories of commitments across ten EU trade agreements. The next section presents the methodological approach handled in this dissertation in order to assess how these commitments shape the countries' regulatory space for labour law.

3.1.2. The analysis of the labour commitments' legal character

It is common knowledge that in international treaties, rights recognise or grant countries legal entitlements, while obligations bind or prohibit them to achieve certain conducts or results. Rights and obligations give shape to a legal space within which countries can position themselves. Rights and obligations are uneven however. They can be formulated in an infinite number of ways. And these formulations bring about an infinity of legal nuances, thus recognising or granting entitlements, and binding or prohibiting achievements to different degrees. In other words, legal commitments can constrain the practices of those to whom they are directed in stronger or weaker ways.[190] Overall, the type of instrument in which they are contained as well as the design of the provisions they are included in determine their legal capacity to induce the desired outcomes.

This short insight into what is called the "legal character"[191] of provisions allows to better grasp the relevance of recurrent discussions surrounding the negotiation and the adoption of certain international instruments. In recent years, debates – that went well beyond the narrow circle of diplomats and academics – on the legal meaning of such instruments pertained, inter alia, to the 2015 UN Paris Agreement on Climate Change,[192] to the 2015 Joint Comprehensive Plan of Action on the

[188] Thus, the analysis undertaken in this dissertation is limited to labour provisions included in the TSD chapters and does not engage with clauses contained in other parts of the trade agreements which may have links to the protection of labour rights, such as the human rights clauses included in some trade agreements.

[189] Importantly, the fact that these clauses do not establish commitments does not mean that they are meaningless. Indeed, these clauses should be considered to define the context and develop a narrative within the TSD chapters which can be used in order to further interpret the commitments.

[190] Daniel Bodansky, *The Art and Craft of International Environmental Law* (Cambridge, Mass: Harvard University Press, 2010), 103..

[191] Shelton uses the term "legal force" as a synonym to "legal character". Dinah Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft Law'," in *Commitment and Compliance*, ed. Dinah Shelton (Oxford University Press, 2003), 4.

[192] See, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last consulted on 26/05/2020).

lifting of nuclear related sanctions against Iran,[193] to the 2018 Global Compact for Safe, Orderly and Regular Migration signed in Marrakesh.[194] In these several cases, the type of instrument, the wording of the text, and even the punctuation and alleged typos[195] together with the legal consequences of these various features were raised in public discussions. Similarly, addressing the question of the *legal character* of labour commitments in EU trade agreements allows to better understand these provisions' legal implications for the Parties to the agreements. The analysis of these labour commitments' legal character is the main undertaking of this chapter.

In this dissertation, the legal character of a provision is defined as 'the extent to which the provision creates rights and obligations for Parties, sets standards for State behaviour, and lends itself to assessments of compliance/non-compliance and the resulting visitation of consequences.'[196] A provision's legal character is determined by a set of four variables:[197] (1) the legal form of the

[193] This plan of action has been concluded between Iran on the one hand and China, France, Russia, United Kingdom, United States and Germany on the other hand. However, on 8 May 2018 the US withdrew from the agreement. See: https://www.consilium.europa.eu/en/policies/sanctions/iran/jcpoa-restrictive-measures/ (last consulted on 26/05/2020).

[194] See, https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf (last consulted on 26/05/2020). For an example of the debate on the binding character of the Marrakesh agreement, see the interview of Prof. Helmut Aust on ARD, on 10 December 2018: https://www.tagesschau.de/multimedia/video/video-481161.html (last consulted on 21/06/2020). In Belgium, the ratification of the Marrakesh agreement led to the governments' dismissal in December 2018.

[195] The inclusion of the word "shall" in article 4(4) of the 2015 Paris Agreement – a key provision providing for a commitment on the side of developed countries to set "nationally determined contributions" – in the take it or leave it draft presented by France towards the end of the 2015 Paris Conference was rejected by the US on the ground that it would entail a different obligation for developed countries than the obligation applicable to developing countries for which the word "should" was handled. The secretariat eventually argued that it was a typo and changed the "shall" into a "should". On this issue, see: Lavanya Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," *Journal of Environmental Law* 28, no. 2 (2016): 354,. Daniel Bodansky, "The Legal Character of the Paris Agreement," *Review of European, Comparative & International Environmental Law* 25, no. 2 (2016): 142; Jacob Werksman, "The Legal Character of International Environmental Obligations in the Wake of the Paris Climate Change Agreement' (Brodies Environmental Law Lecture Series, 2016" (Brodies Environmental Law Lecture Series, September 02, 2016), accessed July 4, 2020, https://www.law.ed.ac.uk/sites/default/files/2019-06/BrodiesLectureontheLegalCharacteroftheParisAgreementFinalBICCLEdinburgh.pdf, 13; J Vidal, 'How a 'Typo' Nearly Derailed the Paris Climate Deal', The Guardian (London, 16 December 2015) <http://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-theparis-climate-deal> accessed 08 April 2020.

[196] Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," 338.

[197] Studies on the legal character of provisions included in various climate change agreements include similar variables. See for instance: Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law*, First edition (Oxford, New York, NY: Oxford University Press, 2017), 17 et seqq. Werksman, "The Legal Character of International Environmental Obligations in the Wake of the Paris Climate Change Agreement' (Brodies Environmental Law Lecture Series, 2016," 8.; Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," 338; Bodansky, "Legally Binding versus Non-Legally Binding Instruments," 158. Tham, Joo-Cheong and Ewing, K. D., "Labour Clauses in the TPP and TTIP: A Comparison Without a Difference?," 10–11; Bourgeois, Dawar and Evenett, "A comparative analysis of selected provisions in free trade agreements," 12. Note that in contrast with the other studies, Bourgeois et al. work also includes the provision's scope of

instrument in which the provision is contained; (2) the obligations included in it; (3) its scope of application; and (4) its degree of precision. The interplay between these four variables defines the provision's legal character. As such, it determines the extent to which Parties are constrained by it, and consequently the degree to which it limits their regulatory space. The following paragraphs further discuss each of these four variables.

First, *the legal form of the instrument in which the provision is contained* determines the instrument's binding character. While several degrees of binding character can be distinguished for international instruments,[198] the labour commitments analysed in this study are all included in trade agreements which constitute Treaties under article 2.1(a) of the VCLT and are binding upon their contracting Parties according to article 26 of the same Convention.[199] This element is important as much confusion exists among commentators as to whether or not labour provisions in EU trade agreements are binding.[200] In this regard, it should be clearly stated that, by the fact of their inclusion in an international treaty, labour provisions *are* binding for the Parties. As such, they have the required formal quality to shape

application as a feature determining the provisions' legal character. Furthermore, some studies also include the treaty's enforcement/oversight mechanisms. This dissertation considers that the provision's scope of application is relevant in order to assess the breadth of the regime of labour protection. However, it does not analyse the enforcement mechanisms. The presence or not of strong enforcement mechanisms may have implications for the design of treaties' provisions. Moreover, it allows to assess the extent to which Parties accept to subject the commitments they have taken up to judicial review. However, enforcement mechanisms do not determine how labour commitments shape the Parties' regulatory space *in abstracto*. Therefore, they are not considered in this research. Instead of that, next chapter will considering the cooperation mechanisms supporting the labour commitments in the TSD chapters.

[198] In this regard, some authors argue that the instruments' binding character varies along a spectrum going from instruments including the "explicit negation of intent to be legally bound" to instruments specifying that they establish "unconditional obligation". See, Abbott et al., "The concept of legalization," 410..

[199] Article 26 of the VCLT proclaims the principle of *pacta sunt servanda*, i.e. a treaty is 'binding upon the parties to it and must be performed by them in good faith.' More specifically, countries who wanted to become Parties have notified their will to be bound (through ratification, acceptance, approval or accession) and acknowledge that they remain bound to the Treaty unless and until they withdraw from it.

[200] There is much terminological confusion as to whether or not the obligation included in the TSD chapters are binding. For an example of this confusion, see: Krajewski and Hoffmann, "Alternative Model for a Sustainable Development Chapter and related provisions in the Transatlantic Trade an Investment Partnership (TTIP)". This is the reason why the EU Commission has repeatedly underlined the binding character of the commitments included in its TSD chapters. See for instance: EU Commission, *Trade for all: Towards a more responsible trade and investment policy* (2015); EU Commission, "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements" (2018). As Bodansky argues,

> **'[…] the term *binding* is ambiguous. Sometimes it is used to describe a norm's formal source: treaties are binding, for example, whereas UN General Assembly resolutions are only recommendations. On other occasions, the term is used to refer to what I am calling *mandatory.* This is apparent when writers characterize a treaty-norm as non-binding. Since a treaty provision clearly has the formal status of law, what they mean is that the provision is non-mandatory. The confusion leads some writers to add the qualification "legally" to the term *binding,* suggesting that a norm can be binding in non-legal ways and that a legal norm may not be binding'.**

Bodansky, *The art and craft of international environmental law*, 104.

their regulatory space. Crucially, the binding character of labour provisions must be distinguished from the consideration of the provisions' specific formulation and from the fact that they may be worded in relatively weak language.[201] This consideration relates to the three other variables defining the provisions' legal character.

Second, *the obligations included in the provision* refers to the "legal verbs"[202] contained in the provision. Typical legal verbs are "shall", "recommend", "acknowledge" etc. Treaty drafters can formulate these obligations in more or less prescriptive language.[203] The specific legal verbs they eventually choose reflect their degree of willingness to be bound to certain achievements. Thus, whereas all labour provisions included in the TSD chapters are formally legally binding upon the contracting Parties, the obligations they contain may confer them different degrees of prescriptiveness. Regarding the criteria handled for the assessment of the obligations, this dissertation distinguishes between obligations of conduct and obligations of result. As the name of these obligations suggests, while the former bind the Parties to the achievement of a specific conduct, the latter bind them to the achievement of a defined result.[204] The determination of whether an obligation is one of conduct or one of result is generally apparent from the ordinary meaning of the legal verb in

[201] Indeed, some provisions in international treaties do not even establish rights and obligations. It is for instance the case of the preambular section (which can be referred to interpret provisions contained in the operative part of the text) as well as provisions that define the objective, the context, or construct a narrative within the agreement. Rajamani defines the importance of non-obligations for the regime set by the Paris agreement in the following terms: 'they perform a critical function. They capture shared understandings, endorse common conceptual underpinnings and tenets, and signal solidarity in addressing the problem.' Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," 356.. As some commentators have highlighted, the dual definition of obligations along the form-and-content dimensions can lead to contrast between the form and the substance. It is for instance the case when, in a legally binding treaty, Parties include political objectives to which they refuse to be legally bound, or hortatory obligations such as "to strive to endeavour", "to seek to promote" etc. This type of formulations creates at best weak legal obligations. See, Abbott et al., "The concept of legalization," 412.

[202] Scholars doing research in legal grammar also speaks of "legal actions". See for instance: Jan Chovanec, "Grammar in the Law," *The Encyclopedia of Applied Linguistics*, 2012; Risto Hiltunen, "The Grammar and Structure of Legal Texts," in *The Oxford Handbook of Language and Law* (2012); Vijay K. Bhatia, "Cognitive Structuring in Legislative Provisions," in *Language and the Law*, ed. John P. Gibbons (Routledge, 2014).

[203] In order to avoid terminological confusion, this dissertation uses the term "binding" to refer to the treaties' legal effects on the contracting Parties (in the sense of art. 26 VCLT); the term "commitment" refers to a contractual clause establishing rights and or obligations for the contracting Parties; and the term "obligation" refers to the legal verb included in a commitment.

[204] In the same vein, Wolfrum defines an obligation of result as one 'where States have to achieve a specific factual situation the prescription of which may be either prohibitive or commanding', and an obligation of conduct as one 'where the State concerned is required to undertake a particular action.' see: Rüdiger Wolfrum, "Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations," in *Looking to the Future* (Brill, 2010), 369,373. See also articles 20 and 21 of the Draft Articles of the International Law Commission on State Responsibility (**the ILC**) by the Special Raporteur Roberto Ago. In: Yearbook of the International Law Commission, 2, 1977.

question.[205] Overall, the distinction between obligations of conduct and obligations of result captures a crucial element of any commitment imposed upon the contracting Parties, namely it sheds light on the nature of the achievements that they must realise. This is indeed a key aspect of treaty provisions, as has proven to be the case in the negotiations towards the conclusion of the 2015 Paris agreement. In this regard, one of the EU negotiators noted,

> **'[we] came to an understanding that a compromise could lie in a classic distinction between an obligation of result (what Kerry referred to in the [Financial Times] as "Kyoto style" targets), and an obligation of conduct. Targets binding as to outcome, as we understood it, were a step too far, as these would require Congressional action in a context where the Executive's regulatory authority proved insufficient to achieve that target.'[206]**

Ultimately, this dissertation does not consider that one type of obligations is "better" or "stronger" than the other. Rather, it contends that both types are of a different nature and call for different kinds of achievements.[207]

Third, *the scope of application of the commitment* refers to the breadth of the commitment for taken up by the Parties. Regarding the assessment of a commitment's scope of application, this dissertation focuses on three elements. First, it attempts to determine the commitment's scope of application *ratione personae* by identifying the Party(ies) upon which it applies. Namely, does the commitment apply to one Party, to all Parties or, for FTAs including more than two Parties, to several of them? Second, it strives to determine the commitment's scope of application *ratione materiae.* To do so it looks at two elements: (i) the specific labour rights covered by the commitment, and (ii) additional phrases qualifying the obligation. Indeed, various sets of labour rights are addressed in the provisions. This includes, inter alia, the core labour standards, the decent work standard, and specific ILO Conventions. This research identifies which of these rights are concerned. Then, additional phrases are

[205] In this regard, this dissertation generally uses the paying online version of the Oxford English Dictionary in order to retrieve the ordinary meaning of the terms. In doing so, it follows the practice previously adopted by arbitration panels. See for instance: In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, fn. 82 (Arbitral panel established pursuant to chapter twenty of the CAFTA-DR 2017, June 14).

[206] Werksman, "The Legal Character of International Environmental Obligations in the Wake of the Paris Climate Change Agreement' (Brodies Environmental Law Lecture Series, 2016," 13. For another example where the distinction between obligation of result and obligation of conduct has been crucial see: Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, 263-4, where the question is raised whether the obligation included in article 6 of the Non Proliferation Treaty on the negotiations towards nuclear disarmament is an obligation of result or one of conduct.

[207] Wolfrum contests the view of Special Rapporteur Roberto Ago according to which an obligation of result is inferior to one of conduct. Wolfrum writes in this regard '[it] seems to be preferable to conclude that the two types of international obligations are of a different nature trying to achieve different objectives and that no hierarchy exists between the two.' Wolfrum, "Obligation of Result Versus Obligation of Conduct," 382. For Ago's position on the matter, see: Yearbook of the International Law Commission, 2, 1977, pt. 1, at 12 §24.

sometimes included in the provision so as to qualify the obligation. These phrases can have as effect to broaden or to narrow the provision's scope of application. The assessment of the phrases' effects on the provision's scope of application is essentially a matter of interpretation. As such, this may entail subjective appreciations from the author. To reduce these subjective appreciations to the minimum, this dissertation focuses on phrases which have been recognised to have a *notorious* effect on the provision's scope of application. In this regard, the assessment largely focuses on formulations that have been discussed by the doctrine and/or in the case law. This approach both recognises the limits inherent to the "interpretation exercise" and attempts to address them in a satisfactory fashion. Regarding the implications of the commitments' scope of application for states' regulatory space, this dissertation adopts the view that commitments with narrower scope of application circumscribe the contracting Parties' regulatory space to a lesser extent, while commitments with broader scope of application have a larger implications for their regulatory space.

Fourth, *the provision's degree of precision* refers to the extent to which the clause unambiguously defines the conducts and/or the results required, proscribed or authorised, as well as the conditions for their application.[208] Provisions can adopt various degrees of precision. These degrees are best conceived of as varying on a spectrum limited at one end by provisions handling strongly unspecific formulations,[209] and at the other end by provisions adopting highly precise language.[210] Between these two extremes many levels of precision are practicable. Regarding the criteria handled in this dissertation to assess a provision's degree of precision, problems of interpretation similar to those noted for the assessment of the phrases qualifying the provisions' scope of application may arise. Here again, this issue is addressed through a focus on formulations which are *notoriously* unprecise, i.e. the phrases vis-à-vis which one can *bona fide* doubt the exact meaning and the legal implications. To do

[208] In this regard, *Abbott et al.* have ranged legal provisions according to their level of precision. In the authors' typology, precision stretches from "determinate rules" with only narrow issues of interpretation, to ''standards'' regarding which it is impossible to determine whether specific conducts comply with them. See: Abbott et al., "The concept of legalization," 415.

[209] Authors have highlighted the recurrent use of such unprecise phrases in environmental agreements. *French et al.* note in this regard: 'For instance, the commitments of developed countries relating to financial resources and technology transfer are peppered with phrases such as 'as appropriate', 'if necessary', 'in so far as possible', and 'all practicable steps'.' D. French and L. Rajamani, "Climate Change and International Environmental Law: Musings on a Journey to Somewhere," *Journal of Environmental Law* 25, no. 3 (2013): 447, https://doi.org/10.1093/jel/eqt022.

[210] At the domestic level the discussion on the degree of precision of norms has been largely framed in terms of "standards" and "rules" where rules refer to precise norms and standards to less precise ones. Bodansky uses the example of speed limit to illustrate this difference. On the one hand, a norm limiting the speed limit to 55miles/hour can be considered to constitute a rule, while a norm requiring people to drive at a "safe speed" can be considered a standard. While rules define *ex ante* what is allowed and what is not, standards allow for *ex post* judgment and discretion on what is permissible. See: Bodansky, *The art and craft of international environmental law*, 105. On the distinction between rules and standards see also: John Braithwaite, "Rules and Principles: A Theory of Legal Certainty," *Austl. J. Leg. Phil.* 27 (2002).

so, the assessment largely concentrates on formulations for which the doctrine and/or the case law recognise the unprecise character. This approach is deemed satisfactory in order to identify provisions with a low degree of precision. Ultimately, this dissertation adopts the view that states with low degrees of commitments are rather inclined to be bound by imprecise rules.[211] Indeed, less precise rules create broader areas of interpretation, thus entailing larger discretion for the concerned Parties.[212] Overall, regarding the degree of precision's implications for regulatory space, this research

[211] In this regard, imprecision can be used in order to limit the binding character of obligations. For an argument in this sense, see: Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International organization* 54, no. 3 (2000); Abbott et al., "The concept of legalization". At the more general level, note that researchers have operationalized precision in different ways. For instance, *Schettler* has looked at whether the specific circumstances under which the obligation apply are defined, or whether it is formulated in vague terms leaving room for interpretation. See, Leon Schettler, *Socializing Development*: *Transnational Social Movement Advocacy and the Human Rights Accountability of Multilateral Development Banks*, 1. Auflage, Edition Politik 96 (Bielefeld: transcript, 2020), 102. In turn, *Manger et al.* have researched precision in IIAs. To measure precision, the authors count the number of clauses present in a given IIA and compare this number to the number of types of clauses present in an index they have constituted (this index includes all types of clauses they have categorised in 1200 IIAs). The higher the ratio between both numbers, the more precise the IIA. See: Mark S. Manger and Clint Peinhardt, "Learning and the Precision of International Investment Agreements," *International Interactions* 43, no. 6 (2017). Then, *Henckels* measures precision by analysing how the formulation of specific provisions – provisions on fair and equitable treatment, indirect expropriation, national treatment and exceptions - have been drafted in the TPP, CETA and TTIP. Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP". While *Manger et al.* approach arguably remains at a relatively general level (they assess the absence of presence of a clause in a Treaty in order to define its degree of precision), *Henckels'* approach pays closer attention to the specific formulation adopted in the text. This dissertation adopts a doctrinal approach similar to that handled by *Henckels*.

[212] Note that there is a debate on whether unprecise rules leave more or less margin of appreciation to countries. On the one hand, it has been contended that precise rules, in that they clearly define the conducts and/or the results to be achieved, leave less discretion to the Parties. In this sense, some authors have argued that 'a precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation.' Abbott et al., "The concept of legalization," 412. In the same vein Rajamani writes, '[if] the provision uses discretionary, qualifying and contextual language (using phrases such as 'as appropriate'), it will expand the space for self-serving interpretations by Parties, and constrict the space for consistent application.' Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," 343. See also: Judith Goldstein et al., "Introduction: Legalization and World Politics," *International organization* 54, no. 3 (2000): 396; Bodansky, "Legally Binding versus Non-Legally Binding Instruments," 162. On the other hand, some authors have laid the emphasis on the role of jurisdictions and how imprecise provisions do complicate the assessment of the Parties' compliance with these rules. For instance, *Henckels* argues that regulatory autonomy can be increased through more precision. Henckels' study is hinged on the role played by adjudicative bodies when reviewing IIAs. She assumes that bodies have more jurisdictional discretion when deciding on unprecise rules. In this regard, she argues that 'Less precise norms give adjudicators greater authority to make evaluative judgments, meaning that lawmakers will have less control over the decision-making criteria that adjudicators use.' Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP," 31. For an analogue consideration of this question in the context of the WTO jurisdictions, see: Christiane Gerstetter, "The Appellate Body's Response to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation," *C. Joerges and E.-U. Petersmann, Constitutionalism, Multilateral Trade Governance and Social Regulation. Hart Publishing, Oxford*, 2006, 117. On the backdrop of this discussion, it is important to note that TSD chapters do not include strong adjudicative mechanisms similar to those included in IIAs or established at the WTO. This tends to challenge the transposability of the conclusions

considers that a provision's degree of precision is negatively related to the regulatory space it grants to the concerned contracting Parties.

In conclusion, the method adopted in this dissertation for the analysis of labour commitments accounts for a "multidimensional normative space"[213] within which the commitments can be placed according to four variables defining their legal character. Together these variables determine the commitments' different degrees of legal force and of authority.[214] Treaty drafters are careful in selecting the combination of forms, obligations, scope of application, and precision that corresponds best to their preferences. The form of the instrument can render its content more or less binding for the Parties; the formulation of the obligation can further nuance the provision's degree of prescriptiveness; the commitments required from the Parties can be extended or narrowed by manipulating their scope of application; finally, precision is another dimension that can be modulated in order to adjust the obligations' legal character.[215] The analysis of the labour commitments undertaken in this dissertation will be conducted in conformity with the rules of interpretation as codified in the VCLT.[216] Last but not least, the study of the labour commitments' legal character undertaken in this chapter allows to gain a detailed understanding of the regime of labour rights protection provided in EU FTAs. As such it digs into a key aspect of the relationship between economic globalisation and social rights. This analysis will unveil the craftsmanship of treaty drafters, and their great creativity when navigating the constraints set by the distribution of competences between the EU and its member states. However, this analysis may also appear, at times, relatively technical. Therefore, the reader is invited to open the window and fill his/her lungs with good fresh air, before beginning the reading.

3.2. Clauses defining the rights to regulate

The clauses establishing the rights to regulate primarily aim at guaranteeing the Parties the ability to adopt and modify their laws and regulations in the field of labour rights protection. Considering the general regime provided in the TSD chapters as well as the Parties' interest in conserving some leeway to adjust production costs in a context of international competition, clauses defining the rights to regulate in EU FTAs essentially strive to ensure that Parties can diminish the levels of protection

reached by Henckels and Gerstetter to labour provisions in EU FTAs and to side with authors who argue that less precise provisions increase the Parties margin of action.

[213] Expression used in: Bodansky, *The art and craft of international environmental law*, 102.

[214] Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," 342.

[215] Abbott and Snidal, "Hard and soft law in international governance," 442.

[216] Article 31 et seq. of the VCLT cover the general rule of interpretation and the supplementary interpretative principles and constitute the legal bases setting the standards for the interpretation of international legal instruments.

guaranteed in their domestic laws and regulations.[217] The rights to regulate in social matters are traditionally understood as sovereign prerogatives.[218] On this backdrop, one can wonder about the added value of including such clauses in TSD chapters.[219] Some authors have indeed questioned the legal effects of these clauses altogether.[220] However, one should consider that, according to the principle of *effet-utile,* these clauses add a particular meaning to the regime of labour rights protection – one that would not exist had the treaty drafters not included these clauses.[221] More specifically, commentators have argued that rights to regulate clauses are most useful in cases of disputes where they may play an important role in the interpretation of the general regime provided by the agreement.[222] The *Opinion 2/15* of the CJEU gives a good example of that. The CJEU consideration that the TSD chapter of the EUSFTA belongs to the EU exclusive competences heavily relied on the existence of rights to regulate in this chapter.[223] Clauses defining rights to regulate have been included in the ten

[217] As such, it contrasts with the rights to regulate provided in investment treaties which primarily aim at guaranteeing the Parties the ability to undertake regulatory reforms to protect legitimate public welfare objectives – such as public health, safety, and the environment – and that have as effects to increase the levels of protection, potentially at the costs of investors. See, Catharine Titi, *The Right to Regulate in International Investment Law*, 1. ed., Studies in international investment law 10 (Baden-Baden: Nomos, 2014), Zugl.: Siegen, Univ., Diss., 2013.

[218] In this sense, article 268 of the EU-Peru-Colombia-Ecuador FTA states that the right to regulate is a 'sovereign right of each Party', and article 285 of the EU-Central America makes the link between the Parties' constitutions and their right to regulate to establish their own levels of social protection.

[219] This consideration is based on the principle that, within their territories, states may exercise their jurisdictions in any matter, even if no rule of international law permits them to do so, and provided that they do not infringe rules of international law to which they have committed. Thus, states have a wide margin of action which is only limited by international law. This principle is derived from the Lotus case-law of the PCIJ which states that '[restrictions] upon the independence of States cannot […] be presumed'. *The case of the S.S. "Lotus" (France v. Turkey)*, PCIJ, September 7, 1927, at 44. In this case, France challenged the capacity, under international law, of Turkish authorities to exercise their jurisdiction over French nationals after a French and a Turkish vessels collided.

[220] For instance, see: Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 15–16. Krajewski and Hoffmann, "Alternative Model for a Sustainable Development Chapter and related provisions in the Transatlantic Trade an Investment Partnership (TTIP)," 12.

[221] In this respect, the WTO Appellate Body has stated that '[one] of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'. (*sic*) Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, p. 23 (adopted 20 May 1996). See also: *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 130.

[222] In the same vein, the authors of the *Rapport Schubert sur l'evaluation de l'impact du CETA* have written: '[les] clauses visant à préserver le droit de l'État de réglementer *sont destinées à déployer leurs effets principalement en cas de contestation*, par une Partie contractante […] ou par un investisseur étranger […], d'une mesure environnementale ou sanitaire adoptée par le Canada, l'Union européenne ou ses États membres'. (Emphasis added by the author) Jean-Luc ANGOT et al., "L'impact de l'Accord Économique et Commercial Global entre l'Union Européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé" (Rapport au Premier ministre, 2018), 20. While the *Rapport Schubert* mainly deals with environmental aspects of the CETA and this specific excerpt relates to chapter 29 on dispute settlement, it is also relevant for the right to regulate under the TSD chapter of EU FTAs.

[223] More generally, the Court pointed to the fact that, in these chapters, it was not the Parties' intention to regulate the levels of protection. See: CJEU, Opinion 2/15, 16 May 2017, pt. 165.

covered FTAs. As such they constitute a key element of the regime of labour rights protection adopted by the EU in its trade agreements. While, the structure of these clauses is stable over all FTAs, their formulation slightly varies across agreements.

TABLE 2: CLAUSES DEFINING THE RIGHTS TO REGULATE IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
Recognising the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies […] (art. 13.3)	1. The Parties reaffirm the respect for their respective Constitutions[224] and for their rights there under to regulate in order to set their own sustainable development priorities, to establish their own levels of domestic environmental and social protection, and to adopt or modify accordingly their relevant laws and policies. (art. 285)	Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels of environmental and labour protection, […] and to adopt or modify accordingly its relevant laws, regulations and policies. (art. 268)	1. Recognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, […] and to adopt or modify their legislation accordingly […] (art. 290)	1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant law and policies […] (art. 228)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-SINGAPORE**
1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant law and policies, (…). (art. 364)	Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies […] (art. 23.2)	1. The Parties recognise the right of each Party to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies […] (art. 9)	Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations […] (art. 16.2)	[…] the Parties recognise the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify its relevant laws and policies accordingly. (art. 12.2)

[224] 'For the EU Party, this refers to the Constitutions of the Member States of the European Union, to the Treaty on the European Union, to the Treaty on the Functioning of the European Union and to the Charter of Fundamental Rights of the European Union' (footnote included in the article).

The clauses defining rights to regulate are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

To begin with, as the name suggests the rights to regulate determine rights rather than obligations. Depending on the agreements, these rights are "recognised" or "reaffirmed." The verb *to reaffirm,*[225] which is only handled in the clause of the EU-Central America FTA, is of declarative nature and indicates that the Parties already recognised these rights to each other prior to the FTA's entry into force. In contrast, the legal verb *to recognise*[226] included in the clauses of all other FTAs is of constitutive nature. As a commentator puts it, this 'might at least support an interpretation that the right exists because of the treaty.'[227] Moreover, all agreements have in common to acknowledge the rights of the Parties (i) to establish[228] their own levels of labour protection,[229] and (ii) to adopt or modify their relevant laws and policies. While the former allow Parties to define the degree of labour rights protection they want

[225] The ordinary meaning of the verb "to recognise" is 'to accept the authority, validity, or legitimacy of; […]' http://www.oed.com/view/Entry/159656?rskey=7RIHvu&result=1&isAdvanced=false#eid (last consulted on 18/02/2019).

[226] The ordinary meaning of the verb "to reaffirm" is 'to affirm or assert again or once more; to maintain and stand by (a statement, etc.) again, restate strongly'.
http://www.oed.com/view/Entry/158908?redirectedFrom=reaffirm#eid (last consulted on 18/02/2019).

[227] In this regard Bartels argues that '[it] is questionable whether this provision has any legal effect. By 'reaffirming' a right to regulate within their territories, by its own wording this paragraph is limited to rights that already exist for both parties. It is weaker than formulations by which the parties 'recognise' a right to regulate, which might at least support an interpretation that the right exists because of the treaty.' Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 15–16. The author makes this comment with respect to the right to regulate under article 8.9.1 of the CETA (chapter on investment). This is however also relevant for the right to regulate clause under the TSD chapters.

[228] The ordinary meaning of the verb "to establish" is 'to set up or bring about permanently (a state of things); to 'create' (a precedent); to introduce and secure permanent acceptance for (a custom, a belief)' http://www.oed.com/view/Entry/64530?redirectedFrom=establish#eid (last consulted on 18/02/2019).

[229] Note that the EU-Peru-Colombia-Ecuador, the EU-Georgia, the EU-Moldova, the EU-Ukraine and the EU-Japan FTAs add to this right one 'to establish/to determine domestic policies and priorities on sustainable development.' This reference to sustainable development can be considered to be broader than the mere reference to labour and environmental standards. Moreover, the right to set one's own "priorities" in matters of labour protection and sustainable development policies implies that contracting Parties have a certain discretion to define the order, and thus the rhythm of their reforms. The clause contained in the CETA is similar to the other clauses, except for the fact that, instead of referring to the Parties' right to establish their domestic policies and priorities on sustainable development, it recognises their right to 'set their labour priorities.' Moreover, the EU-Peru-Colombia-Ecuador agreement provides for an enhanced right to regulate by stating that '[the] Parties recognise the right of each Party to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental and labour regulations and standards, while not undermining the fulfilment of the obligations undertaken under this Title' (art. 277§3); and that '[nothing] in this Title shall be construed to empower the authorities of a Party to undertake labour and environmental law enforcement activities in the territory of another Party.' (art. 277§4) These two clauses have as effect to enhance their right to regulate by acknowledging a certain discretion with respect to the allocation of resources and by forbidding a Party's interference in matters of labour law enforcement on the territory of another Party. The inclusion of these clauses in the EU-Peru-Colombia-Ecuador agreement is probably due to Peru and Colombia's willingness to replicate a provision adopted in FTAs they had previously concluded with the United States. See article 17.3.1.(b) of the United States-Peru and of the United States-Colombia FTAs; https://ustr.gov/trade-agreements/free-trade-agreements/ (last consulted on 15/02/2019).

to guarantee at home, the latter acknowledges their rights to have the laws and policies implementing the degree of protection in question. In this regard, the legal verbs *to adopt*[230] and *to modify*[231] cover both the creation of *new* laws and policies as well as the amendment of *existing* ones. Thus, regardless of whether they "recognise" or "reaffirm" the rights to regulate, the clauses entitle the Parties to proceed to the legislative changes they see fit to guarantee the levels of protection of their own choosing. In other words, under the FTAs, the Parties have the right to adopt new laws or policies and to amend existing laws and policies to provide for higher, but also for lower levels of labour rights protection.

Regarding these rights' scope of application *ratione personae*, as indicated in the clauses, the rights are granted to the *Parties* to the agreements. In others words, they are granted to the EU and its Member States on the one hand, and to the respective trading partners on the other hand. This is at least the case until the EU-SADC agreement. Indeed, the EU-Japan and the EU-Singapore agreements have, for their part, been concluded between the EU alone, and the respective trading partners. Moreover, all trade agreement until the EU-SADC agreement contain a provision defining the term "Party." These provisions are invariably formulated as follows: '"Party" means the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union.'[232] A definition of the term "Party" is not included in the EU-Japan and the EU-

[230] The ordinary meaning of the verb "to adopt" is 'to approve or accept (a report, proposal, resolution, etc.) formally; to ratify' http://www.oed.com/view/Entry/2665?redirectedFrom=adopt#eid (last consulted on 18/02/2019).

[231] The ordinary meaning of the verb "to modify" is 'to make partial or minor changes to; to alter (an object) in respect of some of its qualities, now typically so as to improve it; to cause to vary without radical transformation (Now the principal general sense.)' http://www.oed.com/view/Entry/120655?redirectedFrom=modify#eid (last consulted on 18/02/2019).

[232] See: art. 1.2 EU-RSK FTA; art. 352 EU-Central America FTA; art. 6 EU-Peru-Colombia-Ecuador FTA; art. 428 EU-Georgia FTA; art. 461 EU-Moldova FTA; art. 482 EU-Ukraine FTA; art. 1.1 CETA; and art. 104 EU-SADC FTA. Note that this provision potentially raises a legal issue with respect to TSD chapters. Indeed, the CJEU established in the *Opinion 2/15* that the TSD chapters of the EUSFTA – and by extension, of all EU FTAs considered in this research – fall under the EU excusive competence (See: CJEU, Opinion 2/15, 16 May 2017, pt. 306). Accordingly one may consider that when the term "Party" is used in the relevant TSD chapters, it refers to the EU alone so that the EU and not its Member States are the subject of the commitments contained in the TSD chapters. However, when looking at these commitments, one observes that most of them are clearly drafted with reference to the protection of labour rights in the EU Member States' laws and policies (see for instance the several commitments towards ILO Instruments, the ratification of which is, under the distribution of competences between the EU and its Member States, a Member States' competence). Thus, there appears to be a contradiction between the CJEU case law read in parallel with the definition of the term "Party" under the relevant FTAs on the one hand, and the content of the labour provisions on the other hand. The only way to interpret this provision in a manner that reconciles both would be to argue that the provisions defining the term "Party" under the relevant FTAs do not relate to the external division of competences but to the internal division

Singapore agreements. Regarding the scope of application *ratione materiae* of the rights to regulate, two elements are considered: (1) the specific labour rights they protect; and (2) additional phrases qualifying these clauses. First, the clauses do not refer to any specific labour rights. Instead, they speak of rights to regulate vis-à-vis the (relevant) *laws and policies* (or other related formulations). This formulation is generally understood to refer to both, acts of the legislative and of the executive branches.[233] As such, these clauses apply to all types of labour rights that can be included in these acts. Second, regarding additional qualifications, the clauses do not include phrases that notoriously reduce their scope of application. On the contrary, the Parties' choice for a formulation combining the right "to establish," "to adopt" *and* "to modify" on the one hand, with a reference to "laws" *and* "policies" on the other hand, highlight their intention to opt for a wide-ranging scope of application for their rights to regulate.

With respect to this clause's degree of precision, the expression "levels of labour protection" included in the phrase 'Recognising/Reaffirming the right of each Party to establish its own levels of […] labour protection,' constitutes a key element both of the rights to regulate, and more largely, of the regime of labour protection established under TSD chapters. This expression is purposely vague. This allows to account for complex legal regimes, as is often the case with labour legislation. Indeed, labour laws and policies typically govern subject matters as diverse as collective labour laws and workplace equality laws; obligations of fairness and human rights; wage protection and workers' health and well-being.[234] These laws and regulations include both substantive obligations and procedural provisions which are likely to comprehend guiding principles, exceptions to these principles, and limitations to these exceptions.[235] In short, the expression "levels of labour protection" is practical as it manages to capture these several strands of complexity. Overall, the vague character of this expression grants the Parties a certain margin of appreciation regarding how to specify their regime's level of protection.

---

of competences, in regard to which social policies fall under the competences shared between the EU and its Member States (see, article 4(2)(b) of the TFEU).

[233] Note that the EU-Peru-Colombia-Ecuador FTA uses the formulation "relevant laws, regulations and policies"; the EU-Japan FTA uses the formulation "laws and regulations"; and the EU-Ukraine FTA uses the formulation "their legislation." While the term *law* can have different meanings depending on the jurisdictions, it is widely accepted to cover the legal acts adopted by the legislative bodies. In turn, *policies/regulations* may be understood to refer to acts adopted by bodies exerting executive functions. The reference to laws, policies/regulations and *legislation* thus encompasses both legislative as well as executive acts. For a similar argument see: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at fn. 23.

[234] For a discussion of the variety of subjects treated in labour law and an attempt to find a common normative justification to them, see: Guy Davidov, "The Capability Approach and Labour Law: Identifying the Areas of Fit," in *The Capability Approach to Labour Law*, ed. Brian Langille (Oxford University Press, 2019).

[235] Deakin and Wilkinson, "Rights vs Efficiency-The Economic Case for Transnational Labour Standards".

To conclude, regardless of whether they *recognise* or *reaffirm* certain rights, the rights to regulate entitle the Parties to adopt new laws and policies and to amend existing ones so as to provide for higher but also for lower levels of labour rights protection.[236] With respect to the scope of application, these clauses apply to all Parties and to all types of labour rights that are included in acts adopted by the legislative or by the executive branches. Moreover, they do not include phrases that notoriously reduce their scope of application. On the contrary, the Parties' choice for a formulation combining the right to "establish," "to adopt" *and* "to modify" on the one hand, with a reference to "laws" *and "*policies" on the other hand highlights their intention to opt for a broad scope of application for their rights to regulate. Finally, regarding the clause's degree of precision, the vague character of the expression *levels of labour rights protection* allows for a certain margin of appreciation regarding how to specify a regime's level of protection. This margin of appreciation tends to broaden the Parties' right to regulate. Overall, the rights to regulate grant the Parties a large margin of discretion to adopt and modify labour laws and regulations as they see fit.[237] This margin of discretion is not absolute however. Indeed, in the TSD chapters, the Parties have limited their rights to regulate through the inclusion of several commitments.

3.3. Clauses defining commitments towards minimum levels of protection

Clauses defining commitments towards minimum levels of labour protection constitute a first type of limitation to the Parties' rights to regulate.[238] By setting minimum levels of protection, this type of clauses aims to offer a response to the widespread concern that trade liberalisation leads to a race to the bottom in labour standards.[239] The floor of protection that these provisions guarantee aims to level playing field between economies with sometimes significant differences in levels of labour rights protection, thus promoting fair competition. Four varieties of clauses fall under this category: (1) *Commitments towards internationally recognised standards and agreements*; (2) *Commitments towards core labour standards*; (3) *Commitments towards full and productive employment and decent work for all*; and (4) *Commitments towards the implementation of ILO Conventions*. While, the first type of clauses, *Commitments towards internationally recognised standards and agreements*,

[236] ANGOT et al., "L'impact de l'Accord Économique et Commercial Global entre l'Union Européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé," 20.
[237] ANGOT et al., "L'impact de l'Accord Économique et Commercial Global entre l'Union Européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé," 20.
[238] With respect to the relationship between the rights to regulate and the obligations included in TSD chapters, commentators have written that 'States have the right to regulate under international law unless an international obligation sets limits. In other words, an international obligation – by definition – limits the right to regulate.' Nils Meyer-Ohlendorf, Christiane Gerstetter, Inga Bach, "Regulatory Cooperation under CETA," 13; Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 2..
[239] For a discussion of this phenomenon and of the lack of consensus in empirical studies as to whether international trade leads to a race to the bottom in labour standards see the *Introduction*.

constitutes the cornerstone of the regime defining minimum levels of protection in EU trade agreements, the three other types of clauses further specify it.

3.3.1. Commitments towards internationally recognised standards and agreements

Commitments towards internationally recognised standards and agreements constitute the backbone of the regime of labour rights protection provided in EU trade agreements. These commitments have been included in all EU FTAs. Their primary function is to establish a link between the regime provided in TSD chapters and other international instruments on labour rights protection. With respect to the structure of these clauses, while in the EU-RSK and EU-Central America agreements they are linked to the commitments towards high levels of protection, in all other agreements, they directly follow or are included in the clauses defining rights to regulate.

TABLE 3: COMMITMENTS TOWARDS THE INTERNATIONALLY RECOGNISED STANDARDS AND AGREEMENTS IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
[…] each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements referred to in Articles 13.4 and 13.5 […] (art. 13.3.)	Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of environmental and labour protection, appropriate to its social, environmental and economic conditions and consistent with the internationally recognised standards and agreements referred to in Articles 286 and 287 to which it is a party […] (art. 285 §2)	[…] consistent with the internationally recognised standards and agreements referred to in Articles 269 and 270 […] (art. 268)	[…] in line with relevant internationally recognised principles and agreements […] (art. 290)	[…] consistently with their commitment to the internationally recognised standards and agreements referred to in Articles 229 and 230 of this Agreement. (art. 228)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-Singapore**
[…] consistently with their commitment to the internationally recognised standards and agreements referred to in Articles 365 and 366 of this Agreement. (art. 364)	[…] in a manner consistent with its international labour commitments, including those in this Chapter. (art. 23.2)	[…] consistently with internationally recognised standards and agreements to which they are a party. (art. 9)	[…] consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party […] (art. 16.2)	[…] consistent with the principles of the internationally recognised standards or agreements to which it is party, referred to in Articles 12.3 (Multilateral Labour Standards and Agreements) and 12.6 (Multilateral Environmental Standards and Agreements). (art. 12.2.1)

The clauses defining commitments towards the internationally recognised standards and agreements are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

Regarding the obligations included in the commitments towards internationally recognised standards and agreements, two groups of clauses must be distinguished: (1) those included in the EU-RSK and in the EU-Central America FTAs; and (2) those contained in all subsequent agreements. First, in the case of the EU-RSK and of the EU-Central America FTAs, the clauses specify the commitments towards high levels of protection. More specifically, the internationally recognised standards and agreements they refer to define the high levels of labour protection. While the relationship between both clauses will be further discussed in *Section 3.4.1 Commitments towards high levels of protection,* let us only mention here that the relevant legal verbs provide that each Party 'shall seek to ensure that […]' and 'shall strive to ensure that […],' respectively. As will be commented in greater details below these two verbs define obligations of conduct. Second, in the eight subsequent agreements, the commitments towards internationally recognised standards and agreements qualify the Parties' rights to regulate.[240] As a consequence, they do not include legal verbs of their own. In fact, their particular link to the Parties' rights to regulate implies that these clauses annul, for the cases covered by the commitment's scope of application, the Parties' entitlement to establish any levels of labour protection. Indeed, while Parties are free to establish their own levels of protection and to adopt or modify their laws and regulations accordingly, they must guarantee in their laws and regulations the regulatory outcomes set by the internationally recognised standards and agreements. These clauses thus define an obligation of result for the Parties.

Regarding the commitments' scope of application *ratione personae*, they apply to all contracting Parties.[241] Thus, for all FTAs until the EU-SADC agreement these clauses apply to the EU and its Member

[240] As the adverbs "consistent(ly) with" (in the EU-Peru-Colombia-Ecuador, EU-Georgia, EU-Moldova, EU-SADC, EU-Japan and EU-Singapore FTAs); "in line with" (in the EU-Ukraine FTA); and "in a manner consistent with" (in the CETA), at the beginning of the clauses indicate, these commitments qualify the rights to regulate. One can wonder whether these different adverbs denote different types of relationship between the rights to regulate and the commitments towards internationally recognised standards and agreements? In this regard, it should be noted that these various formulations have been adopted in different agreements concluded between different Parties so that one cannot infer legal implications from the comparison between these different terminologies. However, one can consider *in abstracto* that the formulation "consistently with" indicates a higher degree of conformity between the exercise of the rights to regulate and the commitments towards internationally recognised standards and agreements than the formulation "in a manner consistent with" as the ordinary meaning of the terms "in a manner" is 'in some way, in some degree, so to speak, as it were; to a considerable degree, almost entirely, very nearly […]'
(http://www.oed.com/view/Entry/113569?redirectedFrom=in+a+manner#eid37943685 (last consulted on 20/02/2019).

[241] See however the discussion in fn. 232.

States on the one hand, and to their respective trading partners on the other hand. For their part, the EU-Japan and the EU-Singapore agreements have been concluded between the EU alone and its respective trading partners. With respect to the commitments' scope of application *ratione materiae*, no additional phrase notoriously extends or reduces its scope of application. Therefore, the analysis focuses on the specific labour rights protected under the clauses.[242] In this regard, as their name indicates, they concern a limited set of labour rights, namely those considered as *internationally recognised standards,* and those protected under the relevant *agreements*.[243] All FTAs but the EU-Ukraine, the EU-SADC and the EU-Japan agreements specify the terms *internationally recognised standards and agreements* by including a reference to the Multilateral labour standards and agreements-provisions.[244] As a general matter, these provisions refer to: (i) the standards of full and productive employment and of decent work for all; (ii) to the core labour standards;[245] and (iii) to various sets of ILO Conventions.[246] In turn, the EU-Ukraine, EU-SADC and EU-Japan FTAs do not refer

[242] Note however that several terms included in these clauses may have some effects on the commitment's scope of application. It is for instance the case with the term "relevant" in the expression 'in line with *relevant* internationally recognised principles and agreements' in the EU-Ukraine FTA; with the terms "to which a Party is party" or similar formulations in the expression 'consistent with the internationally recognised standards and agreements […] to which the Party is party' in the EU-Central America, EU-SADC and EU-Japan agreements, etc.

[243] The agreements have adopted different terms in order to specify the norms to which the contracting Parties have committed. The most frequently used formulation is that of 'internationally recognised standards." However, the EU-Ukraine FTA speaks of "internationally recognised principles" and the CETA of "international labour commitments." One can consider that the words "standards" and "principles" can be used interchangeably as both terms are used as synonyms in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (**the 1998 ILO Declaration**), a key international instrument defining *internationally recognised standards*. Moreover, in the EU-Ukraine FTA's text not all *internationally recognised principles* are concerned, only those qualified as "relevant." The epithet *relevant* seems to leave some margin of discretion to the Parties. As such, it creates some confusion on which principles are exactly understood under this formulation, especially given the fact that this FTA does not refer to the multilateral labour standards and agreements-provision. Finally, the CETA adopts a larger formulation, namely 'international labour commitments including those in this chapter.' This formulation is larger in three ways. First, it is larger because it uses the terms *international labour commitments* instead of *internationally recognised standards and agreements*. Second, it is larger as it refers to the whole chapter and not only to a specific provision of it. Third, it is also larger in that by using the word "including" it assumes that there are other international labour commitments.

[244] See: art. 13.4 of the EU-RSK FTA; art. 286 of the EU-Central America FTA; art. 269 of the EU-Peru-Colombia-Ecuador FTA; art. 229 of the EU-Georgia FTA; art. 365 of the EU-Moldova FTA; and art. 12.3 of the EU-Singapore FTA.

[245] There a four core labour standards: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) elimination of all forms of forced or compulsory labour; (c) effective abolition of child labour; and (d) elimination of discrimination in respect of employment and occupation. In this regard, see the 1998 ILO Declaration.

[246] Three different approaches have been adopted in TSD chapters in order to define the agreements concerned by the commitments towards internationally recognised standards and agreements. First, with respect to the five FTAs which integrate a reference to their multilateral labour standards and agreements-provision, the list of relevant agreements is limited to those included in this provision. The relevant agreements mentioned in the EU-RSK FTA are: the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work (**the 2006 UN Declaration**); the 1998 ILO Declaration; and the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The relevant agreements mentioned in the EU-Central America FTA are: the 2006 UN Declaration; and the Fundamental ILO Conventions. The relevant

to the Multilateral labour standards and agreements-provisions and do not otherwise specify the terms *internationally recognised standards and agreements*. As such, this potentially entails problems relating to the determination of the specific rights protected under these clauses. However, the fact that these standards are not any standards but *internationally recognised* standards may help identifying them. In this regard, it is instructive to take a look at how other states have defined *internationally recognised standards*. For instance, US FTAs refer to five standards. One example of that is article 23.1 of the USMCA agreement which provides that:

> **'Labor laws means statutes and regulations, or provisions of statutes and regulations, of a Party that are directly related to the following internationally recognized labor rights:**
> **(a) freedom of association and the effective recognition of the right to collective bargaining;**
> **(b) the elimination of all forms of forced or compulsory labor;**
> **(c) the effective abolition of child labor, a prohibition on the worst forms of child labor, and other labor protections for children and minors;**
> **(d) the elimination of discrimination in respect of employment and occupation; and**
> **(e) acceptable conditions of work with respect to minimum wages[247], hours of work, and occupational safety and health;'[248]**

agreements mentioned in the EU-Peru-Colombia-Ecuador FTA are: the Fundamental ILO Conventions. The relevant agreements mentioned in the EU-Georgia and EU-Moldova FTAs are: the 1998 ILO Declaration; the Fundamental ILO Conventions; and the fundamental, the priority and other ILO Conventions ratified by Georgia/Moldova and the Member States respectively. The relevant agreements mentioned in the EU-Singapore FTA are: the 2006 UN Declaration; the 1998 ILO Declaration; and the ILO Conventions that Singapore and the Member States of the Union have ratified respectively. Second, the EU-Ukraine, EU-SADC and EU-Japan FTAs do not make a reference to their multilateral labour standards and agreements-provision. Regarding the EU-Ukraine FTA, one can consider that it refers at least to the 1998 ILO Declaration, though it is not clear whether other agreements should also be considered. Regarding the EU-SADC FTA, the clause refers to the 'agreements to which they are a party.' Thus, it covers all labour related agreements ratified by a Party. In turn, the EU-Japan FTA handles a formulation similar to that of the EU-SADC FTA so that it should be considered that it also covers all labour related agreements ratified by a Party. Finally, the CETA does not include the words "international agreements" altogether. Rather it uses the general formulation 'international labour commitments, including those in this Chapter.' Moreover, it appears that the norms covered by the standards *and* by the agreements referred to in each clause are largely the same, thus limiting the added value of this double reference. However, the reference to the agreements can be considered to provide some context to the standards. The latter can be useful for their interpretation. In this regard, note that the clause in the EU-RSK FTA uses the conjunction "or" in the expression 'consistent with the internationally recognised standards *or* agreements referred to in Articles 13.4 and 13.5.' As such, this conjunction seems to indicate an alternative. This alternative limits the commitments to either standards *or* agreements. This conjunction has been replaced in all following agreement by the conjunction "and", thus swapping the *alternative* approach for *cumulative* one. Finally, the inclusion of a reference to the 2006 UN Declaration in the EU FTAs and the establishment of specific commitments regarding this Declaration can be considered to provide binding character to what was merely a political declaration.

[247] 'For greater certainty, a Party's labor laws regarding "acceptable conditions of work with respect to minimum wages" include any requirements under each Party's respective laws to provide wage-related benefit payments to, or on behalf of, workers, such as those for profit sharing, bonuses, retirement, and healthcare' (*sic*) (footnote added in the article).

[248] More generally *Nakagawa* notes that '[since] the revisions under its Trade and Tariff Act of 1984, the US has adopted a social clause under which its GSP is not applied to countries that violate 'internationally recognized workers' rights.' According to this Act, 'internationally recognized workers' rights' include the following: (1) freedom of association, (2) the right to organize and bargain collectively, (3) prohibitions on the use of forced labor; (4) a minimum age for the employment of children; and (5) favorable conditions of work, including

This formulation has also been adopted in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**the CPTPP**), a trade agreements shaping the world's third largest free trade area and concluded between eleven countries.[249] Overall, the *internationally recognised standards* in all covered EU FTAs (but the EU-Ukraine, the EU-SADC, and the EU-Japan FTAs), in the US FTAs, and in the CPTPP contain a common set of standards including the four core labour standards as well as the decent work standard.[250] As a consequence, this set of standards may reasonably be considered to be also covered by the commitment towards internationally recognised standards and agreements of the EU-Ukraine, the EU-SADC, and the EU-Japan FTAs.

Regarding the clauses' degree of precision, while there does not appear to be much debate on which standards are internationally recognised, one can consider that the absence of clear specification in the EU-Ukraine, the EU-SADC and the EU-Japan agreements leaves their clauses open to evolutive interpretations and allows for the possible inclusion, in the future, of standards which would become internationally recognised. This could be for instance the case of corporate social responsibility. In addition to this brief remark, the clauses do not include phrases which are notoriously vague or unprecise.

To conclude, the obligations contained in the commitments towards internationally recognised standards and agreements can be grouped into two different categories. On the one hand, in the EU-RSK and EU-Central America agreements the standards and agreements are referred to in order to define the high levels of labour protection vis-à-vis which they have an obligation of conduct. On the other hand, in all other FTAs these clauses have been drafted as a direct limitation to the rights to regulate and, as such, compel the Parties to specific results. The localisation of the clauses in the regime provided under TSD chapters has thus not insignificant legal implications for the Parties. Next, the commitments towards internationally recognised standards and agreements apply to all Parties and target a limited set of labour rights. In this regard, there seems to be a relatively good consensus on the labour rights covered by these norms, namely the four core labour standards as well as the

minimum wages, working hours, and occupational safety and health'. (References omitted) in: Junji Nakagawa, *International Harmonization of Economic Regulation* (Oxford University Press, USA, 2011), 183–84.

[249] The CPTPP constitutes the third largest trade area in the world after the North American Free Trade Area (now implemented through the USMCA) and the EU single market. The CPTPP has been concluded between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. It entered into application on 30 December 2018. It follows the Trans-Pacific Partnership Agreement (**the CPP**) which never entered into force due to US withdrawal from the agreement.

[250] These standards will be further detailed in *Section 3.3.2 Commitments towards core labour standards* and *Section 3.3.3. Commitments towards full and productive employment and decent work for all*.

decent work standard. Regarding the commitments' degree of precision, they do not include notoriously vague language. Overall, it appears that the commitments towards internationally recognised standards and agreements contained in all FTAs since the EU-Peru-Colombia-Ecuador agreement have a relatively strong legal character. This points to the Parties' intentions to firmly bind themselves to the relevant standards.[251] Last but certainly not least, these clauses do not create new commitments for the contracting Parties. Indeed, the latter were already bound to the relevant standards by virtue of their ILO membership.[252] However, while one should consider that the clauses contained in the EU FTAs do not create new commitments *in a substantive sense,* they include in the realm of the FTA pre-existing commitments and recognise them as commitments applicable in the specific relation between the Parties, thus creating new "liability relationships."[253]

3.3.2. Commitments towards the core labour standards

The commitments towards the core labour standards further specify the commitments towards internationally recognised standards and agreements. They have also been included in all TSD chapters and constitute as such a key piece of the regime of labour rights protection in EU FTAs. The core labour standards are considered to be the most essential standards in matters of labour rights protection and are widely seen to constitute human rights.[254] The clauses defining commitments towards the core labour standards generally contain three different elements: (i) a reference to the contracting Parties' membership to the ILO; (ii) the enunciation of the obligations; and (iii) the specification of the obligations, mainly through a reference to the core labour standards.[255] Interestingly, this clause constitutes one of the two legal bases invoked in the first dispute under the TSD chapter of a trade agreement concluded by the EU. In this dispute, the EU argues, inter alia, that several provisions of the

[251] One may consider that this assertion is less true for the EU-RSK and EU-Central America agreements given that these clauses are linked to an obligation of conduct.

[252] In the same sense, Bartels writes : 'On the other hand, the provisions based on multilateral standards add nothing substantively new. As far as the ILO core labour standards are concerned, these are already binding on the parties by virtue of their membership of the ILO. In addition, as mentioned, all of these standards are human rights covered, as the European Commission has itself acknowledged, by the human rights clause.' Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 86.

[253] In her opinion leading to the Opinion 2/15, *AG Sharpston* develops a similar argument. She claims, '[…] I cannot accept the Commission's argument that Article 13.6.2 of the EUSFTA (which requires effective implementation of the multilateral environmental agreements to which the European Union and Singapore are party) involves no new international obligation for the Parties. It is true that that provision merely refers to pre-existing multilateral commitments of the Parties concerning environmental protection. However, its effect is to incorporate those commitments into the EUSFTA and therefore make them applicable between the European Union and Singapore *on the basis of the EUSFTA.* Article 13.6.2 thus clearly results in a new obligation for the Parties, enforceable in accordance with the EUSFTA.' See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at pt. 498.

[254] For a discussion of the classification of certain labour rights as human rights, see: Kevin Kolben, "Labor Rights as Human Rights," *Va. J. Int'l L.* 50 (2009).

[255] Three agreements do not make the initial reference to the ILO, the EU-Peru-Colombia-Ecuador, the EU-Ukraine and the EU-SADC FTAs.

South Korean Trade Union and Labor Relations Adjustment Act (**the TULRAA**) are incompatible with the right to freedom of association protected under the commitments towards core labour standards included in the EU-RSK FTA.[256]

[256] This case is still pending. See the Request for consultation by the European Union, of the 17th of December 2018, accessible under: http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf (last consulted on 20/03/2019). While the decision reached by the group of experts will be limited to this specific case, one can consider that the panel's interpretation will give strong indications of how other panels could interpret similar clauses contained in other EU FTA in future disputes. In other words, while there is no rule of binding precedent in the interpretation of different FTAs, one may consider that absent cogent reasons, similar clauses in different FTAs are likely to be interpreted in similar ways.

TABLE 4: COMMITMENTS TOWARDS THE CORE LABOUR STANDARDS IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 13.4.3.)	The Parties, in accordance with their obligations as members of the ILO, reaffirm their commitments to respect, promote, and realise in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights which are the subject of the fundamental ILO Conventions, namely: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 286)	Each Party commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation (hereinafter referred to as the 'ILO'): (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 269 §3)	The Parties shall promote and implement in their laws and practices the internationally recognised core labour standards, namely: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) elimination of all forms of forced or compulsory labour; (c) effective abolition of child labour; and (d) elimination of discrimination in respect of employment and occupation. (art. 291 §2)	In accordance with their obligations as members of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, the Parties commit to respecting, promoting and realising in their law and practice and in their whole territory the internationally recognised core labour standards, as embodied in the fundamental ILO conventions, and in particular: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 229 §2)

EU-Moldova	CETA	EU-SADC	EU-Japan	EU-Singapore
In accordance with their obligations as members of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998, the Parties commit to respecting, promoting and realising in their law and practice and in their whole territory the internationally recognised core labour standards, as embodied in the fundamental ILO conventions, and in particular: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 365 §2)	Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work which are listed below. The Parties affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization (the "ILO") and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 23.3)	The Parties reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment. (art. 50 of the Cotonou agreement)	The Parties reaffirm their obligations deriving from the International Labour Organisation (hereinafter referred to as "ILO") membership.[257] The Parties further reaffirm their respective commitments with regard to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Accordingly, the Parties shall respect, promote and realise in their laws, regulations and practices the internationally recognised principles concerning the fundamental rights at work, which are: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 16.3.2)	In accordance with the obligations assumed under the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference at its 86th Session in Geneva, June 1998, the Parties commit to respecting, promoting and effectively implementing the principles concerning the fundamental rights at work, namely: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (art. 12.3.3.)

[257] 'For the European Union, "ILO membership" means the ILO membership of the Member States of the European Union' (footnote included in the article).

The clauses defining commitments towards the core labour standards are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

Regarding the obligations included in the commitments towards the core labour standards, six of the ten agreements handle a similar formulation. The EU-RSK, the EU-Central America, the EU-Moldova, the EU-Georgia, the CETA and the EU-Japan FTAs provide that the Parties commit "to respect," "to promote" and "to realise" the core labour standards. These obligations *to respect, promote and realise* are taken over *expressis verbis* from the 1998 ILO Declaration.[258] On the top of these three obligation, the CETA adds a fourth one, namely that each Party "shall ensure" that its labour law and practices embody and provide for the protection of the core labour standards. Next, the EU-Peru-Colombia-Ecuador and the EU-Ukraine FTAs include partly similar legal verbs as they provide for obligations "to promote and (effectively) implement" in their laws and practices the same set of standards. Then, the EU-Singapore agreement mixes both approaches and establishes obligations "to respecting, promoting and (effectively) implementing" the core labour standards. Finally, the EU-SADC agreement limits itself to "reaffirming" the commitments defined in the ILO fundamental Conventions. Thus, in total six different obligations can be identified across the EU trade agreements.

First, the obligation *to promote*, which is common to all agreements but the EU-SADC, is an obligation of conduct compelling the Parties 'to lend active support to the passing of a measure.'[259] The clauses remain silent about the type of support required however, so that the Parties have some margin of discretion in that regard. Second, the obligation *to implement*, which is included in the EU-Peru-Colombia-Ecuador, in the EU-Ukraine and in the EU-Singapore FTAs, compels the Parties to the achievement of a specific result, namely 'to complete, perform, carry into effect'[260] the covered standards. As such, it is relatively close to the third obligation, namely the obligation *to realise*, included in all other FTAs but the EU-SADC. This obligation binds the Parties to the achievement of a determined

[258] For an insightful consideration of the benefits and the drawbacks linked to the proclamation of core labour standards by the ILO, see the discussion between Alston and Langille: Alston, "'Core labour standards' and the transformation of the international labour rights regime" ; Brian A. Langille, "Core labour rights–The true story (reply to Alston)," *European Journal of International Law* 16, no. 3 (2005); Philip Alston, "Facing up to the Complexities of the ILO Core Labour Standards Agenda," *European Journal of International Law* 16, no. 3 (2005).
[259] The ordinary meaning of the term "to promote" is 'to lend active support to the passing of (a law or measure);' http://www.oed.com/view/Entry/152468?redirectedFrom=promote#eid (last consulted on 26/02/2019).
[260] The ordinary meaning of the term "to implement" is 'to complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise);' http://www.oed.com/view/Entry/92452?rskey=yDgfYv&result=2&isAdvanced=false#eid (last consulted on 26/02/2019).

result, namely 'to make real or actual; to convert into real existence or fact'[261] the core labour standards. Fourth, the obligation *to respect*, which is included in the EU-RSK, in the EU-central America, in the EU-Moldova, in the EU-Georgia, in the CETA, in the EU-Japan and in the EU-Singapore FTAs compels the Parties 'to uphold, maintain, refrain from violating'[262] the covered standards. As such, it is a negative obligations which requires not to achieve certain results.[263] Fifth, the CETA also provides that the Parties "shall ensure" that their labour law and practices embody and provide protection of the covered standards. This obligation binds the Parties to certain results, namely 'to guarantee to a person; to warrant'[264] that labour law and practices embody and provide for the protection of the core labour standards. As such, it imposes positive duties on the Parties, i.e. Parties have to undertake appropriate measures in order to guarantee the striven result. And sixth, under the EU-SADC agreement, the Parties "reaffirm" their commitment to the internationally recognised core labour standards, as defined by the ILO fundamental Conventions.[265] The commitments included in the eight relevant Conventions contain a bundle of obligations of conduct and of result so that the reaffirmation of these commitments calls for the adoption of the relevant conducts and results.[266] Overall, besides the obligation *to promote* and some of the obligations covered by the general reference handled in the EU-SADC agreement, which bind the Parties to specific conducts, all other obligations included in the clauses defining commitments towards core labour standards are obligations of result compelling the Parties to the achievement of specific regulatory outcomes.

---

[261] The ordinary meaning of the term "to realise" is 'to make real or actual; to convert (something imagined, planned, etc.) into real existence or fact; to bring (a scheme, ambition, etc.) to fruition.' http://www.oed.com/view/Entry/158938?rskey=7foFnf&result=2#eid (last consulted on 26/02/2019).

[262] The ordinary meaning of the term "to respect" is "to uphold, maintain, refrain from violating (a right, privilege, law, decision, etc.)" http://www.oed.com/view/Entry/163780?rskey=xIAHFA&result=2&isAdvanced=false#eid (last consulted on 26/02/2019).

[263] For a similar assessment of the obligation *to respect* included in the human rights clauses of the EU trade agreements, see: Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 5. Note that with respect to the obligation "to respect" under the ICESCR, it has been written that '[it] requires States to refrain from interfering with the enjoyment of economic, social and cultural rights.' Thus, it establishes a negative obligation for the Parties to the Covenant. See, the Maastricht guidelines on violations of social, economic and cultural rights adopted by a group of experts in January 1997 and later reissued as a UN document UN document E /C.12/2000/13, available on : https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F2000%2F13&Lang=en (last consulted on 13/03/2019).

[264] The ordinary meaning of the term "to ensure" is 'to guarantee (a thing) to a person; to warrant (a fact)'. http://www.oed.com/view/Entry/62745?rskey=O3fbzA&result=2#eid (last consulted on 13/03/2019).

[265] This approach is made possible by the fact that all EU and all SADC members states have ratified all ILO Fundamental Conventions. For a glance at the status of ILO Fundamental Conventions' ratification, see: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO::: (last consulted on 03/06/2020)

[266] For instance, article 2(1) of the Fundamental Convention on Equal Remuneration of 1951 (C100) establishes both for an obligation of conduct (by using the legal verb "to promote") and for an obligation of result (by using the legal verb "to ensure"). It provides that '[each] Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.'

Regarding the scope of application *ratione personae*, the commitments towards core labour standards apply to all Parties.[267] Thus, for all FTAs until the EU-SADC agreement, they apply to the EU and its Member States on the one hand, and to the respective trading partners on the other hand. For their part, the EU-Japan and the EU-Singapore agreements have been concluded between the EU alone and the respective trading partners. Consequently, the right and obligations included in these two agreements concern the EU and not its Member States. Regarding the scope of application *ratione materiae*, the commitments do not include phrases which notoriously broaden or reduce their scope of application.[268] Therefore, the analysis of the scope of application *ratione materiae* focuses on the specific labour rights protected by these clauses. In this regard, all clauses, regardless of their formulation, refer to a set of four principles: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.[269] These are the fundamental principles recognised in the 1998 ILO

[267] See however the discussion in fn. 232.

[268] Some phrases qualify the commitments in relatively marginal ways however. It is for instance the case with the qualification "in their laws and practice" adopted in all FTAs but the EU-Central America and EU-SADC to specify the obligation *to respect, promote and realise* the core labour standards. This phrase indicates that it concerns both, norms adopted by the legislative as well as the actions of the various state bodies (See fn. 233). The EU-Japan FTA adds to these two types of norms the term "regulations." The EU-Peru-Colombia-Ecuador, the EU-Georgia and the EU-Moldova add that these obligations should apply 'on their whole territory.' The latter qualification may be justified by situations of limited statehood in certain of these countries and/or by the intention to also include export processing zones within the commitments' scope of application. Next, the EU-Central America FTA specifies that the Parties should comply with their obligation 'in good faith.' One can consider however that the compliance with the obligation in good faith is a general principle of international law, which applies even if not mentioned. In this sense, the preamble of the VCLT notes that 'the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized […]' and article 26 of the VCLT provides that '[every] treaty in force is binding upon the parties to it and must be performed by them in good faith.' Finally, the epithet "effective" has been added to the obligations under the EU-Peru-Colombia-Ecuador and the EU-Singapore FTAs, so that each Party commits to the '*effective* implementation' of internationally recognised core labour standards. This epithet qualifies the commitment and entails that the obligation *to complete, perform, carry into effect* the internationally recognised core labour standards must be effective, i.e. that it is 'attended with result or has an effect'. See, http://www.oed.com/view/Entry/59674?redirectedFrom=effective#eid (last consulted on 26/02/2019). Accordingly, the obligation to effectively implement is one requiring high levels of implementation. For an interesting discussion of how the word *effective* qualifies an obligation see: *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 130.

[269] The EU-SADC FTA is slightly less ambitious with regard to the labour rights protected under its clause for it provides commitments towards 'the elimination of the worst forms of child labour' and not towards 'the effective abolition of child labour' as it is specified in all other agreements. Moreover, it uses the formulation 'all forms of forced labour' without referring to "compulsory labour" as it is the case in the other FTAs. Finally, the EU-Georgia, the EU-Moldova, and the EU-SADC FTAs adopt a slightly different reference to the labour standards. Indeed, the terms "in particular" have been added in the formulation '[the] Parties commit to respecting, promoting and realising in their law and practice and in their whole territory the internationally recognised core labour standards, as embodied in the fundamental ILO conventions, and *in particular*: [the four core labour standards]'. The addition of these terms assumes that other recognised core labour standards are included in ILO

Declaration and protected under the eight ILO Fundamental Conventions.[270] A discussion has arisen as to whether or not the four core labour standards recognised under the 1998 ILO Declaration can be assimilated to the eight fundamental ILO Conventions and the ILO case law related to these Conventions.[271] In this regard, a distinction must be drawn between a formal and a material assimilation of these instruments. Indeed, with the exception of the EU-SADC agreement, all other FTAs do not mention these Conventions and limit themselves to refer to the 1998 ILO Declaration. In turn, the 1998 ILO Declaration provides that 'all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, *the principles concerning the fundamental rights which are the subject of those Conventions.*'[272] As the wording of this provision reflects, the Declaration drafters took great care not to create an obligation vis-à-vis the ILO Fundamental Conventions but towards *the principles which are the subject of those Conventions*. Hence, while the four core labour standards cannot be *formally* assimilated to the eight fundamental ILO Conventions, *materially* they refer to the same standards. This explains why in *the EU-Korea dispute on labour rights*, the EU heavily relied on the ILO case-law with respect to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and to the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) in its written submission.[273]

Fundamental Conventions and that the Parties lay the emphasis on the four core labour standards. However, there are no other core labour standards protected in the ILO Fundamental Conventions so that the formulation used in these agreements is rather confusing.

[270] The eight fundamental ILO Conventions are the: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98); 3. Forced Labour Convention, 1930 (No. 29) ; 4. Abolition of Forced Labour Convention, 1957 (No. 105) ; 5. Minimum Age Convention, 1973 (No. 138) ; 6. Worst Forms of Child Labour Convention, 1999 (No. 182) ; 7. Equal Remuneration Convention, 1951 (No. 100) ; 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[271] For a glance at this discussion see: Jordi Agustí-Panareda, Franz Christian Ebert and Desirée LeClercq, *Labour Provisions in Free Trade Agreements*: *Fostering Their Consistency with the ILO Standards System* (International Labour Office, 2014). Some authors argue that, in the 1998 ILO Declaration, the core labour standards refer to the eight ILO Fundamental Conventions without further distinction. See for instance: Estella Aryada, *Emerging Disciplines on Labour Standards in Trade Agreements* (2016); TCS Emerging Issues Briefing Note (4) March 2016.

[272] Emphasis added by the author. 1998 ILO Convention, at. Pt. 2. In fact, the adoption of this Declaration has been possible at the 1998 International Labour Conference thanks to the fact that it does not directly refer to these Conventions. Indeed, many countries, including the United States, had not – and still have not – ratified several of these Fundamental Conventions. These countries did not wish to support a Declaration that would have contained commitments towards Conventions they did not have ratified. For a list of the countries having (not) ratified these conventions see: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12001:0::NO::: (last consulted on 15/06/2020).

[273] See the written submission of the EU in the *EU v. South Korea dispute on labour rights protection under the TSD chapter of the EU-RSK FTA* https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf (last consulted on 15/06/2020).

Regarding the commitments' degree of precision, they do not include phrases which are notoriously unprecise. Besides, the reference to the four core labour standards are rather general. However, all clauses establish a link between the obligations they include and the 1998 ILO Declaration. As a consequence, this instrument as well as the abundant case law of the ILO quasi-jurisdictional mechanisms can be used in order to interpret the commitments in question. In other words, the 1998 ILO Declaration and the related case law bring much clarification on how these standards should be applied in concrete cases.[274] Overall, the commitments towards core labour standards are relatively precise so that they leave only marginal room for interpretation to the contracting Parties.

In conclusion, all commitments towards the core labour standards contain both obligations of conduct and of result. These obligations are largely taken over from the 1998 ILO Declaration. These commitments are applicable to all Parties, and the labour rights covered are those corresponding to the four core labour standards. The clauses are relatively precise and as such do not leave much margin of interpretation to the Parties. Overall, the commitments towards the core labour standards can be considered to have a strong legal character.[275] Crucially, these commitments do not create, in a substantive sense, commitments to which the Parties were not previously bound.[276] However, the

[274] In the same vein, Langille argues that the core labour standards have been extensively interpreted and commented both by the doctrine and by the relevant ILO bodies so as to provide abundant case law and nuances in interpretations. See: Langille, "ILO and the New Economy" p. 247.

[275] In the same sense, Bartels has qualified this obligation in the CETA as "hard obligation." See, Bartels, "Human rights, labour standards and environmental standards in CETA", p. 2.

[276] For this reason some authors are sceptical about the added value of these obligations. *Bartels* writes for instance: 'On the other hand, the provisions based on multilateral standards add nothing substantively new. As far as the ILO core labour standards are concerned, these are already binding on the parties by virtue of their membership of the ILO. In addition, as mentioned, all of these standards are human rights covered, as the European Commission has itself acknowledged, by the human rights clause' Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 86. See also: Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 3. Bartels, "The EU's approach to social standards and the TTIP," 87. Still in the same vein, *Bourgeois et al.* argue that '[each] country must observe these fundamental rights, regardless of whether its government has ratified the relevant conventions and regardless of whether any FTA it enters into sets out these commitments. This must be borne in mind when assessing those FTAs that do not contain any provisions concerned with labour or working conditions' Bourgeois, Dawar and Evenett, "A comparative analysis of selected provisions in free trade agreements," 26. Finally, the European Commission also shares the opinion that the core labour standards are covered by the standard human rights clauses. European Commission Communication on Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM (2001) 416, at 12. See also: Alston, "'Core labour standards' and the transformation of the international labour rights regime," 476.

[276] Referring to the commitments towards core labour standards of the EU-Central America FTA, Bartels writes: 'There is a question over whether this 'affirmation' of an existing commitment amounts to a concrete obligation in its own right. Certainly, this is not the usual language of obligations, which uses auxiliaries such as 'shall', 'must' and 'will'. But it is also difficult to see what else such a statement might be taken to mean'. Bartels, "The EU's approach to social standards and the TTIP," 87. Overall, the duplication of the commitment and of dispute settlement mechanisms provide additional mechanisms to increase pressure on a defaulting country.

duplication of existing commitments creates new obligations in a subjective sense – i.e. in the specific relation between the concerned Parties.[277] Thus, the repetition of existing commitments highlights the Parties' intention to incorporate their relation in the multilateral labour system. Hence, in case of alleged failure to comply with the relevant commitments different jurisdictional mechanisms can be activated, namely the procedures provided within the ILO as well as the dispute settlement procedure under the TSD chapters. The *EU-Korea dispute on labour rights* under the TSD chapter of the EU-RSK agreement gives a good example of such superposition of jurisdictional means. Indeed, ILO decisions on South Korea's failures to comply with its commitments under the 1998 ILO Declaration were taken over as evidence of South Korea's lack of compliance with its commitments towards core labour standards in the EU written submission.[278]

3.3.3. *Commitments towards full and productive employment and decent work for all*

The commitments towards internationally recognised standards and agreements are specified a second time through the commitments towards full and productive employment and decent work for all. The latter have also been included in all TSD chapters and constitute as such a basic feature of the regime of labour rights protection under EU trade agreements. Different approaches have been adopted across FTAs regarding these commitments' design and have resulted in clauses that vary according to two variables: (i) whether or not they contain an obligation; and (ii) whether or not they include a reference to the 2006 UN Declaration. Indeed, while the EU-SADC and EU-Japan FTAs do not comprehend any obligation, all other agreements include a clause containing at least one obligation. Then, while the EU-RSK, the EU-Central America and the EU-Singapore agreements refer to the 2006 UN Declaration, none of the other agreements contain such link. Finally, let us note that the CETA includes a clause of its own kind as it does not refer to the standard of full and productive employment and establishes a highly detailed regime for the protection of decent working conditions compared to the other agreements.

In this regard, article 26 of the ILO Constitution provides that 'any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified.' In other words, when two countries have ratified a same ILO Convention, they may file a complaint against each other with the International Labour Office. The latter will decide on the need to establish a Commission of inquiry which will present a report with recommendations. If a government does not accept the report it can refer the Issue to the ICJ. Ultimately, in case of a failure to comply with the recommendation or a decision of the ICJ the governing body may recommend specific actions to the International Labour Conference.

[278] See the written submission of the EU in the *EU v. South Korea dispute on labour rights protection under the TSD chapter of the EU-RSK FTA* https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf (last consulted on 15/06/2020).

TABLE 5: COMMITMENTS TOWARDS FULL AND PRODUCTIVE EMPLOYMENT AND DECENT WORK FOR ALL IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
The Parties reaffirm the commitment, under the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people. (art. 13.4.2.)	Recalling the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, the Parties recognise that full and productive employment and decent work for all, which encompass social protection, fundamental principles and rights at work and social dialogue, are key elements of sustainable development for all countries, and therefore a priority objective of international cooperation. In this context, the Parties reaffirm their will to promote the development of macroeconomic policies in a way that is conducive to full and productive employment and decent work for all, including men, women and young people, with full respect for fundamental principles and rights at work under conditions of equity, equality, security and dignity. (art. 286)	The Parties recognise international trade, productive employment and decent work for all as key elements for managing the process of globalisation, and reaffirm their commitments to promote the development of international trade in a way that contributes to productive employment and decent work for all. (art. 269)	The Parties recognise full and productive employment and decent work for all as key elements for trade in the context of globalisation. The Parties reaffirm their commitments to promote the development of trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people. (art. 291)	The Parties recognise full and productive employment and decent work for all as key elements for managing globalisation, and reaffirm their commitment to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all. (art. 229)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-Singapore**
The Parties recognise full and productive employment and decent work for all as key elements for managing globalisation, and reaffirm their commitment to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all. (art. 365)	2. Each Party shall ensure that its labour law and practices promote the following objectives included in the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference at its 97th Session, and other international commitments: (a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers.	The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems as well as decent work for all as a key element of sustainable development for all countries (art. 8)	The Parties recognise full and productive employment and decent work for all as key elements to respond to economic, labour and social challenges. The Parties further recognise the importance of promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all. (art. 16.3)	The Parties affirm their commitments, under the Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All of 2006, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation. The Parties

	3. Pursuant to sub-paragraph 2(a), each Party shall ensure that its labour law and practices embody and provide protection for working conditions that respect the health and safety of workers, including by formulating policies that promote basic principles aimed at preventing accidents and injuries that arise out of or in the course of work, and that are aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority. When preparing and implementing measures aimed at health protection and safety at work, each Party shall take into account existing relevant scientific and technical information and related international standards, guidelines or recommendations, if the measures may affect trade or investment between the Parties. The Parties acknowledge that in case of existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a person, a Party shall not use the lack of full scientific certainty as a reason to postpone cost-effective protective measures. (art. 23.3.2-3)			resolve to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all. (art. 12.3.2.)

The clauses defining commitments towards full and productive employment and decent work for all are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

Regarding the obligations contained in the commitments towards full and productive employment and decent for all, all agreements but the CETA acknowledge in one way or another the importance of full and productive employment and decent work for all. As a general matter, the mere *acknowledgement* of standards does not create obligations for the contracting Parties. Rather it can be considered to give some context and to construct a narrative within the agreement. As such, this can be useful for the interpretation of the exact implications of the commitments towards full and productive employment and decent for all. More specifically, while some clauses do not contain any obligation, others do. To begin with, the EU-SADC and the EU-Japan FTAs do not include any obligations. Both agreements limit themselves to *recognising* the importance of full and productive employment and/or decent work for all. Then, the EU-RSK, the EU-Central America, the EU-Peru-Colombia-Ecuador, the EU-Ukraine, the EU-Georgia, the EU-Moldova and the EU-Singapore FTAs mention in one form or another an obligation "to promote" the development of international trade in a way that is conducive to full and productive employment and decent work for all. The ordinary meaning of the verb *to promote* is 'to lend active support to the passing of (a law or measure); *spec.* to take the necessary steps to ensure the passing of (a local or private bill).'[279] As such**,** it amounts to an obligation of conduct.[280] Finally, the CETA includes an obligation of its own kind. Indeed, it specifies that the Parties 'shall ensure that its labour law and practices promote the following objectives […],' thus establishing an obligation 'to guarantee (a thing) to a person; to warrant (a fact).'[281] As such, it defines an obligation of result.[282]

Regarding the scope of application *ratione personae*, these commitments apply to all Parties.[283] Thus, for all FTAs until the EU-SADC agreement, they apply to the EU and its Member States on the one hand, and to the respective trading partners on the other hand. For their part, the EU-Japan and the EU-

[279] See: http://www.oed.com/view/Entry/152468?redirectedFrom=promote#eid (website consulted on the 26 February 2019)
[280] Note that in all agreements until the EU-Moldova included, the clauses "reaffirm" the commitment to promote full and productive employment and decent work for all. This reaffirmation points to the fact that these commitments already existed for the Parties, namely under the 2006 UN Declaration as well as under the 2008 ILO Declaration for the decent work for all-standard.
[281] The ordinary meaning of the verb "to ensure" is 'to guarantee (a thing) to a person; to warrant (a fact)'. http://www.oed.com/view/Entry/62745?rskey=O3fbzA&result=2#eid (las consulted on 13/03/2019).
[282] In the same sense, Bartels speaks of a "hard obligation" for the obligation *to ensure* included in the CETA. Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 3.
[283] See however the discussion in fn. 232.

Singapore agreements have been concluded between the EU alone and the respective trading partners. Regarding the scope of application *ratione materiae*, the commitments do not include additional phrases which notoriously extend or reduce their scope of application. Therefore, the analysis focuses on the specific labour rights protected in these clauses. In general, the commitments are relatively laconic as to which labour rights are covered by the standard of full and productive employment and the standard of decent work for all.[284] In fact, the standard of full and productive employment does not relate to the protection of labour rights *stricto sensu*. Rather, it pertains to the promotion of certain levels of employment. As such, it is not so much concerned with the "quality" of the jobs but with their "quantity."[285] In turn, with the exception of the CETA, the standard of decent work for all is not further specified in the agreements.[286] On this backdrop, the 2008 ILO Declaration on Social Justice for a Fair Globalisation (**the 2008 ILO Declaration**) may give some guidance on how to interpret the standards of decent work for all.[287] The 2008 ILO Declaration formulates the decent

[284] Note that the EU-RSK, the EU-Central America, the CETA and the EU-Singapore FTAs give some indications on what should be understood under the standard of decent work for all. Indeed, the EU-RSK and EU-Central America agreements refer to the 2006 UN Declaration. The EU-Central America FTA even adds that these standards 'encompass social protection, fundamental principles and rights at work and social dialogue.'

[285] The 2006 UN Declaration sets a handful of goals for the UN Member States. This instrument is not binding under international law. However, it can be considered as an authoritative reference for the definition of the full and productive employment and decent work for all standards. The 2006 UN Declaration specifies that full and productive employment is to be understood in a context in which 'the total number of people unemployed worldwide reached a new high in 2005 […]' (Preamble). The 2006 UN Declarations further provides that there is a 'dual challenge of creating new productive jobs and improving the quality of existing ones […]' (Preamble). In this framework, full employment has to be implemented through the adoption of adapted macroeconomic policies (*pt. 2*). On its own, the full and productive employment-standard does not call for better jobs. Therefore, it needs to be handled in parallel with the decent work for all-standard. Overall, there is a complex relationship between *more* jobs and *better* jobs. For a discussion of this aspect see, Christian M. Häberli, "An International Regulatory Framework for National Employment Policies," *Journal of World Trade* volume no. 50, issue number no. 2 (2016), SSRN: https://ssrn.com/abstract=2756911.

[286] While some FTAs do not specify the standards at all, other make reference to 2006 UN Declaration, still other make a little description, finally the CETA undertakes a more refined presentation of the different elements included therein. Indeed, the EU-Peru-Colombia-Ecuador, the EU-Georgia, EU-Moldova, EU-Ukraine EU-Japan FTA limit themselves to mention the standards of full and productive employment and decent work for all. The EU-SADC agreement mentions decent work for all without even mentioning full and productive employment. Then, the EU-RSK and EU-Central America FTAs make a reference to the '2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation'. The EU-Central America further details the content of these standards by mentioning that is encompasses 'social protection, fundamental principles and rights at work and social dialogue'. Finally, the CETA undertakes a detailed list of the elements constituting these two internationally recognised standards. Overall, the more detailed the clauses are, the less room for interpretation they are likely to leave to the contracting parties.

[287] The 2008 ILO Declaration further develops principles recognised in the ILO Constitution. It has been adopted by the ILO Conference and constitutes an instrument to interpret the ILO rights and obligations of ILO members under the Organisation's Constitution. Thus, the 2008 ILO Declaration states that the role of the Organisation is to achieve progress and social justice in the context of globalisation. In this regard, it provides that the decent work agenda should help the Organisation. After the Philadelphia Declaration of 1944 and the 1998 ILO Declaration, this 2008 ILO Declaration marks 'the third major statement of principles and policies adopted by the

work agenda through four strategic objectives.[288] The second and fourth objectives define the labour rights protected by the agenda. While objective (ii) includes, inter alia, 'healthy and safe working conditions; and policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection;'[289] objective (iv) lays the accent on the respect, promotion and realisation of the four core labour standards. Thus, the 2008 ILO Declaration associates the decent work for all-standard to the four core labour standards as well as healthy and safe working conditions, wages and earnings, hours and other conditions of work. Finally, the CETA is the only agreement to provide details on which labour rights fall under the decent work for all-standard. The relevant passage of the provision specifies that the Parties commit to ensuring that their labour laws and practices promote three international commitments,[290] namely:

> **'(a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers.'[291]**

In turn, international commitment (a) is further specified in the following terms,

> **'each Party shall ensure that its labour law and practices embody and provide protection for working conditions that respect the health and safety of workers, including by formulating policies that promote basic principles aimed at preventing accidents and injuries that arise out of or in the course of work, and that are aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority.'[292]**

International Labour Conference since the ILO's Constitution of 1919'. See: 2008 ILO Declaration on Social Justice for a Fair Globalisation, foreword by ILO Director General, Juan Somavia.

[288] These four objectives are:

> **'(i) promoting employment by creating a sustainable institutional and economic environment ; (ii) developing and enhancing measures of social protection – social security and labour protection – which are sustainable and adapted to national circumstances ; (iii) promoting social dialogue and tripartism as the most appropriate methods for ; and (iv) respecting, promoting and realizing the fundamental principles and rights at work, which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives'.**

See: 2008 ILO Declaration, point A. https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (last consulted on 26/02/2019).

[289] Pt. 1.(A).ii of the 2008 ILO Declaration.

[290] Article 23.3.2. of the CETA begins by stating that each Party 'shall ensure that its labour law and practices promote the following objectives included in the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference at its 97th Session.'

[291] Article 23.3.2. of the CETA.

[292] Article 23.3.3. of the CETA.

Compared to the other FTAs, the CETA's text thus gives relatively detailed specifications on which labour rights are protected under decent work for all-standard. However, in contrast with the other FTAs, the CETA's reference to decent work does neither make a reference to the core labour standards, except for equality in employment, nor to policies in regard to working hours. Moreover, it further develops the health and safety at work-standard.

Regarding the commitments' degree of precision, the clauses do not include phrases which are notoriously unprecise. However, except for the EU-SADC and the EU-Japan agreements which do not contain any obligation and for the CETA which provides for relatively detail commitments towards decent work for all, all other FTAs are rather unspecific as for what conducts are required from the Parties in order to comply with the commitments. As such, this leaves a wide margin of appreciation to the contracting Parties.

To conclude, all FTAs but the EU-SADC and EU-Japan agreements include an obligation in their clauses defining commitments towards full and productive employment and decent work for all. Except for the CETA, this obligation is one *to promote* and binds the Parties to the achievement of certain conducts. In turn, the CETA contains an obligation of result which provides that the Parties 'shall ensure' that their labour law and practices promote decent work for all. Regarding the scope of application, the obligations apply to all Parties and pertain to a limited set of labour rights. In all agreements including an obligation, but the CETA, this set of labour rights comprehends the core labour standards and health and safety at work, the establishment of acceptable minimum employment standards for wage earners and non-discrimination in respect of working conditions. The CETA's reference to decent work does neither refer to the core labour standards, except for equality in employment, nor to policies in regard to working hours. Moreover, it lays the accent on health and safety at work. Regarding the degree of precision, the commitments do not include phrases which are notoriously unprecise. However, they leave some margin of appreciation to the Parties as to the precise conducts they have to undertake to comply with the commitments. Overall, three categories of commitments towards full and productive employment and decent work for all emerge from this analysis. First, the EU-SADC and the EU-Japan FTAs include a clause without obligations. Second, the EU-RSK, the EU-Central America, the EU-Peru-Colombia-Ecuador, the EU-Ukraine, the EU-Moldova, the EU-Georgia and the EU-Singapore FTAS contain an obligation of conduct, a scope of application and a degree of precision that leave some margin of appreciation to the Parties. Third, the CETA comprehends an obligation of result and a detailed specification of the labour rights covered. Last but not least, considering the analysis of these commitments and given the pre-existing legal framework in matters of full and productive employment and decent work for all, the commitments towards full

and productive employment and decent work for all do not create new obligations in a substantive sense. Rather, they include in the realm of the FTAs pre-existing commitments and recognise them as commitments that the Parties owe to each other's.[293]

3.3.4. Commitments towards the implementation of ILO Conventions

The commitment towards the implementation of ILO Conventions constitute the fourth clause shaping a regime of minimum levels of protection in EU FTAs. ILO Conventions are in some respects extra-ordinary international treaties. As a matter of fact, these agreements bring together countries with significant differences in levels economic and social development to negotiate common labour standards. What is more, their texts are not only discussed and adopted by states' officials, but also by representatives of employers and employees organisations.[294] For these reasons, ILO Conventions generally set minimum levels of protection. As the ILO eloquently puts it,

> **'An international legal framework on social standards ensures a level playing field in the global economy. It helps governments and employers to avoid the temptation of lowering labour standards in the belief that this could give them a greater comparative advantage in international trade. […] Because international labour standards are minimum standards adopted by governments and the social partners, it is in everyone's interest to see these rules applied across the board, so that those who do not put them into practice do not undermine the efforts of those who do.'[295]**

Thus, commitments towards the implementation of ILO Conventions constitutes the last type of clauses aiming at the establishment of minimum levels of protection. All FTAs but the EU-Peru-Colombia-Ecuador agreement include commitments towards the implementation of ILO Conventions.[296] The structure of these clauses are relatively stable across FTAs. However, the specific ILO Conventions to which they refer vary from agreement to agreement.

---

[293] *AG Sharpston* opinion presented in the framework of the Opinion 2/15 develops a similar argument. She writes:

> **'[…] I cannot accept the Commission's argument that Article 13.6.2 of the EUSFTA (which requires effective implementation of the multilateral environmental agreements to which the European Union and Singapore are party) involves no new international obligation for the Parties. It is true that that provision merely refers to pre-existing multilateral commitments of the Parties concerning environmental protection. However, its effect is to incorporate those commitments into the EUSFTA and therefore make them applicable between the European Union and Singapore *on the basis of the EUSFTA.* Article 13.6.2 thus clearly results in a new obligation for the Parties, enforceable in accordance with the EUSFTA.'**

See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at pt. 498.

[294] Louis, *Qu'est-ce qu'une bonne représentation? L'Organisation internationale du travail de 1919 à nos jours*.

[295] International Labour Office, "Rules of the Game: A brief introduction to International Labour Standards" (ILO, 2009), 10–11.

[296] The EU-Peru-Colombia-Ecuador agreement only includes an obligation to implement specific *standards*. For a discussion of this clause, see *Section 3.3.2. Commitments towards core labour standards*.

TABLE 6: COMMITMENTS TOWARDS THE IMPLEMENTATION OF ILO CONVENTIONS IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively (art. 13.4.)	The Parties reaffirm their commitment to effectively implement in their laws and practice the fundamental ILO Conventions contained in the ILO Declaration of Fundamental Principles and Rights at Work of 1998, which are the following: (a) Convention 138 concerning Minimum Age for Admission to Employment; (b) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; (c) Convention 105 concerning the Abolition of Forced Labour; (d) Convention 29 concerning Forced or Compulsory Labour; (e) Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; (f) Convention 111 concerning Discrimination in Respect of Employment and Occupation; (g) Convention 87 concerning Freedom of Association and Protection of the Right to Organise; and (h) Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. (art. 286 §2)	NONE	The Parties reaffirm their commitment to effectively implement the fundamental and priority ILO Conventions that they have ratified, and the ILO 1998 Declaration on Fundamental Rights and Principles at Work. (art. 291 §3)	The Parties reaffirm their commitment to effectively implement in their law and practice the fundamental, the priority and other ILO conventions ratified by Georgia and the Member States respectively. (art. 229 §3)
EU-Moldova	CETA	**EU-SADC**	**EU-Japan**	**EU-Singapore**
The Parties reaffirm their commitment to effectively implement in their law and in practice the fundamental, the priority and other ILO conventions ratified by the Member States and the Republic of Moldova, respectively. (art. 365 §3)	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. (art. 23.3.4)	Taking into account the Cotonou Agreement, and in particular its Articles 49 and 50 , the Parties, in the context of this Article, reaffirm their rights and their commitment to implement their obligations in respect of the Multilateral Environmental Agreements ('MEAs') and the International Labour Organisation ('ILO') conventions that they have ratified respectively (art. 8 §2)	Each Party reaffirms its commitments to effectively implement in its laws, regulations and practices ILO Conventions ratified by Japan and the Member States of the European Union respectively. (art. 16.3.5)	The Parties affirm the commitment to effectively implementing the ILO Conventions that Singapore and the Member States of the Union have ratified respectively. (art. 12.3.3.)

The clauses defining commitments towards the implementation of ILO Conventions are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

Regarding the obligations included in the clauses defining commitments towards the implementation of ILO Conventions, all FTAs but the EU-Peru-Colombia-Ecuador agreement[297] contain a commitment "to implement" the relevant ILO Conventions. This obligation compels the Parties to a specific result, namely 'to complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise)' the covered ILO Conventions.[298] Moreover, all relevant clauses but the one included in the EU-Singapore FTA stipulate that the obligation they contain is "reaffirmed." This *reaffirmation* is consistent with the fact that when ratifying a Convention countries have a legal obligation to implement them. In this sense, it is not entirely clear why the EU-Singapore FTA limits itself to stating that the Parties "affirm" their commitment to implement the relevant ILO Conventions. A possible explanation is that this agreement has been concluded, for the EU side, by the EU alone and that Brussels did not consider appropriate to *reaffirm* a commitment that has been taken up by its Member States.[299] Crucially, the *reaffirmation* implies that these commitments do not create new obligations in a substantive sense. Rather they include in the realm of the FTA pre-existing commitments and recognise them as commitments applicable in the specific relation between the Parties.[300]

Regarding the scope of application *ratione personae*, the commitments towards the implementation of ILO Conventions do *not* apply to all contracting Parties. Indeed, all trade agreement until the EU-SADC agreement contain a provision defining the term "Party." These provisions are invariably formulated as follows, ''Party' means the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union.'[301] Within the EU system of distribution of competences the Member States remain competent for the ratification of ILO

[297] The EU-Peru-Colombia-Ecuador FTA does not include commitments towards the implementation of ILO Conventions.

[298] The ordinary meaning of the term "to implement" is 'to complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise);' http://www.oed.com/view/Entry/92452?rskey=yDgfYv&result=2&isAdvanced=false#eid (last consulted on 26/02/2019).

[299] However, if this explanation is valid, it is not consistent with the formulation adopted in the EU-Japan FTA which has also been concluded by the EU alone.

[300] See fn. 233.

[301] See: art. 1.2 EU-RSK FTA; art. 352 EU-Central America FTA; art.6 EU-Peru-Colombia-Ecuador FTA; art. 428 EU-Georgia FTA; art. 461 EU-Moldova FTA; art. 482 EU-Ukraine FTA; art. 1.1 CETA FTA; and art. 104 EU-SADC FTA. For a discussion of legal issues related to the determination of who are the Parties to which these commitments apply and the distribution of competences between the EU and its Member States, see fn. 232.

Conventions.[302] Thus, on the EU side, only EU Member States are concerned by the commitments to implement ILO Conventions. On this backdrop, the clauses adopted in the EU-Japan and in the EU-Singapore agreements, which have been concluded by the EU alone, appear to raise legal issues. Indeed, the EU commits to implement Conventions that have been concluded by its Member States. However, according to article 46 of the VCLT on the *provisions of internal law regarding competence to conclude treaties*, the legal issues may not so much lie in the relationship between the EU and the relevant trading partners, than in the relationship between the EU and its Member States.[303] Regarding the scope of application *ratione materiae*, the commitments do not include additional phrases which notoriously extend or reduce the scope of application. Therefore, the analysis focuses on the specific labour rights protected in these clauses.[304] First, when defining the labour rights protected under the commitments towards the implementation of ILO Conventions, a distinction needs to be made between three groups of trade agreements. To begin with, the clauses contained in the EU-RSK, in the EU-Georgia, in the EU-Moldova, in the EU-SADC, in the EU-Japan and in the EU-Singapore FTAs compel the Parties to the implementation of all ILO Conventions that they have ratified respectively.[305] Second, the clauses included in the EU-Central America FTA and in the CETA relate to the ILO Fundamental

[302] For an interesting discussion of the distribution of competences in matters of labour rights protection prior to the entry into force of the Lisbon Treaty, see: Jan Orbie, Hendrik Vos, and Liesbeth Taverniers, "EU Trade Policy and a Social Clause: A Question of Competences?," *Politique européenne*, no. 3 (2005).

[303] Article 46 of the VCLT provides that,

> **'1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.**
>
> **2. A violation is manifest if it would be objectively evident to any State con ducting itself in the matter in accordance with normal practice and in good faith.'**

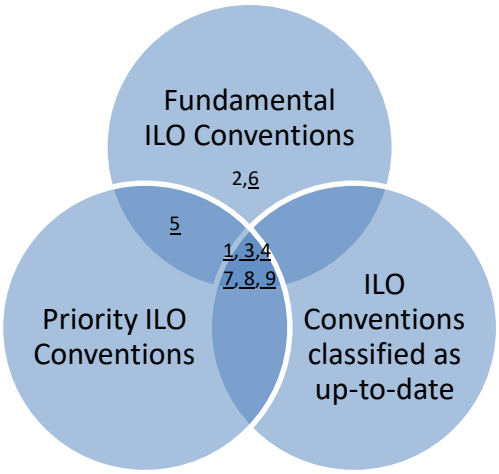
[304] Note that some phrases qualify these clauses. These phrases have however marginal implications for the commitments' scope of application. For instance, the mention 'in their laws (regulations) and practices' or variations thereof included in the EU-Central America, in the EU-Georgia, in the EU-Moldova, in the CETA, and in the EU-Japan FTAs makes clear that the obligation *to implement* concerns both legal instruments as well as their enforcement by public authorities. Moreover, the phrase 'in its whole territory' has been inserted in the CETA. The latter qualification may be justified by the Parties' intention to also include export processing zones within the commitments' scope of application. Finally, the term "effectively" in the expression 'reaffirm the commitment to effectively implementing' included in all considered agreements but the EU-SADC FTA, has also some implications for the obligation's scope of application. Indeed, under the relevant jurisprudence, one considers that the term "effective(-ly)" must be given a proper meaning qualifying in its own way the obligation imposed upon the Parties. Accordingly, the obligation *to implement* can be considered an obligation with various degrees of realisation and the adverb "effectively" indicates a high degree of implementation. Ultimately, the adverb "effectively" can be considered to raise the bar of what is required from the contracting Parties in terms of implementation of the ILO Conventions. For an interesting discussion of how the word *effective* qualifies an obligation, see: *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 130.

[305] The EU-Georgia and EU-Moldova agreements adopt a slightly different formulation by stating that their commitment applies to 'the fundamental, the priority and other ILO conventions ratified by [Georgia/Moldova] and the Member States respectively.' See art. 229 of the EU-Georgia FTA and art. 365 of the EU-Moldova FTA.

Conventions. While the former applies to all ILO Fundamental Conventions, the latter only to those ratified by the Parties respectively. Third, the commitment included in the EU-Ukraine FTA covers the ILO Fundamental and Priority Conventions that each Party has ratified respectively. Thus, the scope of the commitment accepted by the Parties in all FTAs, but the EU-Central America agreement varies according to the ILO Conventions each of them have ratified. This has as consequence that a Party can invoke against another Party the non-implementation of a Convention it has not ratified itself. In other words, there is a discrepancy between the scope of the commitments taken up by the different contracting Parties.[306]

[306] Note that, under art. 26 of the ILO Constitution, an ILO Member State cannot make a complaint against another Member before the ILO Governing Body on the ground of a Convention it has not ratified itself. Such complaint is only admissible if *both* Countries have ratified the Convention in question. In contrast, the inclusion of commitments towards the implementation of ILO Conventions in the TSD chapters makes it possible for a Party to raise a complaint against another Party's alleged non-compliance with Convention even if the complaining Party has not ratified the concerned Convention.

FIGURE 2: SETS OF ILO CONVENTIONS COVERED IN THE CLAUSES DEFINING COMMITMENTS TOWARDS THE IMPLEMENTATION OF ILO CONVENTIONS ACROSS THE NINE RELEVANT FTAS



ILO FUNDAMENTAL CONVENTIONS

1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
3. Forced Labour Convention, 1930 (No. 29)
4. Abolition of Forced Labour Convention, 1957 (No. 105)
5. Minimum Age Convention, 1973 (No. 138)
6. Worst Forms of Child Labour Convention, 1999 (No. 182)
7. Equal Remuneration Convention, 1951 (No. 100)
8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

1. EU-RSK FTA
2. EU-Central America FTA
3. EU-Georgia FTA
4. EU-Moldova FTA
5. EU-Ukraine FTA
6. EU-Canada FTA
7. EU-SADC FTA
8. EU-Japan FTA
9. EU-Singapore FTA

- underlined = obligation towards the relevant ILO Conventions that the Parties have ratified respectively
- not underlined = obligation towards all relevant ILO Conventions

ILO PRIORITY (GOVERNANCE) CONVENTIONS

1. Labour Inspection Convention, 1947 (No. 81)
2. Employment Policy Convention, 1964 (No. 122)
3. Labour Inspection (Agriculture) Convention, 1969 (No. 129)
4. Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

REMAINING ILO (TECHNICAL) CONVENTIONS

C014 - Weekly Rest (Industry) Convention, 1921 (No. 14)
C029 - Forced Labour Convention, 1930 (No. 29)
C077 - Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77)
C078 - Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78)
C081 - Labour Inspection Convention, 1947 (No. 81)
…

Regarding the degree of precision, the clauses do not include phrases which are notoriously unprecise. In fact, the commitments towards the implementation of ILO Conventions are formulated in a relatively precise way. Indeed, the obligations, as well as their scope of application *ratione personae* and *ratione materiae* do not leave much discretion to the Parties as to the result to be achieved.

To conclude, clauses defining commitments towards the implementation of ILO Conventions have been included in all covered agreements but the EU-Peru-Colombia-Ecuador FTA. These clauses (re)affirm a commitment *to implement* various sets of ILO Conventions, thus binding the Parties to the achievement of a certain result. On the EU side, the clauses should be considered to apply exclusively to the EU Member States as they are the one competent for the ratification of ILO Conventions.

However, we have seen that this raises legal problems under the EU-Japan and EU-Singapore agreements, two agreements concluded by the EU alone. Furthermore, the scope of this obligation varies depending on the Conventions the Parties have ratified. More specifically, some FTAs compel the contracting Parties to the implementation of all ILO Conventions that they have ratified respectively; others to the ILO Fundamental Conventions; still others to the ILO Fundamental and Priority Conventions that each Party has ratified. In general, the commitments towards the implementation of ILO Conventions are relatively precise. Overall, the Parties have drafted clauses with a strong legal character, thus showing solid commitment towards the implementation of ILO Conventions. Finally, as they merely reaffirm pre-existing commitments, these clauses do not create new commitments for the Parties. This is the reason why some commentators have argued that these clauses have 'little or no meaning.'[307] However, the re-affirmation of these commitments *in the framework of the concerned FTAs* entails that they apply in the specific legal relation between the Parties and, as such, make them claimable by each of them, if necessary through the dispute settlement mechanisms established under the TSD chapters.[308]

3.4. Clauses defining commitments towards the enhancement of the levels of protection

Beside clauses defining minimum levels of labour protection, EU trade agreement also include clauses providing for the enhancement of the levels of protection. While the former aim to address the worry about a race to the bottom in labour standards, and strive to level the playing field between economies with sometimes significant differences in the levels of protection, the clauses discussed in this section tackle the concern for regulatory chill, and attempt to establish upwards dynamics in labour rights protection. Indeed, next to a race to the bottom, competition between economies also raises the concern that regulators may refrain from improving the domestic levels of protection for fear of undermining the competitiveness of their industry.[309] The clauses providing for the enhancement of the levels of labour protection comprehend four different types of commitments: (1) commitments

[307] *Bartels* argues that these are 'redundant – or close to redundant – provisions referencing multilateral obligations, each of which would arguably have been better left to a political declaration. […] Such 'reaffirmations' have little or no meaning.' Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 3. See also, Bartels, "The EU's approach to social standards and the TTIP," 87.

[308] For a similar argument with respect to the labour obligations included in the EU-Singapore FTA, see Opinion of *AG Sharpston* in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992. pt. 498, available on: http://curia.europa.eu/juris/document/document.jsf?text=&docid=186494&pageIndex=0&doclang=EN (last consulted on 01/02/2019).

[309] The concept of *regulatory chill in matters of labour rights protection* is used to represent the situation in which a lawmaker favours the regulatory *status quo* over the improvement of the levels of protection, mainly for fear that such improvement would have negative effects on the competitiveness of its domestic industry. For a clear theoretical discussion of regulatory chill and race to the bottom in matters of labour rights protection see: Bagwell, Mavroidis and Staiger, "It's a question of market access".

towards high levels of labour protection; (2) commitments towards the improvements of the levels of protection; (3) commitments towards the ratification of ILO Conventions; and (4) commitments towards the approximation of the law to EU practices. One can consider that the commitments towards high levels of protection constitute the keystone of the regime set by these four clauses and that the other commitments specify them. Overall, the clauses defining commitments towards the enhancement of the levels of protection are unequally present in the covered FTAs.[310] They are included in a number of agreements ranging from three for the commitments towards the approximation of the law to EU practices, up to nine for the commitments towards high levels of protection.

3.4.1. Commitments towards high levels of labour protection

Commitments towards high levels of labour protection have been drafted in all FTAs but the EU-SADC agreement. The structure and the content of these clauses are relatively stable across FTAs. As mentioned in *Section 3.3.1. Commitments towards internationally recognised standards and agreements*, the commitments towards high levels of labour protection provided in the EU-RSK and in the EU-Central America FTAs have been phrased in reference to the internationally recognised standards and agreements. This approach has been abandoned in subsequent agreements.

[310] While commitments towards the improvement of the levels of labour protection have been drafted in eights agreements (they are not included in the EU-Peru-Colombia-Ecuador and in the EU-SADC FTAs), commitments towards the ratification of ILO Conventions are provided in seven agreements (they are not included in the EU-Central America, in the EU-Peru-Colombia-Ecuador, and in the EU-SADC FTAs).

TABLE 7: COMMITMENTS TOWARDS HIGH LEVELS OF LABOUR PROTECTION IN THE TEN COVERED AGREEMENTS

KOREU	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
[…] each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements referred to in Articles 13.4 and 13.5 […] (art. 13.3.)	Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of environmental and labour protection, appropriate to its social, environmental and economic conditions and consistent with the internationally recognised standards and agreements referred to in Articles 286 and 287 to which it is a party […] (art. 285 §2)	[…] each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection. (art. 268)	[…] the Parties shall ensure that their legislation provides for high levels of environmental and labour protection […] (art. 290)	In that context, each Party shall strive to ensure that its law and policies provide for and encourage high levels of environmental and labour protection […] (art. 228 §2)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-Singapore**
In that context, each Party shall strive to ensure that its law and policies provide for and encourage high levels of environmental and labour protection […] (art. 364 §2)	[…] each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection […] (art. 23.2)	NONE	[…] each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection […] (art. 16.2)	The Parties […] shall strive towards providing and encouraging high levels of environmental and labour protection. (art. 12.2.2)

The clauses defining commitments towards high levels of labour protection are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

Regarding the obligations included in the commitments towards high levels of labour protection, three categories of FTAs can be distinguished. First, the EU-Central America, the EU-Peru-Colombia-Ecuador, the EU-Georgia, the EU-Moldova and the EU-Japan FTAs use the formulation "shall strive to ensure" high levels of protection. Second, the EU-RSK FTA and the CETA use the verb "shall seek to ensure." Finally, the EU-Ukraine and the EU-Singapore FTAs include legal verbs of their own kind. While, the EU-Ukraine agreement uses the terms "shall ensure," the EU-Singapore agreement employs the legal verb "shall strive towards." These obligations are then further specified. Indeed, they call the Parties to guarantee in one form or another that their domestic regulatory framework "provide for" and "encourage" high levels of protection.[311]

Thus, a first distinction can be made between the obligations *to seek to ensure* and those *to strive to ensure*. According to its ordinary meaning, the legal verb *to ensure* calls the Parties 'to make certain the attainment of (a result).'[312] In turn, the verbal forms *to seek* and *to strive* set an obligation 'to try to obtain (something advantageous); to try to bring about or effect (an action, condition, opportunity, or the like);'[313] and 'to endeavour vigorously, use strenuous effort,' respectively.[314] Thus, the obligation *to seek to ensure* is one where the Parties have *to try to make certain the attainment of (a result*), and the obligation *to strive to ensure* compels the Parties *to endeavour vigorously to make certain the attainment of (a result*).[315] Both approaches thus define obligations of conduct. The legal verbs "shall strive towards" included in the the EU-Singapore agreement also establish an obligation of conduct under which the Parties have *to endeavour vigorously, use strenuous effort.* Then, the ordinary meaning of the legal verb "to provide for" is 'to stipulate in a will, statute, etc.; to lay down as a

[311] Both specification are provided in all relevant FTAs, but the EU-Ukraine and the EU-Japan agreements where only an obligation "to provide for" is formulated.
[312] See the ordinary meaning of the verb "to ensure" in: http://www.oed.com/view/Entry/62745?rskey=WutxVs&result=2&isAdvanced=false#eid (last consulted on 27/02/2019).
[313] See the ordinary meaning of the verb "to seek" in: http://www.oed.com/view/Entry/174794?rskey=v3PSFK&result=2&isAdvanced=false#eid (last consulted on 27/02/2019).
[314] See the ordinary meaning of the verb "to strive" in: http://www.oed.com/view/Entry/191722?redirectedFrom=strive#eid (last consulted on 27/02/2019).
[315] On this backdrop, the latter obligation can be considered to set upon the Parties an obligation requiring more efforts than the former. For a discussion of the weak character of the obligation to "strive to ensure" that the domestic laws protect the ILO fundamental labour rights under US FTAs, see: Sandra Polaski, "Protecting Labor Rights Through Trade Agreements: An Analytical Guide," *UC Davis J. Int'l L. & Pol'y* 10 (2004): 19.

provision or arrangement,'[316] and the ordinary meaning of the verb "to encourage" is 'to allow or promote the continuance or development of (a natural growth, an industry, a sentiment, etc.).'[317] On this backdrop, the Parties under all relevant agreement, but the EU-Ukraine FTAs, have to undertake appropriate efforts to adopt laws and policies which *lay down as a provision* and *allow or promote the continuance or development of* high levels of labour protection. Finally, the obligation included in the EU-Ukraine FTA is in stark contrast with those included in the other agreements. Indeed, it provides that the Parties "shall ensure" that their legislation "provides for" high levels of labour protection. Thus, under this agreement the Parties have *to make certain the attainment of (a result)*, namely to *lay down as a provision* high levels of protection. Consequently, the EU-Ukraine agreement binds its Parties to the achievement of a result and not of a conduct.

Overall, in all agreement including commitments towards high levels of protection but the EU-Ukraine FTA, the contracting Parties' international responsibility will be assessed in regard of the efforts they have made towards the adoption of laws and policies providing for and/or encouraging high levels of labour protection,[318] rather than in face of whether or not they have achieved certain regulatory outcomes. As a commentator puts it, the obligation to "strive to ensure" is relatively weak 'in the sense that it is only a best endeavours provision […].'[319] In contrast, the obligation included in the EU-Ukraine FTA may appear to be substantially stronger than those included in all other concerned agreements.[320]

---

[316] See: http://www.oed.com/view/Entry/153448?rskey=vSrGiA&result=2&isAdvanced=false#eid (last consulted on 27/02/2019).

[317] See: http://www.oed.com/view/Entry/61791?rskey=MyCrOr&result=2&isAdvanced=false#eid (last consulted on 27/02/2019).

[318] Note that the commitment towards high levels of protection in the EU-Japan FTA is only further specified with the legal verb "to provide for".

[319] Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 12–13. For a similar assessment, see also: Bartels, "The EU's approach to social standards and the TTIP," 87; Häberli, Jansen and Monteiro, "Regional trade agreements and domestic labour market regulation," 298. Other commentators have also argued that the obligation "to strive to ensure" 'is more than a hortatory commitment', see: Bourgeois, Dawar and Evenett, "A comparative analysis of selected provisions in free trade agreements," 36..

[320] In the same vein, *Bartels* writes that,

> **'[it] should be noted however that in the EU's TTIP proposal (as in other trade agreements) the wording is much stronger, stating that '[e]ach Party *shall ensure* that its domestic policies and laws provide for and encourage high levels of protection in the labour and environmental areas and shall strive to continue to improve those policies and laws and their underlying levels of protection''.**

Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 6. As such, the author considers the obligation of result – i.e. "shall ensure" – to be "much stronger" than the obligation of conduct – i.e. "shall seek to ensure". Thus, the EU's TTIP proposal provides for a commitment towards high levels of protection similar to the one included in the EU-Ukraine FTA. Note that the more demanding commitment adopted in the EU-Ukraine FTA may be understood in light of the fact that this agreement is the only one to include in its TSD chapter a commitment towards the approximation of the law to EU practices. Arguably the EU practices are perceived as corresponding to high levels of protection. On this point see *Section 3.4.4. Commitments towards the approximation of the law to EU practices*.

Regarding the clauses' scope of application *ratione personae*, they apply to all Parties.[321] Thus, for all FTAs until the EU-SADC agreement, they apply to the EU and its Member States on the one hand, and to the respective trading partners on the other hand. For their part, the EU-Japan and the EU-Singapore agreements have been concluded between the EU alone and the respective trading partners. Consequently, the right and obligations included in these two agreements concern the EU and not its Member States. Regarding the clauses' scope of application *ratione materiae*, the commitments do not include additional phrases which notoriously broaden or reduce their scope of application.[322] Therefore, the analysis focuses on the specific labour rights protected by these clauses. In this regard, except for the EU-RSK and EU-Central America FTAs, the commitments towards high levels of protection do not refer to any specific labour rights. Most agreements specify that Parties' commitments towards high levels of protection relate to their *laws and policies* (or other related formulations) however.[323] Consequently, the labour rights covered by the commitments towards high levels of protection appear to be those protected in these specific instruments. Overall, the approach handled by the Parties does not clearly define which labour rights are protected by these commitments. The EU-RSK and the EU-Central America FTAs bring additional, yet modest precisions in this regard. Both agreements provide that the high levels of labour protection that countries should guarantee, need to be 'consistent with the internationally recognised standards or agreements

[321] See however the discussion in fn. 232.

[322] Note however that art. 285 §2 of the EU-Central America agreement specifies that each party's commitment to make efforts towards high levels of protection should be 'appropriate to its social, environmental and economic conditions and consistent […].' As such, the Parties guarantee themselves some discretion on how to define what constitute high levels of protection. Moreover, the same provision of the EU-Central America agreement provides that the labour laws and policies subjected to the commitment towards high levels of protection should not '[be] applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on international trade.' The objective of this clause is to prevent the abuse or misuse of labour laws and policies for protectionist trade purposes. A similar clause is also included in article 16.2 of the EU-Japan FTA. Though, it is formulated as a standalone clause and not specifically linked to the commitments towards high levels of protection. Finally, note that this clause is largely incorporated text from the chapeau of the General Exception under article XX of the GATT. For a discussion of the chapeau of article XX GATT, see: Lorand Bartels, "The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction," *American Journal of International Law* 109 (2015).; Peter van den Bossche and W. Zdouc, "The Law and Policy of the World Trade Organization," *Text, cases and Materials*, 2017, 593 *et sequ*.

[323] Note that in the EU-RSK, EU-Central America, EU-Georgia, EU-Moldova and EU-Canada FTAs, the commitments towards high levels of protection apply to the "laws and policies" of each contracting Party, thus covering both acts of the legislative and of the executive branches. The EU-Peru-Colombia-Ecuador agreement arguably adopts a narrower approach by using the slightly more specified formulation "*relevant* laws and policies" (emphasis added by the author). In turn, the EU-Japan FTA refers to "laws, regulations and related policies" thus adopting a comprehensive approach. Then, the EU-Ukraine agreement uses the term "legislation" which can be interpreted under this specific FTA as covering both acts of the legislative and the executive branches. Finally, the EU-Singapore agreement does not bring any specification on which specific acts are concerned by the commitments.

referred to in [the provision on the multilateral labour standards and agreements].' As such, both agreements indirectly refer to the full and productive employment and decent work for all standards as well as to the core labour standards.[324] Yet, these internationally recognised standards and agreements are widely recognised to set minimum levels of protection. As a matter of consequence, the precisions brought to the commitments towards high levels of protection included in the EU-RSK and EU-Central America FTAs are not particularly useful, let alone demanding for the contracting Parties. For, they specify that high levels of labour protection should be consistent with minimum labour standards.

Regarding the clauses' degree of precision, all relevant FTAs handle the term "levels of labour protection." *Section 3.2. Clauses defining the rights to regulate* already discussed this expression and has highlighted its underdeterminate character. Indeed, the terms "levels of labour protection" are practical for conceptual purposes as they allow to capture the several strands of complexity inherent to labour law. However, it is relatively vague. What is more, the commitments towards high levels of protection do not bring any information on what constitutes *high* levels of labour protection, and the EU-RSK and EU-Central America FTAs specification that these *high* levels of protection must be consistent with internationally recognised standards and agreements does not help much. Overall, the expression *high levels of labour protection* is inherently underdeterminate and leaves relatively significant margin of discretion to the contracting Parties.

To conclude, all FTAs but the EU-SADC agreement contain commitments towards high levels of labour protection. While the EU-RSK and the EU-Central America FTAs link this clause to the one defining commitments towards internationally recognised standards and agreements, this approach has been abandoned in all subsequent FTAs. All relevant clauses but the one included in the EU-Ukraine agreement contain an obligation of conduct. In contrast, the EU-Ukraine FTA establishes an obligation of result. Moreover, the commitments apply to all contracting Parties. With respect to the labour rights covered by these clauses, the commitment do not refer to any specific rights. Instead, they refer to their laws and policies so that the covered labour rights are those protected in these instruments. Moreover, the clauses' degree of precision is relatively low. The expression *high levels of labour protection*, at the core of the commitments, is rather underdeterminate and, as such, leaves substantial margin of appreciation to the Parties as to what constitutes high levels of protection. Overall, the clauses defining commitments towards high levels of protection can be considered to set

[324] For a discussion of these standards, see: *Section 3.3.1. Commitments towards internationally recognised standards and agreements; Section 3.3.1. Commitments towards full and productive employment and decent work for all; and Section 3.3.3. Commitments towards core labour standards.*

new commitments for the contracting Parties. However, these commitments have been designed with a relatively weak legal character. Indeed, except for the EU-Ukraine FTA, all commitments contain an obligation of conduct which is poorly specified. In contrast, the commitment included in the EU-Ukraine agreement defines an obligation of result. This commitment is for the remaining relatively vague however. The rather weak legal character of the commitments towards high levels of labour protection does not disqualify these clauses altogether.[325] Indeed, the Parties' compliance with these commitments can be challenged under the dispute settlement mechanism of the TSD chapters and their international responsibility will be assessed in regard of the efforts they have made, or the regulatory outcomes they have reached (in the case of the EU-Ukraine FTA) regarding the adoption of laws and policies providing for and/or encouraging high levels of labour protection.[326] Overall, the clauses' design highlights the Parties rather "prudent" commitment towards high levels of labour protection.

3.4.2. Commitments towards the improvement of the levels of protection

The second type of clauses concerned with the enhancement of the levels of protection pertains to the commitments towards the improvement of the levels of protection. These clauses, which aim to set up upwards dynamics in labour rights protection, have been drafted in EU FTAs typically in order to address the concerns of regulatory chill in labour standards. However, as will become clear from the analysis conducted in this section, the commitments towards the improvement of the levels of protection have a relatively weak legal character. All considered trade agreements but the EU-Peru-Colombia-Ecuador and the EU-SADC FTAs include such clauses. Finally, note that the design of these commitments is relatively stable across all relevant agreements**.**

[325] As a commentator argues, '[one] might be tempted to think that a best endeavours provision of this type can have no meaning. But laws and policies that manifestly fail to protect labour or environmental standards would violate such an obligation. Thus the US commenced consultations with Bahrain under an equivalent provision on labour standards.' Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 6. Note that by acknowledging that this provision is a best endeavours one and then, by stating that 'laws and policies that manifestly fail to protect labour or environmental standards would violate such an obligation', Bartel's analysis seems to confuse obligations of conduct and obligations of result.

[326] For a similar arguments with respect to environmental measures, see: Nils Meyer-Ohlendorf, Christiane Gerstetter, Inga Bach, "Regulatory Cooperation under CETA," 13.

TABLE 8: COMMITMENTS TOWARDS THE IMPROVEMENT OF THE LEVELS OF PROTECTION IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
[…] and shall strive to continue to improve those laws and policies. (art. 13.3.)	[…] and shall strive to improve those laws and policies, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on international trade. (art. 285)	NONE	[…] and shall strive to continue to improve that legislation […] (art. 290)	[…] shall strive to continue to improve its law and policies and the underlying levels of protection. (art. 228)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-Singapore**
[…] shall strive to continue to improve its law and policies and the underlying levels of protection. (art. 364)	[…] shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection. (art. 23.2)	NONE	[…] and shall strive to continue to improve those laws and regulations and their underlying levels of protection. (art. 16.2)	The Parties shall continue to improve those laws and policies […] (art. 12.2.2.)

The clauses defining commitments towards the improvement of the levels of protection are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

With the exception of the EU-Central America and the EU-Singapore FTAs, the obligations handled in the commitments towards the improvement of the levels of protection of all relevant agreements are identical. More specifically, the contracting Parties oblige themselves to "strive to continue to improve" their regime of labour protection. In contrast, the EU-Central America agreement does not include the term "continue" and provides that the Parties "strive to improve" their regime of labour protection. In turn, the EU-Singapore FTA adopts verb "shall continue to improve," thus replacing the verbal particle "strive" by "shall."

In the obligation to *strive to continue to improve* included in most FTAs, the particle "strive" compels the Parties 'to endeavour vigorously, use strenuous effort.'[327] As such, it establishes an obligation of conduct where the Parties commit to adopt appropriate efforts "to continue to improve" their domestic regime of labour protection. Thus, the specific conduct required from the Parties is further specified by two verbs, namely "to improve" and "to continue." While the former requires from the Parties 'to make *into* something better or more advanced; to turn something *into* something else by means of improvements,'[328] the latter provides that the efforts must 'carry on, keep up, maintain, go on with, persist in (an action, usage, etc.).'[329] Overall, these two verbs indicate that the Parties' efforts should aim towards raising the levels of protection and should be in line with past efforts. All in all, this obligation leaves a fairly broad margin of discretion to the Parties as to what specific conduct they can adopt.[330] Furthermore, as mentioned above, the EU-Central America FTA does not include the verbal form "to continue," so that the temporal reference and the related indications as to the type of conduct Parties need to adopt is not contained in this commitment. Finally, instead of handling the

[327] See: http://www.oed.com/view/Entry/191722?redirectedFrom=strive#eid (last consulted on 27/02/2019).
[328] See: http://www.oed.com/view/Entry/92855?rskey=gVb2c7&result=2#eid (last consulted on 18/03/2019).
[329] See: http://www.oed.com/view/Entry/40270?rskey=8B3h2o&result=3#eid (last consulted on 19/03/2019).
[330] A commentator has argued with respect to this obligation that 'though weak, it is not meaningless: an overt weakening of existing legislative protections could hardly be said to be consistent with striving to improve these standards.' Bartels, "The EU's approach to social standards and the TTIP," 87. A same argument is made in: Bartels, "Human rights and sustainable development obligations in EU free trade agreements," 12–13. Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 6. Other commentators have also contended that ''[the] widespread erosion of national labour market institutions across the EU has been undertaken more or less explicitly to lower wages and attract investment and growth, i. e. *for comparative advantage.'* For an argument regarding the general weakening of the labour protection regime in EU countries, see also, Schömann, "Réformes nationales du droit du travail en temps de crise"; Cross, "Legitimising an unsustainable approach to trade: a discussion paper on sustainable development provisions in EU Free Trade Agreements," 6.

verbal particle "to strive" the EU-Singapore agreement provides that the Parties "shall continue to improve" their levels of protection, thus providing for an obligation of result which binds the Parties *to carry on to make* their labour laws and policies *into something better or more advanced*. Thus, all relevant agreements, but the EU-Singapore FTA, include an obligation of conduct characterised by varying degrees of specification. In contrast, the EU-Singapore agreement includes an obligation of result.

Regarding to the clauses' scope of application *ratione pesronae*, the commitments apply to all Parties.[331] Thus, for all FTAs until the EU-SADC agreement, they apply to the EU and its Member States on the one hand and to the respective trading partners on the other hand. For their part, the EU-Japan and the EU-Singapore agreements have been concluded between the EU alone and the respective trading partner. Consequently, the right and obligations included in these two agreements concern the EU and not its Member States. Regarding the clauses' scope of application *ratione materiae*, the commitments do not include phrases which notoriously extend or reduce their scope of application.[332] Therefore, the analysis focuses on the specific labour rights protected by these clauses. In this regard, it is the case for the commitments towards high levels of protection, the commitments towards the improvement of the levels of labour protection do not refer to any specific labour rights. Rather, they limit themselves to general formulations on the improvement of the Parties' *laws and policies* (or other similar formulations).[333] As a consequence, the obligation to improve can be considered to span all labour rights protected under the relevant domestic instruments.

Regarding the clauses' degree of precision, the concept of *improvement* at the core of the commitments towards the improvement of the levels of protection raises some problems of interpretation. The obligation *to improve,* included in all relevant FTAs, appears relatively vague indeed. The clauses do neither make clear *how* to consider whether changes in laws and policies

[331] See however the discussion in fn. 232.

[332] The EU-Central America and the CETA agreements include phrases defining limits to the obligations' scope of application. Article 285 of the EU-Central America agreement provides that the labour laws and policies subjected to the commitments towards the improvement of the levels of protection should not '[be] applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on international trade.' Thus, this clause provides that the laws and policies, subjected to obligations towards the improvement of these levels of protection, "are not applied" so as to discriminate or restrict international trade. For a comment on this phrase see fn. 322. In turn, art. 23.2. of the CETA establishes that the commitment *to strive to continue to improve such laws and policies* must be pursued 'with the goal of providing high levels of labour protection.' This phrase marginally specifies the nature of the conduct required from the contracting Parties.

[333] The terms "laws and policies" are used in the EU-RSK, the EU-Central America, the CETA and the EU-Singapore FTAs; the terms "law and policies/regulations and the underlying levels of protection" are used in the EU-Georgia, EU-Moldova and EU-Japan agreements; and the term "legislation" is used in the EU-Ukraine FTA.

constitute an improvement, nor *what* constitutes an improvement.[334] Yet, the assessment of whether the adoption or modification of certain laws or policies constitute an improvement is, in cases, difficult to undertake. Overall, the lack of specification of what amounts to an improvement provides the Parties with a certain degree of discretion. Finally, the EU-Georgia, the EU-Moldova and the EU-Japan FTAs specify that not only the Parties' laws and policies should be improved, but also their *underlying levels of protection*. The expression *levels of protection* has already been discussed in *Section 3.2. Clauses defining the rights to regulate* where it has been argued that the terms *levels of protection* are relatively underdeterminate. By and large, while the vague character of the commitments to *improve* the laws and policies grant the Parties some margin of discretion, the commitment to *improve* the laws and policies' *underlying levels of protection,* even more so.

To conclude, commitments towards the improvement of the levels of labour protection are included in all agreements, but the EU-Peru-Colombia-Ecuador and the EU-SADC FTAs. These commitments include obligations of conduct, except for the EU-Singapore agreement where Parties have committed to the achievement of certain regulatory outcomes. The commitments towards the improvement of the levels of labour protection apply to all contracting Parties. The specific labour rights protected under these commitments are poorly specified however. The clauses limit themselves to referring to the Parties' *laws and policies*. With respect to the clauses' degree of precision, the lack of specification of the term *improvement* at the core of all relevant clauses, as well as the vague character of the expression *levels of protection* included in the EU-Georgia, in the EU-Moldova and in the EU-Japan FTAs provide the Parties with a good deal of margin of appreciation regarding the exact scope of the commitments they have taken up in the FTAs. Overall, Parties appear to have agreed on the adoption of commitments towards the improvement of the levels of protection with relatively weak legal character. This shows their intention to keep a certain degree of discretion on the definition of the levels of protection applicable at home. Ultimately, this implies that these clauses' response to the concern of regulatory chill in labour standards is relatively weak. Finally, it is important to note that the clauses analysed in this section establish new commitments for the Parties.[335]

[334] For instance, does the adoption or modification of a new legislation providing for furlough regime; providing for the anticipation of the retirement age; reducing the maximum number of weekly hours from 35 to 30; allowing for overtime work etc. constitute an improvement or a weakening of the levels of protection? These measures would certainly be considered by some as an improvement and by other as a weakening of the levels of protection. In both cases legitimate arguments are likely to be raised.

[335] Some commentators have argued that these clauses do not include legal obligations as such because they 'confirm what States have already committed to' and because 'the wording is vague' see: Nils Meyer-Ohlendorf, Christiane Gerstetter, Inga Bach, "Regulatory Cooperation under CETA," 13. These arguments are made with respect to the analogue environmental clause under the CETA. The application of this argument to the present clauses it not fully satisfactory however. Indeed, these clauses *do* contain a legal obligation, however weak their legal character. Moreover, a *specific* obligation to improve social rights is not new. Indeed, in article 2.1 of the

3.4.3. *Commitments towards the ratification of ILO Conventions*

Commitments towards the ratification of ILO Conventions constitute the third type of clauses defining commitments towards the enhancement of the levels of protection. These clauses have been inserted in in seven of the ten agreements – i.e. in all FTAs but the EU-Central America, the EU-Peru-Colombia-Ecuador and the EU-SADC agreements.[336] Among the agreements including these clauses, one can distinguish between three categories of FTAs. First, the EU-RSK, the CETA and the EU-Japan FTAs establish an obligation to make efforts linked to the ratification, among other, of the ILO Fundamental Conventions. Second, the EU-Georgia, the EU-Moldova and the EU-Ukraine FTAs set an obligation to consider the ratification of ILO Conventions other than the fundamental ones. Third, the EU-Singapore agreement includes both types of approaches and further develop them. Interestingly, next to the commitments towards the core labour standards, the commitments towards the ratification of ILO Conventions constitute the second legal base invoked in the first dispute under the TSD chapter of a trade agreement concluded by the EU, the *EU v. South Korea dispute on labour rights*. In this dispute, the EU argues, inter alia, that Korea's efforts towards ratifying the outstanding ILO Fundamental Conventions appear inadequate in light of Seoul's commitments under the TSD chapter.[337]

ICESCR develops the idea already embryonic in the article 22 of the UDHR of progressive implementation of economic, social and cultural rights. Article 2.1 of the ICESCR reads as follows,

> **'1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization* of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'**

(emphasis added by the author) However, the commitments to improve the levels of protection provided in the TSD chapters is broader than the one contained in the ICESCR as they apply to labour rights protected in the Parties' laws and policies *in general* – and thus not to the limited set of labour rights specifically protected under the Covenant (see fn. 93). For a discussion of the obligation to progressively implement the rights and obligation included in the ICESCR, see: Schutter, *Economic, social and cultural rights as human rights*.

[336] Two of the three agreements which do not include these commitments did also not contain commitments towards the improvement of the levels of protection, these are the EU-Peru-Colombia-Ecuador and the EU-SADC FTAs.

[337] This case is still pending. See the Request for consultations by the European Union, of the 17th of December 2018, accessible under: http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf (last consulted on 20/03/2019). The concerned Conventions are: C87 Freedom of Association and Protection of the Right to Organise Convention, 1948; C98 Right to Organise and Collective Bargaining Convention, 1949; C29 Forced Labour Convention, 1930; and C105 Abolition of Forced Labour Convention, 1957.

TABLE 9: COMMITMENTS TOWARDS THE RATIFICATION OF ILO CONVENTIONS IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
The Parties will make continued and sustained efforts towards the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO. (art. 13.4)	NONE	NONE	The Parties will also consider ratification and implementation of other ILO Conventions that are classified as up to date by the ILO. (art. 291)	The Parties will also consider the ratification of the remaining priority and other conventions that are classified as up-to-date by the ILO. (art. 229 §4)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-Singapore**
The Parties will also consider the ratification of the remaining priority and other conventions that are classified as up-to-date by the ILO. (art. 365 §4)	The Parties shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so. (art. 23.3)	NONE	Each Party shall make continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions and other ILO Conventions which each Party considers appropriate to ratify. (art. 16.3)	The Parties will make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions, and they will exchange information in this regard. The Parties will also consider the ratification and effective implementation of other ILO conventions, taking into account domestic circumstances. The Parties will exchange information in this regard. (art. 12.3.4)

The clauses defining commitments towards the ratification of ILO Conventions are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

The obligations contained in the commitments towards the ratification of ILO Conventions can be grouped into three categories. The first category is composed the clauses included in the EU-RSK, in the CETA and in the EU-Japan agreements. The commitments drafted in these agreements compel the Parties to 'make efforts towards the ratification' (or other similar formulation) of certain ILO Conventions. Inasmuch as they bind Parties to the achievement of appropriate efforts towards the ratification of ILO Conventions, these clauses establish obligations of conduct. The second category includes the commitments contained in the EU-Georgia, in the EU-Moldova and in the EU-Ukraine agreements under which the Parties are compelled to 'consider the ratification' of certain ILO Conventions. According to the ordinary meaning of the verb "to consider" Parties must *'*take into practical consideration or regard; to show consideration or regard for; to regard, make allowance for'[338] the ratification of certain instruments. As such, this also constitutes an obligation of conduct.[339] While both types of formulation set obligations of conduct, compelling the Parties to undertake appropriate efforts towards the ratification of the relevant ILO Conventions, they are slightly different regarding the nature of the required conducts. Finally, the third category includes the sole EU-Singapore FTA. This agreement includes the two formulations adopted in the other FTAs and add to them one *to make efforts* towards *implementing* the fundamental ILO conventions, as well as one *to consider* the *implementation* of other ILO conventions, thus further complementing the existing obligations with two obligations of conduct. Overall, in spite of what was suggested in the request for consultation-letter addressed by the EU Commission to its South Korean homologue in *the EU-Korea dispute on labour rights*, the Parties are not bound to the achievement of a specific regulatory outcome.[340] In this regard, some commentators have argued that the clauses defining commitments

[338] See: http://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid (last consulted on 01/03/2019).
[339] The type of conducts required under the second group appears less demanding than the conducts called for under the first group. This is confirmed by the approach adopted in the EU-Singapore agreement, which highlights the difference between the obligation *to make efforts* towards the ratification and implementation of the ILO Fundamental Conventions on the one hand and the obligation *to consider* the ratification and implementation of "other ILO Conventions" on the other hand.
[340] See the Request for consultations by the European Union, of the 17th of December 2018, accessible under: http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf (last consulted on 20/03/2019). The relevant passage of the letter reads as follows:

> **'Indeed, more than seven years after the entry into force of the EU-Korea FTA, Korea has still not ratified the aforementioned four fundamental ILO Conventions. Thus, Korea appears to have acted inconsistently with Article 13.4 paragraph 3 last sentence of the EU-Korea FTA, where Korea commits to make continued and sustained efforts towards ratifying the fundamental ILO Conventions.'**

towards the ratification of ILO Conventions handle a 'very timid formulation'[341] and have proposed the adoption of an obligation of result under the following formulation: 'each Party *shall ratify*, to the extent that it has not yet done so, and shall effectively implement in its laws and practices, in its whole territory, the respective Fundamental ILO Conventions […].'[342]

Regarding the commitments' scope of application *ratione personae*, they apply to all contracting Parties.[343] Thus, for all FTAs until the EU-SADC agreement, they apply to the EU and its Member States on the one hand, and to the respective trading partners on the other hand. For their part, the EU-Japan and the EU-Singapore agreements have been concluded between the EU alone and the respective trading partners. Consequently, the right and obligations included in these two agreements concern the EU and not its Member States. Regarding the scope of application *ratione materiae*, two elements are considered: (1) the specific labour rights protected by these clauses, and (2) additional phrases qualifying the clauses. First, the obligations included in the different agreements compel the Parties towards one or several of the following four sets of Conventions: (i) the ILO Fundamental Conventions; (ii) the ILO Priority Conventions; (iii) the ILO Conventions classified as up-to-date; and (iv) other ILO Conventions which each Party considers appropriate to ratify. On this backdrop, the CETA and the EU-

---

At p. 2 of the letter. This formulation was slightly amended in the request for the establishment of a panel of expert-letter and arguably allowed for an interpretation of this provision as containing both an obligation of result and an obligation of conduct. See the Request for the establishment of a panel of experts by the European Union, of the 4th of July 2019, accessible under: https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf (last consulted on 20/03/2020). The relevant passage of the letter reads as follows:

> **'Indeed, eight years after the entry into force of the EU-Korea FTA, Korea has still not ratified the aforementioned four fundamental ILO Conventions. Moreover, Korea has not been making efforts towards ratification of the above fundamental Conventions that could be qualified as sustained and continuous over this period. Thus, Korea appears to have acted inconsistently with Article 13.4 paragraph 3 last sentence of the EU-Korea FTA.'**

At p. 2 of the letter. Finally, note that in its written submission to the panel of experts, the EU seems to confirm its interpretation under which the commitment in question contains both an obligation of result and an obligation of conduct. See: written submission by the European Union, of the 29th of January 2020, §§ 73 and 75 et sequ. accessible under: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf (last consulted on 20/03/2020). For an analysis of the EU original interpretation of the commitment towards the ratification of ILO Conventions, see the blogpost by Thibaud Bodson, Compliance with Labour Obligations Under EU-Korea FTA's Trade and Sustainable Development Chapter, 23/07/2019, available on the following url: http://international-litigation-blog.com/compliance-with-labour-obligations-under-eu-korea-fta/ (last consulted on 06/02/2020).

[341] This comment was made with respect to the clause of the EU-Korea agreement. Given that the formulation adopted under the EU-Korea FTA has largely been taken over in other FTAs, it also applies to these other agreements. Lukas, Karin, Astrid Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements* (2010), 4.

[342] (Emphasis added by the author) Lukas, Karin, Astrid Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements* (2010), 15. Such proposal may however appear problematic in the context of the distribution of competences between the EU and its Member States (*see Section 2.2. Defining the EU competences in matters of labour policies*).

[343] See however the discussion in fn. 232.

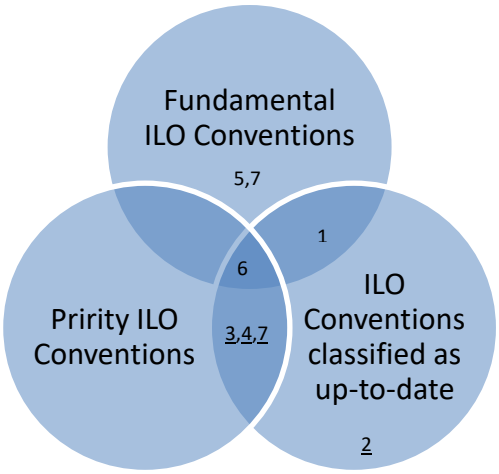
Japan FTAs limit themselves to provide for commitments towards the ratification of the not yet ratified Fundamental ILO Conventions. The EU-Japan FTA commitment towards the ratification of ILO Conventions also apply to 'other ILO Conventions which each Party considers appropriate to ratify.' Considering the level of development of the Parties, the CETA and the EU-Japan FTA are notably unambitious as for the set of ILO Conventions considered for ratification.[344] Then, the EU-RSK agreement targets the ILO Fundamental Conventions and the ILO Conventions classified as up-to-date. Next, the Parties of the EU-Ukraine agreement commit to undertake appropriate efforts towards the ratification of the ILO Conventions classified as up-to-date. Then, the EU-Georgia and the EU-Moldova FTAs refer to 'the remaining priority and other conventions that are classified as up-to-date by the ILO.'[345] Finally, the EU-Singapore agreement adopts an approach which highlights the difference between the obligation *to make efforts* towards- and the obligation *to consider* the ratification of ILO Conventions. Indeed, while the obligation *to make efforts* relates to the ratification or the implementation of the ILO Fundamental Conventions, the obligation to consider pertains to the ratification and implementation of the other ILO conventions.[346]

[344] Such unambitious approach can also be seen in the commitments towards the implementation of ILO Conventions of the CETA agreement which sets upon the Parties an obligation relating only to the ILO Fundamental Conventions. In contrast, the same clause in the EU-Japan FTA provides for an obligation with respect to *all* ILO Conventions ratified by Japan and the Member States of the European Union respectively.

[345] See art. 229 of the EU-Georgia FTA and art. 365 of the EU-Moldova FTA.

[346] The Republic of South Korea has ratified 4 out of the 8 ILO Fundamental Conventions. Singapore has ratified 5 out of the 8 ILO Fundamental Conventions. Japan has ratified 6 of the 8 ILO Fundamental Conventions. Canada has ratified all ILO Fundamental Conventions. More specifically it ratified the minimum age Convention (C138) on 8 June 2016, and the right to organise and collective bargaining Convention (C098) on 14 June 2017. These major achievements can be partly related to the work undertaken by the contracting Parties during the negotiations of the CETA. For a glimpse at the state of ratification of the ILO Fundamental Conventions, see: https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO (last consulted on 16/07/2020).

FIGURE 3: SETS OF ILO CONVENTIONS CONSIDERED IN THE COMMITMENTS TOWARDS THE RATIFICATION OF ILO CONVENTIONS OF THE TEN COVERED EU FTAS

<table>
<tr>
<td> 
</td>
<td>ILO FUNDAMENTAL CONVENTIONS

1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
3. Forced Labour Convention, 1930 (No. 29)
4. Abolition of Forced Labour Convention, 1957 (No. 105)
5. Minimum Age Convention, 1973 (No. 138)
6. Worst Forms of Child Labour Convention, 1999 (No. 182)
7. Equal Remuneration Convention, 1951 (No. 100)
8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)</td>
</tr>
<tr>
<td rowspan="2">1. EU-RSK FTA
2. EU-Ukraine FTA
3. EU-Georgia FTA
4. EU-Moldova FTA
5. EU-Canada FTA
6. EU-Japan FTA
7. EU-Singapore FTA

- underlined = obligation to consider the ratification (and implementation)
- not underlined = obligation to make efforts towards ratifying</td>
<td>ILO PRIORITY (GOVERNANCE) CONVENTIONS

1. Labour Inspection Convention, 1947 (No. 81)
2. Employment Policy Convention, 1964 (No. 122)
3. Labour Inspection (Agriculture) Convention, 1969 (No. 129)
4. Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)</td>
</tr>
<tr>
<td>ILO CONVENTIONS CLASSIFIED AS UP-TO-DATE[347]

C014 - Weekly Rest (Industry) Convention, 1921 (No. 14)
C029 - Forced Labour Convention, 1930 (No. 29)
C077 - Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77)
C078 - Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78)
C081 - Labour Inspection Convention, 1947 (No. 81)
…</td>
</tr>
</table>

Second, some phrases qualifying the commitments have noteworthy implications for their scope of application. Most importantly, the EU-Japan FTA provides that each Party must make continued and sustained efforts 'on its own initiative' towards the ratification of the Fundamental ILO Conventions and towards other ILO Conventions 'which each Party considers appropriate to ratify.' While the former phrase qualifies the obligation in such a way as to grant the Parties some leeway regarding *when* the considered efforts should be undertaken, the latter phrase transfers full discretion to the contracting Parties regarding the *other ILO Conventions* that need to be ratified. As such it amounts to annulling the obligation in question. Thus, the commitment towards the ratification of ILO Conventions

[347] For a glimpse at the list of ILO Conventions classified as up-to-date, see: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12020:0::NO (last consulted on 01/03/2019).

of the EU-Japan agreement insert two phrases which substantially limits its scope of application. Finally, the other FTAs do not include phrases which significantly reduce or broaden their commitments' scope of application.

Regarding the commitments' degree of precision, the obligations *to make efforts towards the ratification* and *to consider the ratification* of certain ILO Conventions can be considered as relatively unspecific with respect to the types of conducts required from the Parties.[348] Are simple discussions within the cabinet of the relevant authorities sufficient? Do the commitments require concertation at parliament level? Or discussions between social partners? Or a vote within the parliament? Or anything else? In other words, it is not clear what measures must be undertaken to fulfil the obligations of conduct included in the commitments towards the ratification of ILO Conventions. The *EU v. South Korea dispute on labour rights* provides a good example of the implications of this lack of precision. In this case, the EU complains, amongst other things, that Seoul has not undertaken appropriate efforts towards the ratification of the outstanding Fundamental ILO Conventions.[349] In turn, Seoul argues that it has taken several initiatives in order to ratify these Conventions and that the procedure is currently stuck at the level of social dialogue between employees and employers organisation on which it has only limited control.[350] The panel of experts established under the dispute settlement mechanism of

[348] Note that the EU-RSK, the CETA, the EU-Japan and the EU-Singapore FTAs have in common that the efforts that need to be undertaken towards the ratification of ILO Conventions must be 'continued and sustained.' According to the ordinary meaning of these two terms, this implies that the efforts need to be 'carried on or kept up without cessation' and 'carried on continuously, without interruption, or without any diminishing of intensity or extent' respectively. Thus, the words *continued and sustained* seem to include both a temporal element – i.e. efforts have to be kept over time – as well as an element relating to the intensity of the efforts. Overall, the addition of the terms *continued and sustained* raises the bar as to the endeavour required from the Parties. For a definition of the term "continued" see: http://www.oed.com/view/Entry/40271?rskey=YTnq9i&result=2&isAdvanced=false#eid (last consulted on 01/03/2019). For a definition of the term "sustained", see: http://www.oed.com/view/Entry/195211?rskey=fnG0qD&result=2#eid (last consulted on 01/03/2019). Note that in its written submission the EU does not define the terms *continued and sustained*. It limits itself to pointing at a relatively limited set of factual and concludes that considering these elements Korea's efforts are inappropriate. See: written submission by the European Union, of the 29th of January 2020, §§ 77-84, accessible under: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf (last consulted on 20/03/2020).

[349] The Conventions in question are the C87 Freedom of Association and Protection of the Right to Organise Convention, 1948; the C98 Right to Organise and Collective Bargaining Convention, 1949; the C29 Forced Labour Convention, 1930; and the C105 Abolition of Forced Labour Convention, 1957. See the Request for consultations by the European Union, of the 17th of December 2018, accessible under: http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf (last consulted on 20/03/2019). Interestingly, in its written submission the EU argues that this obligation goes beyond the obligation of ILO Members in respect of ILO Conventions as established in art. 19(5) of the ILO Constitution which lays on the Member States an obligation to present Conventions to the relevant domestic authorities for the enactment of legislation or other actions and an obligation to report on the outcome of this process to the Director general of the International Labour Office. See §74 of the EU written submission.

[350] Interview of Georgios Altintzis of the International Trade Union Confederation (**the ITUC**). Interview conducted by the author in Brussels on the 15 February 2019.

the agreement's TSD chapter still needs to appreciate this question. In order to make up for the clauses' lack of precision, the EU proposed in the TTIP negotiations to adopt surveillance mechanisms to monitor the progress in matters of ILO Conventions' ratification. Ultimately such mechanism would help clarifying whether or not the efforts undertaken by the Parties are sufficient.[351] Overall, the lack of precision as to what measures need to be undertaken in order to comply with the commitments towards the ratifications of ILO Conventions leaves some margin of discretion to the contracting Parties.

To conclude, three approaches have been adopted with respect to the obligations contained in the commitments towards the ratification of ILO Conventions. While these three approaches have in common to establish obligations of conduct compelling the Parties to undertake appropriate efforts towards the ratification (and the implementation) of the relevant ILO Conventions, they diverge regarding the nature of the required conducts. The commitments towards the ratification of ILO Conventions apply to all Parties and refer to varying sets of Conventions. Interestingly, the EU-Japan FTA includes phrases which convey significant margin of discretion to the Parties as to the endeavours they must undertake, thus limiting the commitment scope of application. Regarding the clauses' degree of precision, none of the commitments clearly defines which conducts are expected from the Parties. This grant them some margin of appreciation with respect to the efforts they have to make. Overall, the commitments towards the ratification of ILO Conventions set new obligations for the contracting Parties. The legal character of these commitments is relatively weak however. Indeed, the Parties have designed these clauses so as to conserve a good deal of discretion regarding the conduct they must adopt, and most importantly vis-à-vis whether or not they want to eventually ratify the Conventions in question. In this respect, while the practical salience of these commitments has been questioned by some authors,[352] these commitments have certainly played a role, even if minor, in the adoption of the two outstanding ILO Fundamental Conventions by Canada. Moreover, these commitments are currently at the core of a dispute between the EU and the Republic of South Korea.

[351] Tham, Joo-Cheong and Ewing, K. D., "Labour Clauses in the TPP and TTIP: A Comparison Without a Difference?," 12. Note that the clause included in the EU-Singapore FTA includes a new mechanism which provides that 'Parties will exchange information' with respects to the efforts they have undertaken.

[352] The comment was made with respect to the commitments towards the ratification of ILO Conventions of the CETA. Considering the design of the commitments towards the ratification of ILO Conventions included in the other FTAs, this comment can apply to these other clauses as well. Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 3.

3.4.4. Commitments towards the approximation of the law to EU practices

Commitments towards the approximation of the law to EU practices constitute the last type of clauses defining commitments towards the enhancement of the levels of protection. These clauses have been formulated in the three association agreements reviewed in this study. Among them, the EU-Ukraine FTA, is the only one in which it has been included in the TSD chapter. Similar clauses have been included in art. 354 of the EU-Georgia and in art. 37 of the EU-Moldova FTAs, which are outside the TSD chapters. As we will see, these different localisations have legal implications for the clauses' enforcement. Moreover, commitments towards the approximation of the law to EU practices have far reaching consequences for the regime of labour rights protection in the EU trading partners' jurisdictions. As such, Brussels' strategy to hinge upon its market to export its laws, standards and values is perhaps most apparent in these clauses. In turn, the analysis of these commitments allows to gain a more concrete understanding of some key aspects of the geopolitical struggle to which countries of the European Eastern Neighbourhood have been subject to in recent years.

TABLE 10: COMMITMENT TOWARDS THE APPROXIMATION OF THE LAW TO EU PRACTICES IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
NONE	**NONE**	**NONE**	As a way to achieve the objectives referred to in this Article, Ukraine, shall approximate its laws, regulations and administrative practice to the EU acquis. (art. 290 §2)	Georgia will carry out approximation of its legislation to the EU acts and international instruments referred to in Annex XXX to this Agreement in accordance with the provisions of that Annex. (art. 354)
EU-Moldova	**CETA**	**EU-SADC**	EU-Japan	EU-Singapore
The Republic of Moldova shall carry out approximation of its legislation to the EU acts and international instruments referred to in Annex III to this Agreement according to the provisions of that Annex. (art. 37)	**NONE**	**NONE**	**NONE**	**NONE**

The clauses defining commitments towards the approximation of the law to EU practices are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

The obligation included in the clause of the EU-Ukraine agreement is one "to approximate" Ukrainian legislation to EU practices. This obligation needs to be read in parallel with article 424 contained in Chapter 21 on *Cooperation on employment, social policy and equal opportunities,* which states that 'Ukraine shall ensure gradual approximation to EU law, standards and practices in the area of employment, social policy and equal opportunities, as set out in Annex XL to this Agreement.'[353] According to the ordinary meaning of the verb "to approximate," Ukrainian legislation must '[…] be almost the same as'[354] EU practices. As such, this defines an obligation of result where Ukraine is compelled to the achievement of specific regulatory outcomes. However, the ordinary meaning of the verb *to approximate* also allows for a certain margin of discretion with respect to the result to be achieved. Indeed, Ukrainian legislation does not need to be identical to EU practices, rather it is required that it is *almost* the same.[355] Finally, the obligations included in the EU-Moldova and EU-Georgia FTAs are similar to the one contained in the EU-Ukraine FTA as they provide that Moldova and Georgia "shall/will carry out the approximation"[356] of its legislation to certain EU instruments. Thus, they also define an obligation of result where the concerned Parties are compelled to achieve specific regulatory outcomes.

With respect to the commitments' scope of application *ratione personae*, the clauses only apply to the EU trading partners, namely Ukraine, Moldova and Georgia. In other words, these clauses do not establish commitments for the EU and its Member States. Regarding the commitments' scope of application *ratione materiae*, the clauses do not include additional phrases which notoriously broaden or reduce their scope of application. Therefore, the analysis only focuses on the specific labour rights protected by these clauses. In this regard, the EU-Ukraine agreement states that the obligation to approximate relates 'to the EU acquis.'[357] In turn, article 424 of the EU-Ukraine FTA provides that

[353] Th Annex XL is added to this dissertation as the *Annex 2: Annex of the commitment towards the approximation of the laws to EU practices of the EU-Ukraine FTA.*
[354] The ordinary meaning of verb "to approximate" is 'to bring close or near, to cause to approach or be near (*to*)'. http://www.oed.com/view/Entry/9904?rskey=g7ajYJ&result=2#eid (last consulted on 01/03/2019).
[355] Note that, the EU-Ukraine FTA's commitment towards the approximation of the law to EU practices is included in the provision defining the Parties' rights to regulate. The obligation *to approximate* is framed as a way to achieve the objective of this provision, namely 'to ensure that the [Ukrainian] legislation provides for high levels of environmental and labour protection and [to] strive to continue to improve that legislation.' See art. 290 of the EU-Ukraine FTA.
[356] See art. 354 of the EU-Georgia FTA, and art. 37 of the EU-Moldova FTA.
[357] See art. 290 of the EU-Ukraine FTA.

'Ukraine shall ensure gradual approximation to EU law, standards and practices in the area of employment, social policy and equal opportunities, as set out in Annex XL to this Agreement.' In this regard, Annex XL provides that 'Ukraine undertakes to gradually approximate its legislation to the following EU legislation within the stipulated timeframes: […].' Annex XL then includes an exhaustive list of directives and Council directives as well as timetables for their approximation into Ukrainian legislation. These directives and Council directives are grouped into three categories: (1) labour law;[358] (2) anti-discrimination and gender equality;[359] and (3) health and safety at work.[360] In total, these are more than 40 instruments with respect to which Ukraine has an obligation of approximation and vis-à-vis which defined timetables have been established. In general, Annex XL provides for implementation periods ranging from 2 up to 10 years after the agreement's entry into force.[361] Finally, the lists of directives and Council directives as well as the timetables included in the EU-Georgia and in the EU-Moldova FTAs correspond to the ones contained in the EU-Ukraine agreement.

Regarding the commitments' degree of precision, the clauses of the EU-Ukraine, of the EU-Georgia and of the EU-Moldova agreements do not include phrases which are notoriously unprecise. On the contrary, the obligation to approximate they contain combined with the lists of instruments that need to be implemented and the attached timelines are relatively clear as to what regulatory outcomes contracting Parties must achieve. Yet, as mentioned above the legal verb *to approximate* does not require that the EU trading partners' law is made identical to EU practices. Rather it is sufficient that it is *almost* the same as EU practices. As such, the obligation *to approximate* allows for a certain margin of discretion with respect to the regulatory outcomes to be achieved. In this respect, it is not fully clear how much discretion the EU trading partners have.

To conclude, commitments towards the approximation of the law to EU practices have been included in three agreements. While it is provided in the TSD chapter of the EU-Ukraine FTA, it appears outside

[358] This category includes *inter alia* instruments regulating: employer's obligation to inform employees of the conditions applicable to the contract or employment relationship; part-time work; and collective redundancies. The full list is included in *Annex 2: Annex of the commitment towards the approximation of the laws to EU practices of the EU-Ukraine FTA.*

[359] This category includes *inter alia* instruments regulating: the principle of equal treatment between persons irrespective of racial or ethnic origin; the principle of equal treatment between men and women in the access to and supply of goods and services; parental leave. The full list is included in *Annex 2: Annex of the commitment towards the approximation of the laws to EU practices of the EU-Ukraine FTA.*

[360] This category includes *inter alia* instruments regulating: the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling; the protection of the health and safety of workers from the risks related to chemical agents at work; the minimum safety and health requirements for improved medical treatment on board vessels. The full list is included in *Annex 2: Annex of the commitment towards the approximation of the laws to EU practices of the EU-Ukraine FTA.*

[361] The EU-Ukraine FTA is provisionally applied since 1 January 2016.

of these chapters in the EU-Georgia and in the EU-Moldova FTAs.[362] These commitments establish an obligation of result according to which the relevant Parties have to reach certain regulatory outcomes. More specifically, these commitments only apply to the EU trading partners and neither to the EU nor to its Member States. With respect to the labour rights protected by these clauses, the commitments refer to a set of directives and Council directives relating to labour law, anti-discrimination and gender equality, and health and safety at work. Finally, the clauses and the annexes linked to them have been formulated with a relatively high degree of precision. Overall, the commitments' different features point to their strong legal character. This highlights the Parties' intention to provide for firm commitments in matter of approximation of the law to EU practices. Last but not least, these clauses set new commitments for the relevant contracting Parties.

3.5. Clauses defining commitments towards upholding the levels of protection

Next to the commitments towards minimum levels of protection and towards the enhancement of levels of protection, the Parties' rights to regulate are limited by a third category of clauses, namely the clauses defining commitments towards upholding the levels of protection. Two types of clauses set commitments towards upholding the levels of protection: (1) the commitments not to fail to enforce labour law; and (2) the commitments not to lower the levels of protection. Commitments to uphold the levels of protection aim to strike at least two objectives. First, they have been designed, next to other clauses, in order to address the existing concerns about races to the bottom in labour

[362] The different localisations of the commitments towards the approximation of the law to the EU practices have implication for the applicable regime of enforcement. With respect to the EU-Ukraine agreement, the clause is included in the TSD chapter. In this regard, article 300 §7 of the EU-Ukraine FTA provides that for any matter arising under this Chapter, the Parties shall only have recourse to the dispute settlement procedures provided for in articles 300 and 301 included in the TSD chapter. In turn, articles 300 and 301 of the EU-Ukraine FTA establish a review mechanism articulated around consultations between the Parties and a possible assessment of the issue by a Panel of Experts. Finally, the Panel of Experts makes non-binding recommendations. Article 424 which also provides for the approximation of Ukrainian legislation to EU practices is not included in the TSD chapter. With respect to this provision, the enforcement mechanism provided in art. 477 applies. Art. 477 §2 provides that 'The Parties shall endeavour to resolve the dispute by entering into good faith consultations within the Association Council and other relevant bodies (…), with the aim of reaching a mutually acceptable solution in the shortest time possible.' As such the enforcement mechanisms provided in the TSD chapter, in that it allows for the establishment of a Panel of Experts seems to go further than the mere consultations provided under art. 477 of the EU-Ukraine FTA. In turn, in case of dispute between the Parties regarding the commitments to approximate the labour law to EU practices under the EU-Georgia and the EU-Moldova FTAs, article 454§1 of the EU-Moldova and article 421§1 of the EU-Georgia FTAs similarly provide that '1. When a dispute arises between the Parties concerning the interpretation, implementation, or good faith application of this Agreement, any Party shall submit to the other Party and the Association Council a formal request that the matter in dispute be resolved […].' As a consequence, the fact that the commitments towards the approximation of the law to EU practices has not been included in the TSD chapters of the EU-Georgia and of the EU-Moldova FTAs prevent the Parties to have access to the slightly more articulate dispute settlement mechanisms provided under these chapters.

standards and about social dumping. By including non-retrogression mechanisms, TSD chapters strive indeed to offer a response to worries about unfair competition based on the non-application and on the weakening of the regimes of labour law in place.[363] Second, they also aim to tackle the issue of the non-enforcement of labour legislations in the so-called "export processing zones," where in order to attract investors, some public authorities may prove "rather lax" regarding the enforcement of the social laws and regulations.[364] Finally, note that the clauses defining commitments towards upholding the levels of protection included in the EU trade agreements are largely inspired from analogue clauses contained in the US trade and investment agreements.[365]

3.5.1. Commitments not to fail to enforce labour laws

Commitments not to fail to enforce labour laws have been drafted in all covered trade agreements.[366] The design of these clauses remains relatively stable over the ten FTAs covered in this research. Interestingly, commitments not to fail to enforce domestic labour laws were at the core of the first dispute under the labour chapter of a trade agreement ever, the *United States v. Guatemala dispute on labour rights*. In this case the United States complained that Guatemala did not comply with its commitment not to fail to enforce labour laws provided in article 16.2.1(a) of the Dominican Republic-Central America FTA (**the CAFTA-DR**). The trade agreements covered in this research and the CAFTA-DR are separate treaties concluded between partly different countries.[367] Hence, according to the rules of interpretation established under the VCLT, the CAFTA-DR does not formally qualify as a reference

[363] In this regard, *Shaffer* writes that,

> **'[the] real underlying concern should be social dumping of products—that is, products produced under exploitative labor conditions—that sell for less than domestically produced products, and that thus lead to concerns over wage suppression and reductions of labor protections in the "North." These policies can undermine the domestic social contract and trigger political contestation against trade. An increasing number of bilateral and plurilateral agreements include labor clauses pursuant to which countries agree not to obtain a trade advantage by failing to uphold national labor laws or (in some cases) minimum labor standards. These provisions, however, have proved insufficient in ways that this proposal aims to remedy'**

(references omitted) Shaffer, "Retooling Trade Agreements for Social Inclusion," 34.

[364] For an interesting discussion of labour standards in export processing zones, see: Lukas, Karin, Astrid Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements* (2010), 10; Andrew Lang, *Trade Agreements, Business and Human Rights*: *The Case of Export Processing Zones* (John F. Kennedy School of Government, Harvard University, 2010).

[365] See for instance article 12.2 of the 2012 US Model BIT. For an analysis of treaty drafters' innovation in FTAs, see: Morin, Pauwelyn and Hollway, "The trade regime as a complex adaptive system".

[366] More specifically, they have been included in the *upholding levels of protection*-provision of all TSD chapters, but those of the EU-SADC and EU-Japan FTAs. In these two agreements, the commitments not to fail to effectively enforce labour laws have been included under the *right to regulate and levels of protection* provision. The content of these various clauses is largely similar, however.

[367] Some of the contracting Parties to the CAFTA-DR (signed on 5 August 2004 and concluded between the United States and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, as well as the Dominican Republic) are also Parties to the EU-Central America FTA (signed on 29 June 2012 and concluded between the EU and Honduras, Nicaragua, Panama, Costa Rica, El Salvador, and Guatemala).

for the interpretation of the covered FTAs.[368] Yet, the EU and its trading partners' deliberate choice to replicate clauses and formulations which, at the moment of the conclusion of the agreements, were notoriously linked to the US FTAs' approach in matters of labour rights protection, together with the application of the good faith principle, imply that the case law relating to labour provisions in US FTAs is at least *indicative* of how replicated clauses and formulations in EU trade agreements can be interpreted. Therefore, whenever relevant, the analysis conducted in this section will consider the panel decision in the *United States v. Guatemala dispute on labour rights*.

[368] See articles 31 and 32 of the VCLT which provide for the *General rule of interpretation* and for the *Supplementary means of interpretation* respectively.

TABLE 11: COMMITMENT NOT TO FAIL TO ENFORCE LABOUR LAWS IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. (art. 13.7)	A Party shall not fail to effectively enforce its labour and environmental legislation in a manner affecting trade or investment between the Parties. (art. 291 §3)	A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. (art. 277 §2)	A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. (art. 296)	A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour law, as an encouragement for trade or investment**.** (art. 235 §3)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-Singapore**
A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour law, as an encouragement for trade or investment. (art. 371 §3)	A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment. (art. 23.4.3)	2. The Parties reaffirm the importance of protection as afforded in domestic labour and environmental laws. 3. Recognising that it is inappropriate to encourage trade or investment by weakening or reducing domestic levels of labour and environmental protection, a Party shall not (…) persistently fail to effectively enforce, its environmental and labour laws to this end. (art. 9 §2-3)	The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not (…) fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties. (art. 16.2.2)	A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, where such failure to effectively enforce would affect trade or investment between the Parties. (art. 12.12.2)

The clauses defining commitments not to fail to enforce labour laws are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

The obligations included in the commitments not to fail to enforce labour laws are the same in all covered FTAs. These commitments provide that the contracting Parties "shall not fail to enforce" their labour law. A quasi identical clause was at the core of the *United States v. Guatemala dispute on labour rights* decided in July 2017.[369] In this dispute, the Parties and the arbitration panel agreed that the ordinary meaning of the terms "fail" and "enforce" was 'to be or become deficient in; to fall short in performance or attainment' and to 'compel compliance or obedience,' respectively.[370] The arbitration panel considered the obligation *not to fail to enforce* an obligation of result.[371] However, it highlighted that this result should *not* be understood as perfectly flawless. In this regard, it stated that:

> **'[…] the phrase *"not fail to effectively enforce"* in Article 16.2.1(a) imposes an obligation to compel compliance with labor laws (or, more precisely, not neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well.'[372]**

Thus, the obligation *not to fail to enforce* does not require the perfect enforcement of domestic law. Rather, it compels Parties to a degree of enforcement such *that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well.* Moreover, the verbal group establishes a negative obligation

[369] In this dispute, the United States complained that Guatemala did not comply with its obligation under Article 16.2.1(a) of the CAFTA-DR which provides that '[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement'. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 73.

[370] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 127. Moreover, the US argued that Guatemala had failed to effectively enforce its labour laws in three different ways: (1) by failing to secure compliance with court orders; (2) by failing to properly conduct investigations under the Guatemalan Labor Code and by failing to impose the requisite penalties; and (3) by failing to register unions or institute conciliation processes. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 60 and 73. Interestingly, article 23.5 of the CETA gives some indications as to what activities can be considered as "enforcement activities." This includes 'maintaining a system of labour inspection […]' and 'ensuring that administrative and judicial proceedings are available to persons […]' On this point, see: Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017, 4.

[371] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 134.

[372] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 139.

and the verb "shall" points at the Parties' intention to provide for a strong obligation.[373] Overall, the phrase *shall not to fail to enforce* amounts to a prohibition to reach certain results, namely that the degree of labour law enforcement guaranteed by states would be such that litigants would no longer feel compelled to abide by the rules.[374]

Regarding the clauses' scope of application *ratione personae*, they apply to all contracting Parties.[375] Thus, for all FTAs until the EU-SADC agreement, they apply to the EU and its Member States on the one hand, and to the respective trading partners on the other hand. For their part, the EU-Japan and the EU-Singapore agreements have been concluded between the EU alone and the respective trading partners. Consequently, the right and obligations included in these two agreements concern the EU and not its Member States. Regarding the scope of application *ratione materiae*, two elements are considered: (1) the specific labour rights protected by the commitments, and (2) additional phrases qualifying the clauses. First, the commitments not to fail to enforce labour laws do not refer to specific labour rights. Rather, they provide for the obligation not to fail to enforce *labour laws* (or other related formulations) in general.[376] As such, the clauses can be considered to cover all labour rights protected

[373] As some commentators have argued '[the] use of the word *shall* give the parties an obligation to enforce domestic labour laws which are based on international principles and standards.' Bourgeois, Dawar and Evenett, "A comparative analysis of selected provisions in free trade agreements," 27.

[374] With respect to enforcement activities, article 277.3-4 of the EU-Peru-Colombia-Ecuador agreement provides that '[the] Parties recognise the right of each Party to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental and labour regulations and standards, while not undermining the fulfilment of the obligations undertaken under this Title.' For a discussion of this clause, see fn. 233. Note that in spite of the absence in the CAFTA-DR of a clause acknowledging some discretion in matters of labour law enforcement, the arbitration panel considered in the *United States-Guatemala dispute on labour rights* that certain circumstances can exonerate the liability of a contracting Party under this obligation. It is for instance the case for the insolvency of an employer who has to pay a fine; of the voluntary settlement of a dispute between trade union members and employers etc. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 374 and 375. For a discussion of these discretionary clauses, see: Bourgeois, Dawar and Evenett, "A comparative analysis of selected provisions in free trade agreements," 35. Estella Aryada, *Emerging Disciplines on Labour Standards in Trade Agreements* (2016); TCS Emerging Issues Briefing Note (4) March 2016, 8.

[375] See however the discussion in fn. 232.

[376] The clauses refer to various types of instruments which the Parties must not fail to enforce, namely "labour laws" – in the EU-RSK, in the EU-Peru-Colombia-Ecuador, in the EU-Ukraine, in the EU-Georgia (where the word "law" is written at the singular person), in the EU-Moldova (where the word "law" is also written at the singular person), in the EU-SADC and in the EU-Singapore FTAs; "labour legislation" in the EU-Central America FTA; "labour laws and standards" in the CETA, and "labour laws and regulations" in the EU-Japan FTA. Each of these formulations is generally understood to cover both, acts of the legislative and of the executive branches. On this point see: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at fn. 23. Similarly, in the *United States-Guatemala dispute on labour rights*, the panel considered that the term "labor laws" handled in the CAFTA-DR, 'requires a Party to "not fail to effectively enforce its labor laws," regardless of which organs of the State – whether executive or non-executive – are responsible for enforcement,' thus opting for a broad interpretation of this word. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 121.

in these *labour laws*. Second, regarding the phrases qualifying the commitments, two different types of phrases notoriously limit the clauses' scope of application: (i) a "link to a certain recurrence"; and (ii) a "link to trade or investment."[377]

To begin with, regarding the *link to a certain recurrence*, all covered FTAs but the EU-Central America and the EU-SADC agreements add the phrase 'through a sustained or recurring course of action of inaction' to qualify the obligation *not to fail to effectively enforce*. While the EU-Central America FTA does not make any link to a certain recurrence altogether, the EU-SADC agreement does add the word "persistently."

The phrase *through a sustained or recurring course of action of inaction* has been the subject of intense discussions in the *United States v. Guatemala dispute on labour rights*.[378] Eventually, the panel considered that the qualification *sustained or recurring course of action or inaction* should be interpreted as referring to,

> **"[…] a line of connected, repeated or prolonged behavior by an enforcement institution or institutions. The connection constituting such a line of behavior is manifest in sufficient similarity of behavior over time or place to indicate that the similarity is not random. A "sustained or recurring course of action or inaction" is thus composed of (i) a repeated behavior which displays sufficient similarity, or (ii) prolonged behavior in which there is sufficient consistency in sustained acts or**

[377] In the *United States-Guatemala dispute on labour rights* the arbitration panel considered that the clause is constituted of four phrases. For a glimpse at the slightly different treatment adopted by the arbitration panel see: *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 499. Note that the EU-SADC and EU-Japan FTAs also include phrases establishing a link to a reduction of the levels of labour protection. See art. 9 of the EU-SADC FTA and art. 16.2. of the EU-Japan FTA. Finally, note also that all clauses include the adverb "effectively" in order to qualify the obligation. Accordingly, the Parties must not fail to *effectively* enforce their labour laws. In the *United States-Guatemala dispute*, the panel considered that the inclusion of the word "effectively" necessarily must add a meaning to the obligation to *not fail to enforce*. As such the panel acknowledged that different levels of enforcement are possible (at pt. 130). More specifically, it stated that 'production of results is the quality that makes enforcement action effective' (at pt. 137.) However, the panel considered that 'individual instances of non-compliance do not ipso facto prove that enforcement is ineffective' (at pt. 137). The panel then conclude that 'interpreting the phrase "effectively enforce" as requiring a Party to achieve perfect compliance by each and every employer would impose an unreasonable burden not mandated by the relevant article' (at pt. 138).

[378] The United States and Guatemala shared the view that the terms *sustained course* should be understood as 'a consistent or ongoing course of action or inaction.' Both sides also agreed that the term *recur* means to '[o]ccur or appear again, periodically, or repeatedly.' However, the Parties disagreed on how to interpret the term *course*. While the United States claimed that this word amounts to a 'manner of conducting oneself' or a 'way of acting: behavior,' Guatemala contended that it means '[h]abitual or regular manner of procedure; custom, practice … [a] line of conduct, a person's method of proceeding.' Both Parties disagreed thus on whether or not the term *course* should be understood as pointing to a *degree of relatedness between the actions or inactions* or to a *deliberate policy of action or inaction adopted by a Party*. See: *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 141-144.

omissions as to constitute a line of connected behavior by a labor law enforcement institution, rather than isolated or disconnected instances of action or inaction.'[379]

Thus, the panel decided that for the determination of whether a failure to enforce labour laws has been *through a sustained or recurring course of action of inaction*, it is crucial to 'consider whether the failures to enforce in question display sufficient similarity to one another and sufficient proximity in time or place to one another to be treated as connected behavior, rather than as isolated or disconnected acts or omissions.'[380]

In turn, the term "persistently" is handled in the commitment not to *persistently* fail to enforce labour laws included in the EU-SADC agreement. The ordinary meaning of the adverb *persistent* is 'continuous, continuing to exist; enduring, lasting; chronic.'[381] Thus, this formulation calls for the demonstration of a lasting failure to enforce, i.e. of a failure to enforce that exists over a significant period of time. It is however not clear how long such period must be for the failure to enforce labour laws to be considered *persistent*. Overall, the conditions set by *the link to a certain recurrence* raise the bar for the demonstration that a Party has not complied with its obligation not to fail to enforce labour laws. As such, it further limits the clauses' scope of application.

Then, all obligations are qualified by a phrase establishing in one way or another a *link to trade or investment*. More specifically, while some FTAs provide that the failure to enforce labour laws should

[379] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 152.

[380] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 433. The panel enumerated several evidences which without being sufficient to demonstrate a line of conduct can constitute it. These are for instance, 'evidence of deliberateness underlying enforcement failures or bias against enforcement action involving particular sectors or employers or particular types of labor rights'; 'evidence of institutional direction aimed at securing legitimate institutional aims that unintentionally produced failures to effectively enforce'; 'evidence of established customs or practices that routinely result in enforcement failures' etc. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 437. Overall, the panel argued that establishing the that a failure to enforce labour laws has resulted from a *sustained or recurring course of action of inaction* involves more than simply counting the number of occurrences or the distance in time between them, and that this must be appreciated in the broader context. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 434. Ultimately, the Panel considered that 74 workers at eight worksites was 'small enough in relation to the five-year period between the beginning of the first instance and the date of the panel request to make it difficult to discern a line of conduct or behavior indicating a greater likelihood of failure to enforce in the future than would be expected on the basis of a set of isolated events'. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 443.

[381] See: http://www.oed.com/view/Entry/141468?redirectedFrom=persistent#eid (last consulted on 05/04/2019).

not be 'in a manner affecting trade or investment between the Parties,'[382] others provide that it should not be 'to encourage trade or investment' (or other related formulation).[383]

In the *United States v. Guatemala dispute on labour rights* the Parties defended different understandings of the phrase *in a manner affecting trade or investment between the Parties*.[384] The panel considered that according to the objective of the agreement, which is to promote fair conditions of competition,[385] the phrase in question should be understood to refer to failure to enforce domestic labour law *conferring a competitive advantage*.[386] The panel stressed that three elements must be demonstrated in order to fulfil the condition set by this phrase, namely:

> **'(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.'[387]**

[382] This formulation is included in the EU-RSK, in the EU-Central America, in the EU-Peru-Colombia-Ecuador, in the EU-Ukraine, in the EU-Japan and in the EU-Singapore FTAs.

[383] While the CETA and the EU-SADC FTAs contain the phrase "to encourage trade or investment", the EU-Georgia and EU-Moldova FTAs handle the formulation "as an encouragement for trade or investment".

[384] While the US adopted the view that it amounts to 'the modification of the condition of competition,' Guatemala argued that to be *in a manner affecting trade* a course of action or inaction must '[cause] a change in prices of or trade flows in particular goods or services.' See: *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 165.

[385] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 171

[386] As such, the panel favoured the interpretation presented by the United States. Thus, the panel rejected the fact that the demonstration of the failure to enforce 'occurred in a traded sector, or with respect to an enterprise engaged in trade' (at pt. 168) would be sufficient to conclude that it *was in a manner affecting trade*. Moreover, it considered that variations in trade volumes or prices were irrelevant for the interpretation of the phrase *in a manner affecting trade* (at pt. 177). Then, the panel also considered that delivering the proof of an effect of the failure to effectively enforce labour laws on prices or traded volume is extremely difficult and is likely to make the provision inoperable. The same applies for a proof of trade flows distortion (at pt. 178-180). It is interesting to note that in the recently concluded USMCA, the contracting Parties have added a footnote to their *commitments not to fail to enforce labour laws* included in article 23.5. This footnote provides that,

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

[387] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 196. The panel considered that not any failure to effectively enforce labour laws confers a competitive advantage. Rather it should be inferred from "the likely consequences" or from "other aspects of the totality of the circumstances." *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 194. In other words, a Party needs to bring evidence that 'labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage' (at pt. 480).These "reasonably expected cost effects" are thus *potential* costs effects.

Interestingly, the first element according to which the enterprise(s) in question has to *export in competitive markets or compete with imports* implies that companies operating in non-competitive markets (such as companies benefiting from a monopolistic position), and companies which do not compete with imports (such as many types of local businesses; certain branches of the non for profit sector, etc.) are not covered by this commitment. As the United States contended, '[…] the obligation does not apply to enforcement failures that have no effect on trade between the parties, such as labor enforcement issues relating to government workers or civil servants whose work does not involve the production of goods or the provision of services entering cross-border commerce.'[388] Furthermore, the activities covered by this clause are not trade activities *in general* but trade activities *between the contracting Parties*. Thus, the inclusion of the terms *between the Parties* dismisses from the commitments' scope of application trade activities conducted with third countries.[389] In other words, the scope of application is reduced to those economic activities linked to trade with the other contracting Party(ies). Finally, it is not only trade, but investment that can also be affected. The arbitration panel did not discuss this element of the clause. However, proving that a failure to enforce domestic labour laws has been *in a manner affecting investment between the Parties* seems to raise significant practical difficulties. Indeed, to demonstrate that the investment diversion has to be *between the two disputing Parties* potentially requires to show that an investor has decided to invest in a contracting Party rather than in another, and that this decision was in part or in full based on the non-enforcement of the domestic labour laws. Overall, one can consider that the phrase *in a manner affecting trade or investment between the Parties* substantially limits the scope of application of the clause in several ways.[390] Most notably, it rejects the activities not involved in international trade as well as the activities related to international trade with third countries. As some commentators have

[388] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 478.

[389] The limitation of the assessment of a failure to effective implementation to trade related actives *between the Parties* implies that sectors which are competing on the contracting Parties' markets are protected from *direct* social dumping caused by the non-implementation of domestic law. However, this makes *indirect* social dumping possible – i.e. social dumping that arises from the competition of the Parties' industries on third markets. Note that one can also wonder how to interpret the terms "between the parties" in agreements concluded by more than two Parties. In the US-Guatemala case, the US contended that this would imply any two Parties to the CAFTA-DR. On the other hand, Guatemala considered that under the provision, the effect on trade should affect all Parties to the agreement as the term is not specified under the relevant clause. The Panel considers that the interpretation privileged by Guatemala would substantially limit the purposes of the agreement and of the concerned provisions, that the word "between" is the only term available in order to 'to express the relation of a thing to many surrounding things severally and individually' and that, as such, one must consider that the phrase "between the Parties" refers to any two Parties to the CAFTA-DR (at pt. 198-202).

[390] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 169.

argued, the mention that it is "in a manner affecting trade" does not account for the fact that massive failure to enforce domestic law can occur without it affecting trade.[391]

In turn, the phrase "to encourage trade or investment" (or other related formulations) has been included in the commitments contained in the EU-Georgia, in the EU-Moldova, in the CETA, in the EU-SADC, and in the EU-Japan FTAs. Two elements are worth mentioning regarding this phrase. First, the ordinary meaning of the verb "to encourage" is 'to allow or promote the continuance or development of (a natural growth, an industry, a sentiment, etc.).'[392] Thus, for a Party to be found in breach with its commitments, the failure to enforce its labour laws must, inter alia, aim to *promote the continuance or development* of trade or investment.[393] In other words, a link needs to be established between a Party's failure to enforce its labour laws and its *intention* to support trade or investment.[394] Second, the nature of trade and investment considered under this prong is no longer limited to that conducted *between the Parties,* but includes all international trade and investment, no matter who is the trading partner. Overall, the elements that need to be demonstrated under each formulation of the *link to trade or investment* are different. However, both formulations have as effect to limit the commitment's scope of application. Indeed, by including a *link to trade or investment* a significant number of work situations are excluded from these clauses' scope of application.

Regarding the commitments' degree of precision, the clauses include several prongs which are relatively unprecise. As observed in the *United States v. Guatemala dispute on labour rights*, the meaning of certain phrases – most notably, "not fail to effectively enforce;" "in a manner affecting trade;" and "course of action or inaction" – was subject to intense discussions between the Parties. Overall, the relatively vague meaning of these phrases grants the contracting Parties with some margin of appreciation.[395]

To conclude, commitments not to fail to enforce domestic labour laws have been included in all covered FTAs. The obligations they contain are obligations of result. With respect to their scope of

[391] Alston, "'Core labour standards' and the transformation of the international labour rights regime," 503 et sequ.
[392] See: https://www.oed.com/view/Entry/61791?rskey=ukF1pK&result=2#eid (last consulted on 26/02/2019).
[393] For a definition of the term "to promote", see: http://www.oed.com/view/Entry/152468?redirectedFrom=promote#eid (last consulted on 26/02/2019).
[394] In this regard, the arbitration panel in *the US-Guatemala dispute on labour law* considered that 'a course of conduct may be in a manner affecting trade whether or not a Party intends it to be so.' As such it rules out any consideration of the Party's intent for assessing the phrase "in a manner affecting trade." *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 197.
[395] The latter must be understood in the context of the TSD chapters where the enforcement mechanisms do not lead to the imposition of sanction, thus privileging the resolution of dispute through negotiation.

application, the commitment applies to all Parties and concern all types of labour rights considered in the relevant domestic legislations. This broad scope of application is however substantially reduced by several phrases qualifying the obligation. Indeed, these phrases establish cumulative conditions that need to be fulfilled for a Party to be in breach with its commitment not to fail to enforce labour laws.[396] Some of these phrases significantly limit the clauses' scope of application *ratione materiae*. This is most clearly the case of the phrases establishing a *link to a certain recurrence* and a *link to trade or investment*. The high bar set by the combination of these phrases has been problematic in the *United States v. Guatemala dispute on labour rights*. Indeed, while some failures to enforce labour laws were considered by the arbitration panel to constitute a *sustained or recurring course of actions or inactions* but were not together or separately *in a manner affecting trade*, another set of failures were considered to affect trade but were not of such a nature as to constitute a *sustained or recurring course of actions or inactions*.[397] In this regard, some commentators have criticised the formulation adopted by the treaty drafters and have argued that,

> **'[not] only is it necessary to prove that trade has been affected, it must also be demonstrated that the effects on trade arose out of reoccurring or sustained action or inaction. Such a narrow formulation of the enforceability of labor law provisions in this FTA allow for blatant and systematic violations of the freedom of association to be tolerated. This arises, in part, because the Panel implicitly interpreted "recurring or sustained action or inaction" to be measured in a single work context, rather than more broadly across an industry.' [398]**

With respect to the clauses' degree of precision, they handle several formulations which leave some room for interpretation and as a consequence grant the Parties some margin of appreciation. Overall, the clauses' design indicates the Parties' intentions to provide for strong obligations with an extremely narrow scope of application, thus weakening the clauses' overall legal character. Finally, states' commitment not to fail to enforce labour laws constitutes a basic element of the rule of law principle. As such, the clauses reviewed in this section can hardly be said to create new commitments for the contracting Parties. Yet, their inclusion in EU FTAs surely establishes new mechanisms to bring states' application of the rule of law principle (in the specific domain of labour rights protection) under international scrutiny.

---

[396] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 500.

[397] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, pt. 505.

[398] (References omitted) Phillip Paiement, "Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute," *Georgetown Journal of International Law* 49 (2018): 690. Moreover, regarding the phrase "in a manner affecting trade, *Shaffer* argues that 'it is notoriously difficult to prove causation, and such difficulty should not work to the advantage of a producer that violates labor rights in a sustained manner'. Shaffer, "Retooling Trade Agreements for Social Inclusion," 37.

3.5.2. *Commitments not to lower the levels of protection*

To ensure the upholding of the levels of protection two elements have to be guaranteed: (i) the correct enforcement of the existing legislations; and (ii) the protection of these legislations from (abusive) modifications that would result in lowering the levels of protection. While the former is addressed by the commitments not to fail to enforce labour laws, the latter is taken care of by the commitments not to lower the levels of protection. Thus, commitments not to lower the levels of labour protection, also called non-regression clauses, constitute the second type of clauses defining commitments towards the upholding of the levels of protection. These clauses have been included in all FTAs. As such they constitute a central element of the regime of labour rights protection provided under TSD chapters. Negotiators have adopted three different approaches with respect to the design of these clauses across the covered FTAs. A first approach has been handled in the EU-Central America, in the EU-Georgia, in the EU-Moldova, in the CETA, in the EU-SADC and the EU-Singapore FTAs. Commitments not to lower the levels of protection included in these agreements are articulated around two paragraphs. While the first paragraph recognises the *inappropriateness* of lowering the levels of protection to encourage trade, the second one establishes a set of obligations for the contracting Parties. A second approach has been adopted in the EU-RSK and in the EU-Ukraine agreements. In these two FTAs the Parties do not limit themselves to recognising the *inappropriateness* of lowering the levels of protection to encourage trade. For, they *forbid* the lowering of the levels of protection to encourage trade altogether. Finally, the last approach has been drafted in the EU-Peru-Colombia-Ecuador and in the EU-Japan agreements. In these FTAs, the Parties commit to not encourage trade or investment by the lowering of the levels of protection. These commitments are then further specified by a set of obligations.

TABLE 22: COMMITMENTS NOT TO LOWER THE LEVELS OF PROTECTION IN THE TEN COVERED AGREEMENTS

EU-RSK	EU-Central America	EU-Peru-Colombia-Ecuador	EU-Ukraine	EU-Georgia
A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties. (art. 13.7.2.)	1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental and labour laws. 2. A Party shall not waive or derogate from, or offer to waive or offer to derogate from, its labour or environmental legislation in a manner affecting trade or as an encouragement for the establishment, acquisition, expansion or retention of an investment or an investor in its territory. (art. 291 §1-2)	No Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment. (art. 277)	A Party shall not weaken or reduce the environmental or labour protection afforded by its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties. (art. 296 §2)	1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labour law. 2. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour law as an encouragement for trade or the establishment, the acquisition, the expansion or the retention of an investment of an investor in its territory. (art. 235 §1-2)
EU-Moldova	**CETA**	**EU-SADC**	**EU-Japan**	**EU-Singapore**
1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labour law. 2. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour law as an encouragement for trade or the establishment, the acquisition, the expansion or the retention of an investment of an investor in its territory. (art. 371 §1-2)	1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards. 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory. (art. 23.4. 1-2)	2. The Parties reaffirm the importance of protection as afforded in domestic labour and environmental laws. (to be discussed) 3. Recognising that it is inappropriate to encourage trade or investment by weakening or reducing domestic levels of labour and environmental protection, a Party shall not derogate from, […], its environmental and labour laws to this end. (art. 9 §2-3)	The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations […] (art. 16.2.2)	The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded by their domestic labour and environment law. At the same time, the Parties stress that environmental and labour standards should not be used for protectionist trade purposes (article 12.2.3.) A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws, in a manner affecting trade or investment between the Parties (art. 12.12.1)

The clauses defining commitments not to lower the levels of protection are characterised by specific obligations, scopes of application, and degrees of precision. The following paragraphs analyse these three elements consecutively.

The obligations included in the commitments not to lower the levels of labour protection can be divided into three groups. Each of these three groups is partly defined by legal verbs of their own kind. The first group is constituted by the commitments not to lower the levels of protection contained in the EU-Central America, in the EU-Moldova, in the EU-Georgia, in the CETA, in the EU-SADC, and in the EU-Singapore FTAs. These clauses begin by "recognising" in one way or another that it is "inappropriate" to encourage trade or investment by lowering the levels of protection afforded in domestic labour laws.[399] Such formulation does not create obligations for the Parties altogether. Rather, it sets the context and constructs a narrative within which the relevant obligations should be interpreted. Then, the clauses provide that the Parties 'shall not waive or derogate from' or 'offer to waive or derogate from' their labour laws.[400] Thus, the clauses include in total four obligations. First, the obligation *shall not waive from* can be understood under its ordinary meaning as an obligation not 'to refrain from applying or enforcing (a rule, law), to make an exception to.'[401] As such, it sets an obligation of result upon the Parties. Then, the obligation *shall not derogate from* also constitutes an obligation of result where the Parties commit not 'to repeal or abrogate in part (a law, sentence, etc.); to destroy or impair the force and effect of.'[402] According to its ordinary meaning, the obligation *shall not offer to waive from* forbids the Parties to adopt certain conducts, namely 'to propose or express one's readiness (*to* do something)'[403] *to refrain from applying or enforcing a rule, law, to make an*

[399] The verb "to recognise" is defined as 'to accept the authority, validity, or legitimacy of; *esp.* to accept the claim or title of (a person or group of people) to be valid or true' http://www.oed.com/view/Entry/159656?rskey=7RIHvu&result=1&isAdvanced=false#eid (last consulted on 18/02/2019). In turn, the adjective "inappropriate" means 'not appropriate; unsuitable to the particular case; unfitting, improper'. http://www.oed.com/view/Entry/93142?redirectedFrom=inappropriate#eid (last consulted on 01/03/2019). Thus, recognising that something is inappropriate means *to accept the authority, validity, or legitimacy that a certain practice is unsuitable to the particular case*. The acknowledgment that certain practices are inappropriate does not set any obligation upon the contracting Parties. With respect to the phrase 'The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws' included in Article 19.4 of the CPTPP *Namgoong* writes: '[a] question that immediately comes up pertaining to Article 19.4 [of the CPTPP] is whether the first sentence requires that a separate subjective condition, i.e. intent, be adduced in order to establish a breach of Article 19.4. The answer will be negative because most obviously the term 'inappropriate' cannot be considered to give legal effect to it.' Namgoong, "Two Sides of One Coin, The US-Guatemala arbitration and the dual structure of labour provisions in the CPTPP," 499.

[400] Note that the EU-SADC FTA only includes the obligation *not to derogate from*.

[401] See: http://www.oed.com/view/Entry/225159?rskey=G2qfiL&result=2&isAdvanced=false#eid (last consulted on 01/03/2019).

[402] See: http://www.oed.com/view/Entry/50655?rskey=aCqAtZ&result=2#eid (last consulted on 01/03/2019).

[403] See: http://www.oed.com/view/Entry/130620?rskey=sSZNo4&result=4#eid (last consulted on 01/03/2019).

exception to it.[404] Finally, and in a similar fashion, the obligation *shall not offer to derogate from* prohibits Parties to adopt certain conducts, namely 'to propose or express one's readiness (*to* do something)'[405] *to repeal or abrogate in part (a law, sentence, etc.); to destroy or impair the force and effect of a law*.[406] Thus, the formulation adopted in the agreements belonging to the first group includes four different obligations which can all exist on their own. The obligations *not to waive from* and *not to derogate from* complement one another. And this couple of legal actions is complemented by another couple of legal verbs under which Parties cannot *offer to waive from* and cannot *offer to derogate from*. By handling such combinatory formulations, the Parties show their intention to cover a broad spectrum of cases pertaining to the lowering of the levels of protection in domestic laws.[407]

The second group is constituted of the commitments not to lower the levels of protection contained in the EU-Peru-Colombia-Ecuador and in the EU-Japan FTAs. These clauses begin by establishing a prohibition for the Parties "to encourage" trade or investment by weakening the levels of protection, thus turning the declaratory language of the clauses belonging to the first group into mandatory language. The ordinary meaning of the verb *to encourage* is 'to allow or promote the continuance or development of (a natural growth, an industry, a sentiment, etc.).'[408] Hence, the Parties are subjected to an obligation not to undertake certain conducts, namely to promote the development of trade or investment by weakening the levels of protection. The second part of the clauses brings further precisions to these obligations and provide that the Parties "shall not waive *from*," and "shall not derogate *from"* their labour laws. Under these two obligations the Parties cannot 'refrain from applying or enforcing (a rule, law), to make an exception to,'[409] and they cannot 'repeal or abrogate in part (a law, sentence, etc.); to destroy or impair the force and effect of;'[410] respectively. As such they define an obligation of conduct and an obligation of result, respectively. This second part also contrasts with the obligations included in the first group's clauses in that they do not include a prohibition *to offer to waive from* and *to offer to derogate from*.

The third group is constituted of the commitments not to lower the levels of protection contained in the EU-RSK and the EU-Ukraine FTAs. These clauses include two obligations. They provide that the

[404] See: http://www.oed.com/view/Entry/225159?rskey=G2qfiL&result=2&isAdvanced=false#eid (last consulted on 01/03/2019).
[405] See: http://www.oed.com/view/Entry/130620?rskey=sSZNo4&result=4#eid (last consulted on 01/03/2019).
[406] See: http://www.oed.com/view/Entry/50655?rskey=aCqAtZ&result=2#eid (last consulted on 01/03/2019).
[407] As such this contrasts with the formulation adopted in the EU-SADC FTA where an obligation *not derogate from* is also included.
[408] See: https://www.oed.com/view/Entry/61791?rskey=ukF1pK&result=2#eid (last consulted on 01/03/2019).
[409] See: http://www.oed.com/view/Entry/225159?rskey=G2qfiL&result=2&isAdvanced=false#eid (last consulted on 01/03/2019).
[410] See: http://www.oed.com/view/Entry/50655?rskey=aCqAtZ&result=2#eid (last consulted on 01/03/2019).

Parties "shall not weaken" and that they "shall not reduce" the labour protections to encourage trade or investment. This formulation contrasts in two ways with the approaches adopted in the first and in the second groups. To begin with, similarly to the clauses of the second group, they turn the declaratory language of the clauses of the first group into mandatory language. Then, they switch the main obligation and the qualification of first part of the second group's clauses. The ordinary meaning of the verb "to weaken" is 'to lessen (authority, influence, power, credit), †to lower the value of (something); to impoverish (an estate).'[411] As such, this establishes an obligation of result. In turn, "to reduce" is defined as 'to lower, diminish, lessen; to make smaller; (also) to limit.'[412] This also defines an obligation of result. While *to weaken* means to hold a similar scope of protection but to lessen the *authority, influence, power, credit of* this protection, for instance by downgrading the regime of protection provided by a certain instrument into an instrument of lower rank, *to reduce* means to lessen the scope of protection altogether. The latter can for example happen through the reduction of the scope of application of a certain norm. Both legal verbs appear thus complementary. Then, the commitments further specify the obligations *not to weaken* and *not to reduce* by providing that the Parties cannot *waive or otherwise derogate from, or offer to waive or otherwise derogate from* their legislations. These legal verbs are identical to those discussed for the obligations included in the first group and thus comprehend both obligations of conduct and of result.

Regarding the clauses' scope of application *ratione personae*, they apply to all Parties.[413] Thus, for all FTAs until the EU-SADC agreement, they apply to the EU and its Member States on the one hand, and to the respective trading partners on the other hand. For their part, the EU-Japan and the EU-Singapore agreements have been concluded between the EU alone and the respective trading partners. Consequently, the rights and obligations included in these two agreements concern the EU and not its Member States. Regarding the clauses' scope of application *ratione materiae*, two elements are considered: (1) the specific labour rights protected by these clauses, and (2) additional phrases qualifying the clauses. First, the commitments not to lower the levels of labour protection provided across the ten FTAs do not specifically refer to certain labour rights. Instead the commitments not to lower the levels of protection relate to the Parties *labour laws* (or other related formulations).[414] As a

[411] See: http://www.oed.com/view/Entry/226543?redirectedFrom=weaken#eid (last consulted on 01/03/2019).
[412] See: http://www.oed.com/view/Entry/160503?rskey=jQj5P9&result=2#eid (last consulted on 01/03/2019).
[413] See however the discussion in fn. 232.
[414] The clauses included in FTAs belonging to the first group refer to *labour legislation/laws/standards.* The clauses included in FTAs belonging to the second group refer to *labour protections afforded in its laws* as well as to *laws, regulations and standards.* Finally, the clauses included in FTAs belonging to the third group refer to *labour laws (and regulations).* Each of these formulations is generally understood to cover both, acts of the legislative and of the executive branches. On this point see: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at fn. 23.

matter of consequence, the commitments not to lower the levels of protection cover all labour rights protected in these instruments. Second, like the commitments not to fail to enforce labour laws, the commitments discussed in this section are all qualified by a phrase establishing in one way or another *a link to trade and investment*. More specifically, references to *trade and investment* are different from agreement to agreement. Some FTAs use the formulation 'in a manner affecting trade or investment between the Parties',[415] others include the phrase 'as an encouragement for trade or the establishment, the acquisition, the expansion or the retention of an investment of an investor in its territory'[416] (or a related formulation), still others mix both types of phrases.[417] While it can be referred to *Section 3.5.1. Commitments not to fail to enforce labour laws* for a more detailed discussion of these two phrases, it is important to restate that the *link to trade or investment* has as consequence to reduce the commitments' scope of application.

Regarding the clauses' degree of precision two aspects of the commitments not to lower the levels of protection are notoriously unprecise. First, as discussed in *Section 3.5.1. Commitments not to fail to enforce labour laws*, the exact meaning of the formulations 'in a manner affecting trade or investment between the Parties' and 'to encourage trade or investment' has proven to be highly disputed.[418] While the panel decision in the *United States v. Guatemala dispute on labour rights* brought some clarifications regarding how to understand the *link to trade and investment*, this interpretation is not definitive and other panels could favour different interpretations. Ultimately, the relatively underdeterminate character of these phrases can be considered to grant the Parties some margin of discretion. Second, the commitments not to lower the levels of protection include the terms *reducing/lowering/relaxing* either as obligations or in order to qualify the obligations. These words raise issues similar to those discussed with respect to the term of "improvement" in *Section 3.4.2. Commitments towards the improvement of the levels of protection*. Indeed, the clauses neither make clear *how* to consider whether changes in laws and regulations *reduce/lower/relax* the levels of protection, nor *what* constitutes such *reducing/lowering/relaxing* of the levels of protection. Consequently, a key element of the commitments not to lower the levels of protection remains relatively vague. At the end, this lack of determinacy grants a certain margin of appreciation to the Parties when considering whether they have or not *reduced/lowered/relaxed* the levels of protection.

[415] This formulation is included in the EU-Singapore FTA.
[416] These formulations are included in the EU-Peru-Colombia-Ecuador; in the EU-Georgia; in the EU-Moldova; in the CETA; in the EU-SADC; and the EU-Japan FTAs:
[417] This formulations are included in the EU-RSK; in the EU-Ukraine; and in the EU-Central America FTAs.
[418] For a discussion of these issues see *Section 3.5.1. Commitments not to fail to enforce labour laws*.

To conclude, commitments not to lower the levels of protection have been included in all covered agreements. With respect to the obligations, three different approaches have been used in TSD chapters. In the first group of FTAs, the clauses provide that the Parties 'shall not waive or derogate from' or 'offer to waive or derogate from' their labour laws. Thus, these clauses include in total four obligations mixing obligations of conduct and obligations of result. The second group of FTAs includes clauses which begin by establishing a prohibition for the Parties "to encourage" trade or investment by weakening the levels of protection. Then, the clauses continue by specifying that the Parties "shall not waive from" and" shall not derogate from" their labour laws. As such the second group of FTAs establishes both obligations of conduct and of result. The third group of FTAs includes clauses which provide that the Parties "shall not weaken" and "shall not reduce" the labour protections to encourage trade or investment. These clauses establish obligations of result. Regarding these clauses' scope of application, they apply to all contracting Parties. Moreover, they address all labour rights covered in the domestic legislations. Finally, the clauses' scope of application is substantially reduced by the inclusion of phrases establishing a *link to trade or investment*. With respect to the commitments' degree of precision, the *link to trade or investment* as well as the very concept of *reduction* in levels of protection are relatively vague. Accordingly they grant the Parties some margin of discretion. Overall, the design of the clauses defining commitments not to lower the levels of protection is relatively diverse. However, these clauses include phrases which both importantly limit their scope of application and provide the Parties with important margin of appreciation. Last but not least, these clauses define new commitments for the Parties.

3.6. Findings relating to the analysis of labour commitments in EU trade agreements

The analysis of the labour commitments' legal character was the main undertaking of this chapter. This analysis allowed to gain a detailed understanding of the regime of labour rights protection provided in the EU FTAs. In this regard, this dissertation has identified eleven types of clauses disseminated around ten FTAs. These clauses have been classified into four categories. To begin with, the clauses defining the Parties' rights to regulate are a cornerstone of the regime of workers' protection established in the TSD chapters. These clauses allow Parties to determine the domestic regime of labour rights they see fit. The rights to regulate included in the TSD chapters are not absolute however. Indeed, three varieties of limitations are contained in EU FTAs. The first limitation is shaped by commitments towards minimum levels of protection. This limitation is detailed in four different clauses which together set up a relatively articulate regime defining a bottom level of protection.[419] The second limitation compels

[419] These four clauses are: (i) the commitments towards the internationally recognised standards and agreements; (ii) the commitments towards core labour standards; (iii) the commitments towards full and

the Parties towards the enhancement of the levels of protection.[420] Here again, four clauses define the Parties' legal engagement to raise the levels of protection applicable at home. Finally, the third limitation is constituted of commitments towards upholding the levels of protection.[421] This third limitation includes two types of clauses defining non regression commitments. Overall, the analysis has highlighted the commitments' wide diversity of legal character. *Table 13* below summarises the existing labour rights and commitments included in TSD chapters and specifies their legal character.

By and large, the relatively technical analysis of the legal character of labour commitments undertaken in this dissertation results in two key findings which contribute to the current literature on labour provisions in FTAs. First, labour commitments mainly relate to *the legal determinant of labour law* and have only marginal implications for it, thus barely reshaping states' regulatory space for labour law. As a matter of consequence, labour commitments minimally address the concern that trade agreements reduce states' regulatory space for labour law. Second, labour commitments give shape to what this dissertation calls a "dual structure of domestic labour law." This *dual structure* is best conceived of as an *apricot*, where labour commitments give shape to a regime of protection characterised by a hard core and a soft periphery. Indeed, whereas labour commitments provide for the strong protection of a limited set of internationally recognised standards, they establish a much softer regime of protection for the remaining labour rights. Ultimately, this dissertation questions labour commitments' fitness to protect a big chunk of labour rights altogether. The reader is kindly invited to go back and forth between the analysis provided in the following paragraphs and *Table 13*.

productive employment and decent work for all; and (iv) the commitments towards the implementation of ILO Conventions.

[420] This limitation is mainly articulated around clauses setting: (i) commitments towards high levels of labour protection; (ii) commitments towards the improvement of the levels of protection; (iii) commitments towards the ratification of ILO Conventions; and (iv) commitments towards the approximation of the laws to EU practices.

[421] This category includes two types of clauses, namely (i) those defining commitments not to fail to enforce labour law, and (ii) those defining commitments not to lower the levels of protection.

TABLE 13: LEGAL CHARACTER OF THE LABOUR COMMITMENTS INCLUDED IN THE TSD CHAPTERS OF THE TEN COVERED AGREEMENTS

	Type of clause	Obligation (conduct/result)	Scope of application (RP/RM-lr/RM-q)[422]	Precision (notoriously imprecise formulations)	Norm generating quality	Number of agreements including this clause
Rights to regulate	(1) Rights to regulate	• Rights providing for extensive entitlements	• RP: All Parties • RM-lr: All labour rights protected under the relevant acts • RM-q: Broad scope of application	• "levels of labour protection"	• No (EU-C.A. FTA); • Yes (all other FTAs)	• 10/10
Commitments towards minimum levels of protection	(2) Commitments towards internationally recognised standards and international agreements	• Conduct (EU-RSK, EU-C.A. FTAs); • Result (all other FTAs)	• RP: All Parties • RM-lr: Internationally recognised standards • RM-q: /	• /	• No	• 10/10
	(3) Commitments towards core labour standards	• Conduct and Result	• RP: All Parties • RM-lr: Four core labour standards • RM-q: /	• /	• No	• 10/10
	(4) Commitments towards full and productive employment and decent work for all	• None (EU-SADC, EU-Japan FTAs) • Result (CETA) • Conduct (other FTAs)	• RP: All Parties • RM-lr: Decent work-related standards • RM-q: /	• "Promote" (all FTAs but the EU-SADC, EU-Japan FTAs)	• No	• 10/10
	(5) Commitments towards the implementation of ILO Conventions	• None (EU-Pe.-Co.-Ec. FTA) • Result (all other FTAs)	• RP: All EU trading partners + on the EU side, only the EU Mem. St Parties (*issue w.r.t. distribution of competences) • RM-lr: Various sets of ILO Conventions • RM-q: /	• /	• No	• 9/10[423]

[422] RP = Ratione Personae; RM-lr = Ratione Materiae-labour rights; RM-q = Ratione Materiae-qualifications.

[423] Not included in the EU-Peru-Colombia-Ecuador FTA.

Commitments towards the enhancement of the levels of protection	(6) Commitments towards high levels of labour protection	• Result (EU-UKR. FTA) • Conduct (all other FTAs)	• RP: All Parties • RM-lr: All labour rights protected under the relevant acts • RM-q: /	• "High levels of protection"	• Yes	• 9/10[424]
	(7) Commitments towards the improvement of the levels of labour protection	• Result (EU-Sing. FTA) • Conduct (all other FTAs)	• RP: All Parties • RM-lr: All labour rights protected under the relevant acts • RM-q: /	• "to improve" • "level of protection" (EU-Mol., EU-Geo., CETA, EU-Jap. FTAs)	• Yes	• 8/10[425]
	(8) Commitments towards the ratification of ILO Conventions	• Conduct	• RP: All Parties • RM-lr: Various sets of ILO Conventions • RM-q: Discretion w.r.t. the efforts to be undertaken (EU-Jap. FTA)	• No specification of the conducts to undertake	• Yes	• 7/10[426]
	(9) Commitment towards the approximation of the laws to EU practices	• Result	• RP: Ukraine, Georgia and Moldova only • RM-lr: Labour rights protected under a set of circa 40 EU directives • RM-q: /	• /	• Yes	• 3/10[427]
Commitments towards upholding the levels of protection	(10) Commitments not to fail to enforce labour laws	• Result	• RP: All Parties • RM-lr: All labour rights protected under the relevant acts • RM-q: Link to a certain recurrence (except in EU-C.A. FTA) + Link to trade and investment	• "Effectively" • Link to a certain recurrence (except in EU-C.A. FTA) • Link to trade and investment	• No	• 10/10
	(11) Commitments not to lower the levels of labour protection	• Conduct and Result	• RP: All Parties • RM-lr: All labour rights protected under the relevant acts • RM-q: Link to trade and investment	• "To lower/to reduce/to relax the levels of protection" • link to trade and investment	• Yes	• 10/10

[424] Not included in the EU-SADC FTA.

[425] Not included in the EU-Peru-Colombia-Ecuador, and in the EU-SADC FTAs.

[426] Not included in the EU-Central America, in the EU-Peru-Colombia-Ecuador, and in the EU-SADC FTAs.

[427] Included in the EU-Ukraine, in the EU-Georgia, and in the EU-Moldova FTAs.

Among the five determinants of labour law, all labour commitments appear to relate to *the legal-determinant*.[428] Indeed, the labour commitments define substantive rights and obligations which shape the Parties' available margin of action to legislate and implement regulations in labour-related matters. In other words, these labour commitments define certain regulatory outcomes and/or conducts in matters of labour rights protection, which constrain the Parties' labour law making activity. What is more, the way the commitments affect *the legal-determinant* is further specified by the commitments' legal character. As shown in *Table 13,* each of the different categories of clauses displays its own specificities.

To begin with, the clauses defining commitments towards minimum levels of protection appear to be mere replications of pre-existing commitments. While these replications do not create new commitments in a substantive sense, and as such do not amend states' regulatory space for labour law, they are not meaningless however. Indeed, they integrate pre-existing commitments in a new legal relationship, namely the relationship established by the specific trade agreement. In the procedure leading to the *Opinion 2/15,* the EU Commission contended in this sense that the TSD chapter of the EU-Singapore FTA does not aim to create new substantive obligations concerning labour and environmental protection. Rather, it strives to reaffirm certain existing international commitments.[429] Hence, the commitments towards internationally recognised standards and agreements, the commitments towards core labour standards, the commitments towards full and productive employment and decent work for all, and the commitments towards the implementation of ILO Conventions all reveal the EU clear intention to include the regime of labour rights protection provided in its FTAs in a pre-existing multilateral regulatory environment.[430] This environment is

[428] Note however that the commitments towards full and productive employment and decent work for all, in that they lay upon the Parties an obligation to strive towards full employment touch upon the labour market determinant of labour law. Yet, these commitments generally use declaratory language and relatively underdeterminate obligations of conduct..

[429] See: Opinion of AG Sharpston in Opinion procedure 2/15, *EU-Singapore FTA* [2016] ECLI:EU:C:2016:992, at pt. 471.

[430] In this regard, the EU Commission acknowledged in its response to the consultation round on the future of TSD chapters that,

> **'[during] the debate, strong and recurrent messages, notably received during consultations with Member States, called on the Commission to continue to maintain the TSD chapters in a multilateral context (i.e. based on the rules and principles of the International Labour Organisation (ILO) and of Multilateral Environmental Agreements (MEAs)) and to intensify work with the relevant bodies to strengthen this mutually beneficial relationship. The Commission services see the need to systematically coordinate with these bodies and ensure coherence with their activities in support of TSD implementation'.**

See: EU Commission, "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements" (2018) p. 4.

primarily shaped by the ILO Constitution, by the ILO Declarations, and by ILO Conventions. The EU approach is thus one of "bilateralising" multilateral commitments. This *bilateralisation* of multilateral commitments has the advantage to create links between the EU FTAs and the ILO system, thus potentially allowing the Parties to hinge upon the ILO review procedures as well as upon its jurisprudence.[431] This was for instance the case in the *EU v. South Korea dispute on labour rights* where, in its written submission, the EU referred to the ILO case law regarding South Korea's failure to respect its commitments towards core labour standards under the 1998 ILO Declaration.[432]

While the commitments towards minimum levels of protection replicate pre-existing commitments, those towards the enhancement of the levels of protection create new ones. The latter have a relatively weak legal character, however. Indeed, with the important exception of the commitments towards the approximation of the laws to EU practices, contained in only three agreements,[433] the other commitments include weak obligations, are formulated in rather vague language and contain phrases granting a certain margin of discretion to the Parties.[434] Thus, the implications of the commitments towards the enhancement of the levels of protection for the Parties' regulatory space for labour law are largely marginal. Yet, no matter how marginal these implications are, they raise important questions regarding the commitments' "positioning" vis-à-vis the *regulation of the levels of social protection-threshold*. While it appears that this threshold has to a large extent framed the design of the commitments in question, most notably through the drafting of obligations of conduct compelling the Parties to the adoption of appropriate efforts, rather than to the achievement of certain regulatory outcomes, some of these commitments *do* include obligations of result which arguably cross the threshold.[435] Indeed, out of the 27 clauses defining commitments towards the enhancement

[431] In this regard, it is interesting to note that in the ILO system a state can file a submission against another state only vis-à-vis labour rights protected by Conventions that *both* states have ratified. See in this regard, article 26 of the ILO Constitution. In contrast, the inclusion of the commitments towards the implementation of ILO Conventions in TSD chapters makes it possible for a state to complain against another Party's compliance with certain Conventions even if the complaining Party has not ratified the concerned Convention.

[432] See written submission of the EU at pt. 23 *et sequ*. : https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf (last consulted on 15/06/2020).

[433] These commitments are included in art. 290 of the EU-Ukraine FTA, in art. 354 of the EU-Georgia FTA, and in art. 37 of the EU-Moldova FTA. Regarding these commitments one can consider that their implications for the legal determinant of labour law are significant, thus reshaping these three countries' regulatory space in a substantial way.

[434] What is more, these clauses establish relative commitments, i.e. commitments which do not bind the Parties to absolute standards but which establish obligations that hinge upon their current levels of protection. As such, relative commitments appear to provide the Parties with a certain degree of discretion regarding how to appreciate their current and their future levels of protection.

[435] Interestingly, the commitments towards the approximation of the law to EU practices have a strong legal character including relatively determinate obligations of result. However, these obligations are unilateral and only last on the EU relevant trading partners. Consequently, they should not be considered to cross the threshold.

of the levels of protection across the ten covered FTAs, 22 establish obligations of conduct. In turn, out of the five clauses providing for an obligation of result, three are included in the commitments towards the approximation of the laws to EU practices. As such, they apply to Ukraine, Georgia and Moldova, and *not* to the EU and its Member States. Consequently, they do not regulate the levels of protection in the EU Member States' territories, thus *not* crossing the threshold. Finally, the two remaining clauses including an obligation of result are the commitments towards high levels of labour protection in the EU-Ukraine FTA, and the commitments towards the improvement of the levels of labour protection in the EU-Singapore FTA. Both clauses apply to all contracting Parties, thus also compelling the EU side to adopt high levels of protection and to improve its levels of protection. As a matter of consequence, these clauses can be considered to regulate the levels of protection – however vague the commitments are. As such, they fall under the competences shared between the EU and its Member States, and the EU Council could have required their adoption along the co-decision procedure. Overall, these observations provide good evidence of the EU treaty drafters' acute attention for the *regulation of the levels of social protection-threshold* when designing labour commitments.

Finally, the commitments towards upholding the levels of protection call for a mixed assessment. First, the commitments not to fail to enforce labour laws do not create new obligations for the Parties. Consequently, they do not affect their regulatory space for labour law. Second, the commitments not to lower the levels of protection can entail a more significant encroachment on the Parties' regulatory space. Indeed, these clauses aim to prevent the countries' reduction of the levels of protection. Yet, these clauses are rather underdeterminate and have a limited scope of application, thus weakening their overall legal character. By and large, while commitments not to fail to enforce labour laws should not be considered to have implications for the Parties' regulatory space for labour law, this is well the case for the commitments not to lower the levels of protection, no matter how marginal these implications are. Here again, it appears that these specific clauses fall under the competences shared between the EU and its Member States and the EU Council could have required their adoption through the co-decision procedure.

The review of the eleven types of labour commitments highlights important variations in legal character. Overall, the analysis shows that only some labour commitments have only little implications for the legal determinant of labour law.[436] Furthermore, these modest implications are conform with the corresponding normative reference according to which: (i) it is to each country, in accordance with

[436] Again, mind the specific case of the commitments towards the approximation of the laws to EU practices taken up by Ukraine, Georgia and Moldova.

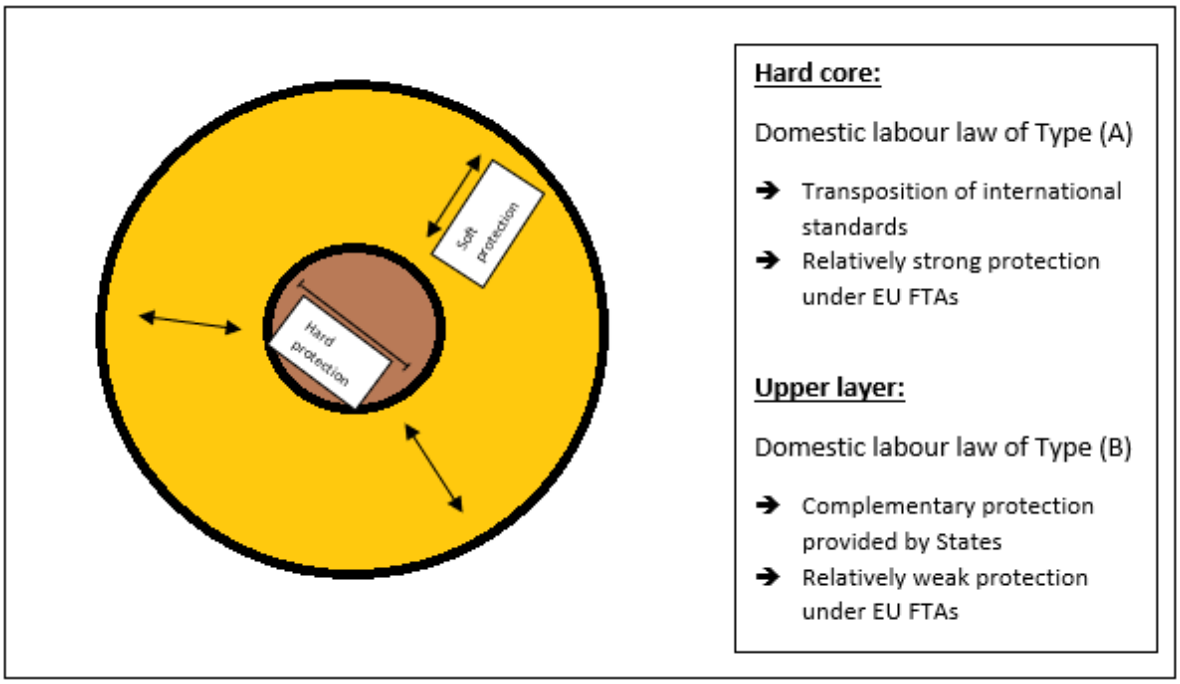
its needs and circumstances, to strike the right balance between national regulatory space and international disciplines and commitments ; (ii) countries' margin of discretion should be limited with respect to the core labour standards ; and (iii) within the limits set by their needs and circumstances, countries should attempt to improve their levels of protection. Thus, labour commitments appear to *only* marginally address the concern that trade agreements reduce states' regulatory space for labour law. In fact, a more refined analysis of these commitments allows to question their capacity to protect a big chunk of labour rights altogether. Indeed, this dissertation shows that labour commitments in EU FTAs provide for a *dual structure of domestic labour law,* where a limited set of basic labour rights benefits from strong legal protections, while the remaining labour rights are weakly protected.

The *dual structure of labour law* is most apparent when reviewing the commitments' legal character according to the labour rights they protect (see *Table 13*). This review shows that the commitments guaranteeing the protection of international standards display stronger legal character. More specifically, in EU FTAs, international standards are mainly protected under the commitments towards minimum levels of protection. In turn, these commitments bind the Parties to the achievement of a fairly large number of specific regulatory outcomes; they are relatively determinate; and they do not include phrases notoriously limiting their scope of application. Thus, the regime of labour rights protection included in the TSD chapters distinguishes between two categories of labour rights: those protected under the relevant international instruments, and those that go *beyond* the minimum protection set by these international instruments. Whereas the former are protected by commitments with strong legal character, the latter are protected by relatively weaker commitments. This apricot-like approach ,with a hard kern and a softer upper layer, characterises the regime of labour rights protection provided in EU trade agreements. Ultimately, this dual approach creates a distinction between the domestic laws transposing these international standards, and the domestic laws which go beyond these minimum standards, hence the name *dual structure of domestic labour law*. Thus, the regime of labour rights protection in EU trade agreements makes a distinction between two types of domestic labour laws. The first type is composed of the domestic labour laws transposing international standards. Let us call this type, "Type A." Examples of *Type (A)* legislation are the domestic laws guaranteeing decent working conditions as well as the respect of the four core labour standards.[437] The second type of domestic labour legislation regroups the laws providing for protections *complementary* to international standards. Let us call this type, "Type (B)." Typical examples of *Type*

[437] The four core labour standards are: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

(B) legislation are domestic laws relating to limited duration contract, dismissal conditions, maternity leave, furlough regime, among other.

FIGURE 4 : DUAL STRUCTURE OF DOMESTIC LABOUR LAW (APRICOT-LIKE APPROACH)



Domestic labour laws of *Type (A)* and of *Type (B)* are protected by commitments with different legal characters. While the levels of protection provided by the former are strongly shielded by the commitments towards minimum levels of protection, the levels of protection guaranteed by the latter are shielded by commitments with relatively weaker legal character. In other words, whereas the covered EU FTAs offer a relatively strong protection to domestic legislations in matters of freedom of association and the right to collective bargaining, among others, the protection they offer to domestic legislations relating for instance to dismissal conditions and limited duration contracts is much weaker. While these findings may appear intuitive to the informed reader, their specification in this dissertation constitutes an important contribution to understanding the regime of labour rights protection provided in EU FTAs. Indeed, it brings essential nuances to the all too straightforward statements by Commission officials that EU trade agreements include TSD chapters which offer strong protection to workers.[438]

[438] For instance, former trade commissioner Malmström declared regarding the EU-Japan FTA that '[the] agreement also includes a comprehensive chapter on trade and sustainable development; […] sets very high standards of labour, safety, environmental and consumer protection; strengthens EU and Japan's commitments on sustainable development […].” Press release, EU-Japan trade agreement enters into force, 31 January 2019. Available on: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_785 (last consulted on 20/08/2020). With respect to the EU-Singapore FTA Malmström declared, 'Our trade agreement with Singapore

Finally, it is also interesting to compare the findings drawn from this doctrinal analysis with *Häberli et al.* empirical study on the effects of trade agreements on labour rights protection.[439] In their study, the authors assess the labour legislation of ninety developed and developing countries from 1980 to 2005. With respect to high-income countries, they identify a decrease in the protection of the domestic labour standards *beyond* those reflected in the 1998 ILO Declaration on the Fundamental Principles and Rights at Work, after the entry into force of FTAs with other high income countries. These observations thus typically correspond to FTAs similar to those concluded by the EU with Japan, Canada and the Republic of South Korea. *Häberli et al.* study and this research cover of course different time periods and consequently look at different trade agreements. Yet, it is striking that the peculiarities of the regime of labour rights protection in EU FTAs described in this research echo the phenomenon identified in their study. Indeed, both works point to the "vulnerability" of labour rights *beyond* a set of fundamental standards. More generally, *Häberli et al.* study and the present analysis both capture two facets of one and the same phenomenon, namely the fact that trade liberalisation may have different implications for different types of labour rights. While their study highlights this aspect empirically, this dissertation reveals the existence of a legal regime allowing for such dynamics.[440]

---

provides further evidence of our commitment to fair and rules-based trade. The agreement will benefit workers, farmers and companies of all sizes, both here and in Singapore. It also includes strong clauses protecting human and labour rights and the environment.' *Press release,* Trade: EU-Singapore agreement to enter into force on 21 November 2019, Brussels, 8 November 2019. Available on: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2078 (last consulted on 20/08/2020). Regarding the EU-Vietnam FTA which entered into force on the 1st of August 2020 the Commission website indicates that '[under] the new agreement, the economic benefits go hand in hand with guarantees of respect for labour rights, environment protection and the Paris Agreement on climate, through strong, legally binding and enforceable provisions on sustainable development.' And that '[…] the trade agreement expresses a strong commitment of both sides to environment and social rights. It sets high standards of labour, environmental and consumer protection and ensures that there is no 'race to the bottom' to promote trade or attract investment.' Press release, EU-Vietnam trade agreement enters into force, 31 July 2020, Brussels, available on: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1412 (last consulted on 20/08/2020).

[439] Christian Häberli, Marion Jansen, and José-Antonio Monteiro, "Regional trade agreements and domestic labour market regulation," *Policy priorities for international trade and jobs*, (2012). Note that studies on the relationship between trade liberalisation and labour rights protection rarely distinguish between different categories of labour rights when assessing this relationship. For example: *Greenhill et al.* look at "collective labour rights", i.e. at the freedom of association and the right to collective bargaining; *Neumayer and de Soysa* look at the right to Free association and collective Bargaining and at child labour. See: Neumayer and Soysa, "Trade openness, foreign direct investment and child labor"; Eric Neumayer and Indra de Soysa, "Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis," *World development* 34, no. 1 (2006); Brian Greenhill, Layna Mosley, and Aseem Prakash, "Trade-Based Diffusion of Labor Rights: A Panel Study, 1986–2002," *American Political Science Review* 103, no. 4 (2009).

[440] This echoes the critique made by Alston against the 1998 ILO Declaration. The author argued that by focussing on the core labour standards, the ILO would create a "second league" of labour standards. See: Alston, "'Core labour standards' and the transformation of the international labour rights regime".

4. Cooperation mechanisms in EU trade agreements

Commitments binding the Parties in matters of labour rights are not the only feature of labour provisions which may have implications for the different determinants of labour law. Labour provisions also establish cooperation mechanisms. In fact, the EU adopted in its TSD chapters a so-called "cooperative approach." Accordingly, the enforcement of labour commitments included in the EU FTAs primarily relies on relatively articulated channels of cooperation between the contracting Parties.[441] On this backdrop, surprisingly little research has focussed on this aspect of labour provisions. The few studies that have done so have largely concentrated on the institutional dimension of cooperation, i.e. on the different bodies TSD chapters establish to conduct cooperation activities. More specifically, research comparing treaty provisions on civil society involvement has shown the existence of large variations in matters of CSOs' participation across TSD chapters.[442] Studies investigating the purposes and achievements of civil society gatherings under TSD chapters have highlighted that the goals of these meetings vary depending on the stakeholders' perceptions and include supporting the FTA; monitoring its application and providing information; engaging in dialogue and deliberating on relevant issues; and advising the governments. Accordingly, these studies have shown that the evaluation of whether these meetings have been successful largely depends on which one of these perspectives is adopted.[443] A recent enquiry into cooperation activities more generally contends that labour provisions have been of limited effectiveness to enforce labour rights, and that these provisions should instead be used to channel capacity-building activities relating to labour rights protection.[444] Overall, in spite of the alleged importance of cooperation mechanisms in the EU approach, the effects of these

[441] The cooperation-based approach chosen by the EU contrasts with the "sanction-based approach" generally credited to the US, where the enforcement of labour commitments is guaranteed through the possibility to impose sanctions in case of a Party's non-compliance with its commitments. For a discussion of the distinction between what have also been called the conditional and the promotional approaches, see: International Labour Organization, *Social Dimensions of Free Trade Agreements*, Revised edition (Geneva, 2015), 21. See also: Oehri, Myriam. *US and EU External Labor Governance: Workers' Rights Promotion in Trade Agreements and in Practice*. Springer, 2017; Ebert, Franz Christian, and Anne Posthuma. *Labour Provisions in Trade Arrangements: Current Trends and Perspectives*. ILO, 2011.

[442] Orbie, van den Putte and Martens, "Civil society meetings in EU free trade agreements: the purposes unravelled".

[443] Orbie, Martens and van den Putte, "Civil society meetings in European Union trade agreements: features, purposes, and evaluation"; Orbie, van den Putte and Martens, "Civil society meetings in EU free trade agreements: the purposes unravelled". Some already relatively old studies have been undertaken with respect to various aspects of Civil society dialogue in TSD chapters. See in this regard: Anneke Slob, Smakman, Floor, "A Voice, Not a Vote: Evaluation of the Civil Society Dialogue at DG Trade" (ECORYS Nederland BV, 2007); "Evaluation of DG TRADE's Civil Society Dialogue in order to assess its effectiveness, efficiency and relevance" (2014).

[444] Ebert, "Labour provisions in EU trade agreements". In the same line, *Hradilova et al.* contend that TSD chapters' general objectives should be to strengthen civil society participation, enhance cooperation between the Parties, and monitor implementation. Hradilová, Kateřina & Svoboda, Ondřej, "Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness".

mechanisms on the protection of labour rights have largely remained out of the academic radar. With the first TSD chapter being in force since almost a decade, cooperation activities have now sufficiently developed to carry out an analysis of how Parties cooperate in matters of labour rights protection. On this background, this chapter addresses the question of the cooperation activities' implications for the determinants of labour law.

This chapter begins with a presentation of the methods adopted in order to review the cooperation activities conducted under the EU trade agreements (*Section 4.1. Methodological clarifications*). Then, it briefly discusses the cooperation mechanisms provided in the EU trade agreements in matter of labour rights protection (*Section 4.2. The agreements' provisions on cooperation in matters of labour rights*). In this regard, the most relevant provisions can be found both, under the TSD chapters as well as in the chapters on regulatory cooperation included in some of the most recent FTAs. Once the regime of cooperation established in EU trade agreements has been presented, this chapter considers how Parties have used in practice the possibilities offered by this regime (*Section 4.3. Cooperation activities undertaken by the Parties*). To this end, it reviews the reports of the Committees in charge of cooperation in matters of labour rights under the EU trade agreements. These reports present the different activities undertaken by the Parties and by CSOs. As such, they allow to trace cooperation practices developed under the TSD chapters, and to consider how these practices may have implications for the various determinants of labour law. More specifically, the analysis of the reports results in the identification of five types of cooperation practices: (1) the exchange of information; (2) calls and exhortations; (3) capacity building activities; (4) work plans; (5) civil society involvement. Finally, this dissertation demonstrates that each of these cooperation practices triggers mechanisms which can affect different determinants of labour law, thus reshaping the Parties' regulatory space (*Section 4.4. Findings relating to the analysis of cooperation mechanisms in EU trade agreements*).

4.1. Methodological clarifications

This dissertation handles a broad understanding of *cooperation in matters of labour rights protection*. Indeed, it covers activities stretching from mere verbal exchanges between the Parties or between their civil society aiming at the promotion and the improvement of labour rights protection, to more sophisticated capacity building programs and jointly agreed work plans pursuing similar ends. The analysis of cooperation mechanisms in EU trade agreements undertaken in this chapter is articulated around two sections. The first section looks at what trade agreements provide for in matters of labour rights-related cooperation. The second section analyses the cooperation activities that have been undertaken by the Parties. The analysis conducted in each of these sections requires a different method.

First, this chapter looks at what trade agreements provide for in matters of labour rights-related cooperation. In this regard, it discusses two types of cooperation mechanisms: (i) those specific to the TSD chapters; and (ii) those on regulatory cooperation included in a separate chapter in some of the most recent EU trade agreements.[445] The review of the provisions establishing these two types of cooperation allows for a mapping of the different channels of cooperation established under the EU FTAs. On this backdrop, this chapter pays particular attention to three elements. To begin with, the analysis considers which *obligations* in matters of cooperation bind the contracting Parties. Then, it looks at their *scope of application*. And finally, it assesses the *institutional framework* established for the realisation of these cooperation activities.

Second, this chapter identifies the cooperation activities undertaken by the Parties and by CSOs and discusses their implications for the regulatory space in matters of labour law. In order to identify these cooperation activities, it reviews the annual reports produced by the Committees on Trade and Sustainable Development (**the CTSDs**). These intergovernmental bodies are established under the TSD chapters and constitute the primary place where cooperation activities in labour-related matters are undertaken. Thus, the reports published by the CTSDs offer an appropriate source of information for tracking cooperation activities. More specifically, this chapter focusses on the activities undertaken under the EU-RSK, the EU-Central America and the EU-Georgia FTAs, i.e. agreements concluded by the EU with an Asian partner, with Latin American countries, and with a government from the eastern European neighbourhood. These three agreements are among the earliest EU FTAs including a TSD chapter.[446] Their longer period of application has enabled the development of more extensive cooperation activities. Hence, for the EU-RSK FTA, this dissertation considers six reports published by the CTSD established under this specific agreement.[447] For the EU-Central America FTA, it reviews five reports published by the corresponding CTSD.[448] Finally, for the EU-Georgia FTA, it analyses four CTSD

[445] Regulatory cooperation chapters have been included in the CETA and in the EU-Japan FTA.

[446] Some of these reports are available on the website of the EU Commission as well as on the website of the European Economic and Social Committee (**the EESC**). For a look at these documents see the website of the EU Commission: https://trade.ec.europa.eu/doclib/cfm/doclib_search.cfm?action=search (last consulted on 25/09/2020) and the website of the EESC: https://www.eesc.europa.eu/ (last consulted on 19/11/2019). The outstanding reports have been shared by contact persons at the International Trade Union Confederation (**the ITUC**) and at the EU Commission.

[447] With respect to the CTSD under the EU-RSK FTA, the first meeting was held in 2012. Representatives of the Parties met thereafter annually except in 2016 and in 2019, where no meeting of the Committee took place. These meetings were always followed by the redaction of a report. Thus, six reports have been produced as of January 2020.

[448] With respect to the CTSD under the EU-Central America FTA, the first meeting was held in 2014. Representatives of the Parties met thereafter annually except in 2017, where no meeting of the Committee took place. Overall, five reports have been produced as of January 2020. CTSD meetings under the EU-Central America

reports.[449] The analysis of these reports is conducted with an eye for the following types of information: (i) *which labour rights are subject to cooperation activities*? (ii) *Which contracting Party(ies) are involved in the cooperation activities?* (iii) *Which specific actions/measures/cooperatives activities are undertaken*? (iv) *Do the Parties acknowledge certain achievements in the reports?* These information make it possible to identify labour rights that are more, and labour rights that are less considered in cooperation activities, and whether the different Parties equally engage in these activities. Moreover, identifying the specific cooperation activities undertaken by the Parties as well as acknowledged achievements is crucial in order to draw links between the cooperation activities in question and specific outcomes. More specifically, Parties' acknowledgments of certain achievements consecutive to the organisation of cooperation activities helps identifying "connection paths" between specific cooperation practices and their effects on the determinants of labour law. In this regard, the methodological approach adopted in this dissertation hinges upon *Aissi et al.* theoretical model linking labour provisions to socio-economic and socio-political "proximate outcomes."[450] In their model *Aissi et al.* consider that labour provisions constitute policy levers which can affect various capacities peculiar to states, CSOs and firms. These capacities constitute *proximate outcomes*. In turn, the effects of labour provisions on these capacities may eventually lead to changes in "distant outcomes," typically the improvement of labour standards and working conditions in the field. Thus, like *Aissi et al.'s* theoretical model, this dissertation considers that cooperation mechanisms provided in the labour provisions can have implications for a set of *proximate outcomes*. The proximate outcomes defined in this dissertation are however more specific than *Aissi et al.'s states, CSOs and firms capacities*. Indeed, they consist in the five determinants of labour law identified in *chapter 2*. Thus, this chapter uses the information collected in the CTSD reports to identify *connection paths* between cooperation activities and the determinants of labour law.

4.2. The agreements' provisions on cooperation in matters of labour rights

For more than a decade, the EU Commission's trade strategy has coupled the promotion of labour rights with cooperation mechanisms. The 2006 *Global Europe* strategy included for the first time an explicit link between labour standards and cooperation activities. The Commission declared indeed, '[in] considering new FTAs, we will need to work to strengthen sustainable development through our

agreement contrast with those undertaken under the EU-RSK FTA in that they include, next to the EU bloc, six other contracting Parties.

[449] Regarding the CTSD under the EU-Georgia FTA, the first meeting was held in 2016. Representatives of the Parties met thereafter annually. Overall, four reports have been produced as of January 2020.

[450] *Aissi et al.* present a model to assess the effectiveness of labour provisions in FTAs on the protection of labour rights. For a discussion of the limits of this model see: AISSI, Rafael PEELS and Daniel SAMAAN, "Evaluating the effectiveness of labour provisions in trade agreements: An analytical and methodological framework," 683–84.

bilateral trade relations. This could include incorporating new co-operative provisions in areas relating to labour standards and environmental protection.'[451] This approach was reaffirmed in the Commission's subsequent strategic note, the 2015 *Trade for All* strategy. This document stated that,

> **'[as] FTAs enter into force, the EU will have to make sure that the provisions on trade and sustainable development are implemented and used effectively, including by offering appropriate support through development cooperation. This is a crucial step in bringing about change on the ground. Respecting the commitments on labour rights and environmental protection can be a significant challenge for some of our trading partners. The Commission stands ready to assist trading partners to improve the situation. Coordinating aid and cooperation programmes better in these areas will allow the EU to use the opportunities and leverage a closer trade relationship to promote this value-based agenda.'[452]**

Thus, the 2006 and 2015 programmatic documents have opened the way for the inclusion of labour-related cooperation mechanisms in EU FTAs. The following paragraphs discuss the specificities of these cooperative provisions. In this regard, they analyse two types of cooperation mechanisms under the EU trade agreements: (1) those specific to the TSD chapters and; (2) those on regulatory cooperation included in the CETA and in the EU-Japan FTAs. While cooperation specific to the TSD chapters mainly involves representatives of the contracting Parties as well as relevant CSOs and aims at the good implementation of the chapters' provisions, regulatory cooperation is primarily directed at regulators of both Parties and strive towards a certain degree of coordination of the domestic regulations.

4.2.1. Cooperation in the Trade and Sustainable Development chapters

The provisions establishing cooperation activities in the TSD chapters are relatively uniform across the covered FTAs.[453] The regime they set up fix two broad categories of features: the modalities of cooperation and the institutional structure within which cooperation activities are meant to take place.[454] Overall, these provisions have three characteristics: (1) they set a strict obligation to

[451] EU Commission. *Global Europe*., 2006, 9.

[452] EU Commission. *Trade for All: Towards a More Responsible Trade and Investment Policy*., 2015, 24. For a recent discussion of the regime provided in EU PTAS and of the EU Commission reform agenda, see: Harrison, James, Mirela Barbu, Liam Campling, Franz Christian Ebert, Deborah Martens, Axel Marx, Jan Orbie, Ben Richardson, and Adrian Smith. "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda." *World Trade Review* 18, no. 4 (2019): 635–57.

[453] Note that the provisions relating to cooperation in matters of sustainable development and of labour rights protection more specifically, are mostly, though not exclusively, included in the TSD chapters of the FTAs. Some agreements provide distinct chapters or provisions on cooperation *in general*. This is for instance the case in Part III of the EU-Central America FTA; in Title VI of the EU-Georgia FTA; in TitelI IV of the EU-Moldova FTA; and in Title V of the EU-Ukraine FTA. Moreover, cooperation on labour-related matters can also be conceived of under cooperative provisions the scope of which comprehends, inter alia, labour standards. This is for instance the case of provisions relating to cooperation in matters of human rights protection. See, inter alia, art. 29 of the EU-Central America FTA; art 6 and 14 of the EU-Ukraine FTA.

[454] For an historical consideration of cooperation mechanisms linked to labour provisions see: Ebert, "Labour provisions in EU trade agreements" 414 et sequ.

cooperate; (2) the modalities of cooperation they define are rather vague;[455] (3) they define a relatively articulate institutional setting to undertake cooperation activities.

First, the provisions establishing cooperation activities in the TSD chapters set strict obligations to cooperate. To begin with, in the TSD chapters the Parties recognise the benefits of cooperation for the promotion of labour rights.[456] While this type of clauses does not set an obligation upon the contracting Parties, it contributes to shaping the context within which labour rights promotion is understood in TSD chapters. Then, all trade agreements but the EU-Japan FTA contain a firm obligation to cooperating in matters of labour rights protection. All agreements provide indeed that '[the Parties] commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest' (or other related formulations).[457] Thus the Parties explicitly agree to undertake cooperation in matter of labour rights protection.

Second, the modalities of cooperation defined in the agreements are rather vague. Indeed, while the commitments clearly compel the Parties to cooperating, several phrases qualify this obligation and grant the Parties relatively broad discretion as to the modalities of the cooperation activities they have to undertake. Typically, the prong "as appropriate" qualifies the commitment to cooperate so as to give the Parties a certain leeway on the format of cooperation. In the same vein, all agreements contain an open and often exemplative list of cooperation areas.[458] As such, they do not bind the Parties to specific domains of cooperation. For the remainder, the cooperation provisions are largely silent on most modalities of cooperation. Hence, they do not specify elements such as the financial and

[455] On the indeterminate character of labour provisions in matters of cooperation see: Ebert, "Labour provisions in EU trade agreements".

[456] It is for instance the case of article 11.1 of the EU-SADC FTA, which provides that '[the] Parties recognise the importance of working together on trade related aspects of environmental and labour policies in order to achieve the objectives of this Agreement.' See also, art.13.1.2, art. 13.4.1. and art. 13.11 the EU-RSK FTA; art. 63.1., art. 286.1., art. 288.1. of the EU-Central America FTA; art. 267 and art. 286 of the EU-Peru-Colombia-Ecuador FTA; art. 239 the EU EU-Georgia FTA; art. 375 of the EU-Moldova FTA; art. 22.3 and art. 23.1 of the CETA; art. 8 of the EU-SADC FTA; art. 16.12 of the EU-Japan FTA; and art. 12.4. of the EU-Singapore FTA.

[457] See also: art. 13.4.1. of the EU-RSK FTA; art. 286.5. and art. 288.1. of the EU-Central America FTA; art. 267.2. of the EU-Peru-Colombia-Ecuador FTA; art. 229 of the EU-Georgia FTA; art. 365 of the EU-Moldova FTA; art. 23.1. of the CETA; and art. 12.3.1. of the EU-Singapore FTA. In the other agreements analogue commitments to cooperating have been formulated. See art. 302 and art. 419 of the EU-Ukraine FTA; and art. 11 of the EU-SADC FTA.

[458] It is for example the case for *ANNEX 13* on "Cooperation on Trade and Sustainable Development" of the EU-RSK FTA which provides that '1. In order to promote the achievement of the objectives of Chapter Thirteen and to assist in the fulfilment of their obligations pursuant to it, the Parties have established the following indicative list of areas of cooperation: […]'. See also: art. 27 and art. 63.2. of the EU-Central America FTA; art. 286 of the EU-Peru-Colombia-Ecuador FTA; art. 239 of the EU-Georgia FTA; art. 375 of the EU-Moldova FTA; art. 420 of the EU-Ukraine FTA; art. 23.7 of the CETA; art. 11.3. of the EU-SADC FTA; art. 16.12. of the EU-Japan FTA; and art. 12.4. of the EU-Singapore FTA.

technical resources which must be dedicated to cooperation.[459] They do not link cooperation activities to the level of development and the specific circumstances of the Parties. They do not envisage to coordinate cooperation activities undertaken under the agreement with those pursued in other regional or international fora, typically the ILO etc.[460] Overall, while all TSD chapters but the EU-Japan FTA contain a strict obligation to cooperating, the modalities of cooperation are weakly defined in the EU TSD chapters. As a matter of consequence, the Parties keep a broad margin of discretion regarding the practical organisation of labour-related cooperation activities.

Third, the agreements set up a relatively articulate institutional setting to undertake cooperation activities. Indeed, regarding the institutional structure within which cooperation activities should take place, TSD chapters invariably provide for the establishment of three bodies: (i) an intergovernmental body on trade and sustainable development, generally called the Committee on Trade and Sustainable Development[461] (**the CTSD**); and groupings of CSOs in the form of (ii) Domestic Advisory Groups (**the DAGs**)[462] peculiar to each Party, and in the form of (iii) Civil Society Fora (**the CSFs**)[463] bringing CSOs and representatives of the different Parties together.

To begin with, CTSDs are constituted of high-level representatives from within the administration of each Party. The agreements provide that CTSDs should meet within the first year after the date the agreement enters into force, and thereafter as necessary. CTSDs are free to establish their own rules of procedure. In general, these intergovernmental bodies are in charge, among other things, of the oversight of the of the TSD chapter's implementation; the identification of areas of cooperation; and the verification of the effective implementation of cooperation.[464] The Committees must also report

[459] Whenever they refer to resources for cooperation, they do so, so as to leave a certain margin of discretion to the contracting Parties. See for example art. 325 of the EU-Peru-Colombia-Ecuador FTA which refer to cooperation *in general,* and provides that**:**

> **'1. Cooperation shall be carried out by means of instruments, resources and mechanisms available to the Parties to that end, according to the rules and procedures in force, and through the bodies of each Party competent to execute relations, including those regarding trade-related cooperation.**
>
> **2. Pursuant to paragraph 1, the Parties may use instruments such as exchanging information, experience and best practices, technical and financial assistance, and the joint identification, development and implementation of projects, among others.'**

[460] In a similar vein, Ebert writes that 'the relevant provisions do not contain prescriptions on the specifics of the activities to be carried out, such as the type of activity, time frames or budget requirements. Nor do they foresee a mechanism for the evaluation of the said activities.' Ebert, "Labour provisions in EU trade agreements", 417.

[461] In certain FTAs this body is also called "the Sub-Committee on TSD" or "the Board on Trade and Sustainable Development."

[462] In certain FTAs this body is also called "the Advisory Group on Sustainable Development."

[463] In certain FTAs this body is also called "Civil Society Dialogue Forum."

[464] See for instance, art. 280 of the EU-Peru-Colombia-Ecuador FTA.

their activities to their respective Association Committee, the body in charge of the implementation of the agreement as a whole.[465] Next, the DAGs are constituted of representative CSOs in a balanced manner so as to represent economic, social and environmental stakeholders including, employers and workers organisations, business associations, NGOs etc. The DAGs can meet on their own initiative. Their tasks are, inter alia, to express views and make recommendations on trade-related aspects of sustainable development and to advise the Parties and the CTSD on how to better achieve the objectives of the TSD chapters.[466] In certain agreements they can also present their own views to the panel of experts in case of dispute on the interpretation or on the implementation of the obligations included in the TSD chapters.[467] Finally, the CSFs bring together the DAGs of the different Parties,[468] other stakeholders as well as representatives of the Parties. This forum is organised once a year unless otherwise provided by the Parties. CSFs serve as a venue, where the different actors can express their views and opinions on the implementation of the TSD chapters and on how to better achieve the objectives of these chapters.[469]

Ultimately, while all TSD chapters, but the one included in the EU-Japan FTA contain a strict obligation to cooperating, the modalities along which cooperation activities have to be undertaken are weakly defined. This approach has the advantage to grant the Parties with some flexibility as to the specific activities they want to organise. At the same time, the regime of cooperation in matters of labour rights protection set under TSD chapters can be criticised for not having been framed into more ambitious and more specific language defining among other thigs minimum resources and targets for cooperation.

---

[465] In certain FTAs this body is also called "the Trade Committee", "the Association Council" or "the Joint Council." The Association Committee is composed of representatives of the Parties, generally at ministerial level. The task of the Association Committee are, inter alia, to supervise and monitor the application and the implementation of the Agreement, and to examine major issues arising within the framework of the Agreement. Moreover, the Association Committee supervises the work of the specialised committees established under the FTAs. The CTSD is one of those specialised committees. For a detailed description of the competences of the Association Committee see for instance art. 13 of the EU-Peru-Colombia-Ecuador FTA.

[466] See for instance, art. 294 EU-Central America FTA. For a discussion of the purposes of the DAGs and CSFs see: Orbie, Jan, Deborah Martens, and Lore van den Putte. "Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation." *Centre for the Law of EU External Relations (CLEER)* 3 (2016): 1–48.; Orbie, Jan, Lore van den Putte, and Deborah Martens. "Civil Society Meetings in EU Free Trade Agreements: The Purposes Unravelled." In *Labour Standards in International Economic Law*, 135–52. Springer, 2018.

[467] For an analysis of the involvement of CSOs as provided in TSD chapters see: Martens, Deborah, den Putte, Lore Van, Myriam Oehri, and Jan Orbie. "Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index." *European Foreign Affairs Review* 23, no. 1 (2018): 41–62.

[468] In certain agreements it is specifically provided that the operation of the CSFs is defined by the Parties. See for example art. 240 of the EU-Georgia FTA or art. 299 EU-Ukraine FTA. Under the EU-Japan FTA, it is called joint dialogue with civil society organisations and consists of a meeting between the Parties and CSOs. See art. 16.16 of the EU-Japan FTA.

[469] See for instance art. 295 EU-Central America FTA.

4.2.2. Cooperation in the Regulatory Cooperation chapters

Next to the mechanisms of cooperation specific to the TSD chapters, labour-related cooperation is also practicable[470] under the provisions on regulatory cooperation included in the CETA and in the EU-Japan FTAs.[471] Regulatory cooperation under the realm of trade agreements is generally driven by cost reduction benefits, trade enhancement and the willingness to reduce "behind the border" barriers to trade.[472] The inclusion of regulatory cooperation chapters in two recent EU FTAs has raised much comments and concerns among experts. For instance, It has been argued that it would undermine democratic principles, that it would undercut existing standards and levels of protection, and that the regime set in the dedicated chapters does not include the necessary safeguards to avoid the capture of these mechanisms by profit seeking and antisocial interest groups.[473] In spite of these several legitimate concerns, this dissertation demonstrates that regulatory cooperation also offers some tools which, if properly used, can be beneficial to workers. This section further analyses the regime set in this regard in chapter 21 on *Regulatory Cooperation* of the CETA and in chapter 18 on *Good Regulatory Practices and Regulatory Cooperation* of the EU-Japan FTA. The regimes of regulatory cooperation established by these two chapters may be considered to have two important features which strikingly contrast with cooperation under the TSD chapters: (1) they do *not* set strict obligations to undertake

[470] Regulatory cooperation chapters are so-called transversal chapters, i.e. they do not cover a specific policy area, rather they address sectors potentially treated under different chapters of the FTA. With respect to labour rights more specifically, art. 21.1 of the CETA provides that, '[this] Chapter applies to the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities that are covered by, among others, *chapter* […] *Twenty-Two (Trade and Sustainable Development), Twenty-Three (Trade and Labour)* and Twenty-Four (Trade and Environment).' (Emphasis added by the author) Thus, the CETA allows for regulatory cooperation in matters covered by the chapters on trade and sustainable development as well as by the chapter on trade and labour. The regulatory cooperation chapter of the EU-Japan FTA also includes labour-related matters under its scope of application, though less explicitly. Article 18.3.1 provides indeed that, '[this] Section applies to regulatory measures issued by the regulatory authority of a Party in respect of any matter covered by this Agreement.' Considering that labour rights are covered by the FTA under *Chapter 16*, labour-related matters *de facto* fall under the scope of application of the regulatory cooperation chapter. Note that art. 18.1 par. 2 of the EU-Japan FTA makes a reference to labour-related matters. It provides indeed that, '2. Nothing in this Section shall affect the right of a Party to define or regulate its own levels of protection in pursuit or furtherance of its public policy objectives in areas such as: […] (d) labour conditions; […] (g) social protection and social security;' This confirms that labour related matters are indeed covered by chapter 18 of the EU-Japan FTA. Labour-related matters can thus be subjected to regulatory cooperation under both FTAs.

[471] A widely used definition of the term "regulatory cooperation" is the one handled by the OECD, according to which regulatory cooperation amounts to 'the range of institutional and procedural frameworks within which national governments, sub-national governments, and the wider public can work together to build more integrated systems for rule-making and implementation, subject to the constraints of democratic values, such as accountability, openness and sovereignty.' OECD (1994) Regulatory Cooperation for an Interdependent World (Paris: OECD, 1994), 15.

[472] Golberg, Elizabeth. "Regulatory Cooperation – a Reality Check." *Harvard Kenedy School, M-RCBG Associate Working Paper Series | No. 115*, 2019, 3. In matters of labour rights protection, one can consider that regulatory cooperation is undertaken to reduce discriminatory non-tariff barriers to trade as well as to address the legitimacy deficit of international trade.

[473] Ferdi de Ville, "Regulatory Cooperation in TTIP. A Risk for Democratic Policy Making?," *FEPS Policy Brief*, 2016.

regulatory cooperation; (2) the modalities of regulatory cooperation are clearly defined in both agreements.

First, neither of the two agreements establish a strict obligation to undertake regulatory cooperation activities. In fact, several elements ensure the contracting Parties' full discretion to decide on whether or not they want to engage in such cooperation. Most importantly, in both FTAs the Parties are covered by a so-called "clause of reserve." This clause guarantees that regulatory cooperation activities are conducted on a voluntary basis. More specifically, with regard to the initiation of the regulatory cooperation procedure, article 21.2.6 of the CETA enounces that, '[the] Parties may undertake regulatory cooperation activities on a voluntary basis. For greater certainty, a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation.' In turn, the EU-Japan FTA provides that a contracting Party may make a proposal to engage into regulatory cooperation activities. The other Party may accept or refuse this proposal. In case of refusal, the concerned Party must, however, explain the reasons of its decision.[474] Thus, in both agreements, contracting Parties engage voluntarily in regulatory cooperation activities.[475] What is more, if they decide to engage into regulatory cooperation, the Parties are not compelled to adopt the regulation resulting from the regulatory cooperation procedure.[476]

---

[474] See art. 18.12 of the EU-Japan FTA. This article specifies how contracting Parties define activities suitable for regulatory cooperation. In this regard it provides that, '4. In order to identify suitable activities for regulatory cooperation, each Party shall consider: (a) the list provided for in Article 18.6; and (b) proposals for regulatory cooperation activities submitted by persons of a Party that are substantiated and accompanied by relevant information.' In turn, art. 18.6 provides that,

> **'The regulatory authority of each Party shall make publicly available at least once a year a list of its planned major regulatory measures, together with a brief description of their scope and objectives, including, if available, the estimated timing for their adoption. Alternatively, if the regulatory authority of a Party does not make such a list publicly available, that Party shall provide annually, and as soon as possible, the Committee on Regulatory Cooperation established pursuant to Article 22.3 with the list together with the brief description. That list together with the brief description, with the exception of information designated as confidential, may be made publicly available by the regulatory authority of each Party.'**

Note that with respect to the terms "major regulatory measures" a footnote in the article further specifies that **'**The regulatory authority of each Party may determine what constitutes "major" regulatory measures for the purposes of its obligations under this Section.' Thus, the Parties have some margin of discretion when defining what constitutes a "major" regulatory measures, and thus when determining the matters regarding which they accept to engage into regulatory cooperation.

[475] The latter can consult with stakeholders and interested Parties in order to gain non-governmental perspectives on matters related to the implementation of this chapter. See in this regard art. 21.8 of the CETA.

[476] Art. 18.1 par. 5 of the EU-Japan FTA provides indeed that, 'Nothing in this Section shall be construed as obliging the Parties to achieve any particular regulatory outcome.' Under the CETA this follows from the art. 21.2.6 discussed above. Moreover, both chapters reaffirm the Parties' right to regulate. Art. 18.1 par. 3 of the EU-Japan FTA provides that, 'Nothing in this Section shall be construed to prevent a Party from: (a) adopting, maintaining and applying regulatory measures in accordance with its legal framework, principles and deadlines, in order to

Second, the modalities of regulatory cooperation are relatively clearly defined in both agreements. Most interestingly, both agreements contain mechanisms allowing, inter alia, for the joint review of domestic regulatory projects.[477] With respect to the details of these review procedures the CETA and the EU-Japan FTAs have slightly different characteristics. To begin with, the CETA contains a non-exhaustive and suggestive list of activities that contracting Parties may undertake. This list includes various elements such as: the discussion of regulatory reforms and of their effects on the Parties' relationship; the exploration of alternative approaches to regulation; mutual consultations and the exchange of information throughout the regulatory development process; the provision, upon request by a Party, of a copy of the draft regulation discussed in the other Party; the exchange of information about contemplated regulatory actions, measures or amendments under consideration; and the cooperation on issues that concern the development, adoption, implementation and maintenance of international standards, guides and recommendations.[478] Thus, the regulatory cooperation regime set by the CETA envisages numerous ways to review domestic regulatory projects. Finally, the regime also provides for the consultation of CSOs and other stakeholders in order to gain additional views on discussed regulatory projects.[479] This consultation mechanism has the benefit to open the discussions to nongovernmental actors and to promote transparency.

---

achieve its public policy objectives at the level of protection it deems appropriate;' For the CETA, see art. 21.2 par. 4 which provides that 'Without limiting the ability of each Party to carry out its regulatory, legislative and policy activities, the Parties are committed to further develop regulatory cooperation in light of their mutual interest in order to: […]'

[477] This review takes place within the Regulatory Cooperation Forum (**the RCF**). The RCF is a specialised committee (See art. 26.2.1.h of the CETA and art. 22.3 of the EU-Japan FTA) in charge of facilitating and promoting regulatory cooperation between the Parties (See art. 21.6 of the CETA and art. 18.14 of the EU-Japan FTA). This Forum does not have any normative power and, consequently, cannot adopt binding decisions. For a discussion of the role played by the RCF see: ANGOT, Jean-Luc, Geneviève BASTID BURDEAU, Christophe BELLMANN, Sophie DEVIENNE, Lionel FONTAGNÉ, Roger GENET, Géraud GUIBERT, Sabrina ROBERT-CUENDET, and Katheline SCHUBERT. "L'impact De L'accord Économique Et Commercial Global Entre L'union Européenne Et Le Canada (AECG/CETA) Sur L'environnement, Le Climat Et La Santé." Rapport au Premier ministre, September 7, 2018, 38. Note that, under the EU-Japan FTA, other specialised committees established under article 22.3 of the agreement can provide a venue for regulatory cooperation. For instance, the CTSD, in its quality of specialised committee can host regulatory cooperation in labour-related matters. Finally, note that under the CETA the RCF is not a closed forum, for other interested Parties may by mutual consent of the contracting Parties be invited to take part in the meetings of the RCF. See: art. 21.6§3 of the CETA.

[478] See art. 21.4§1 of the CETA. With respect to these several cooperation activities, the RCF is tasked to 'enable monitoring of forthcoming regulatory projects and to identify opportunities for regulatory cooperation […]' See art. 22.7§1 of the CETA.

[479] See art. 18.7 and art. 18.10 the EU-Japan FTA. For an analysis of the potential capture of regulatory cooperation procedure by various stakeholders, see: ANGOT, Jean-Luc, Geneviève BASTID BURDEAU, Christophe BELLMANN, Sophie DEVIENNE, Lionel FONTAGNÉ, Roger GENET, Géraud GUIBERT, Sabrina ROBERT-CUENDET, and Katheline SCHUBERT. "L'impact De L'accord Économique Et Commercial Global Entre L'union Européenne Et Le Canada (AECG/CETA) Sur L'environnement, Le Climat Et La Santé." Rapport au Premier ministre, September 7, 2018, 6.

The review mechanisms have been further developed in the later EU-Japan FTA. Indeed, this agreement provides for an incremental procedure allowing Parties to get clarifications, assess and eventually challenge planned or existing regulatory measures of the other Party. In fact, the whole process comprehends up to three stages. To begin with, a contracting Party can submit a request asking for information or clarification on a planned or existing regulatory measure. The responding Party needs to provide the required information or clarification promptly.[480] Then, the procedure provides for a second stage, where the requesting Party may express concerns with respect to an existing or planned regulatory measure.[481] The final stage allows for possible consultations. The requesting Party may indeed ask for consultations in two different situations. First, if it is not satisfied with the written response drafted by the responding Party. Second, if the responding Party has not submitted a written response within the period of 60 days.[482] During these consultations, the Parties have the obligation to seek, in good faith, for a satisfactory solution. This may include the consideration of alternative regulatory measures or the adoption of less trade restrictive regulatory measures.[483] Finally, a report on the outcome of the consultations should be produced by the requesting Party in collaboration with the responding Party and communicated to the Committee on Regulatory Cooperation for consideration.[484]

The implications of the mechanisms allowing for a review of regulatory projects under both FTAs are potentially far reaching for the protection of labour rights. Indeed, a contracting Party may ask the other Party for information or clarifications regarding some of its existing labour legislation or project draft. Under the EU-Japan trade agreement, this can even go further given that, when the requesting Party is not satisfied with the response, it can raise concerns. These concerns have to be answered by the responding Party and can, under certain conditions, be followed by consultations between the Parties. Surely, the significance of this procedure for the protection of labour rights results from the *ex-ante* discussion and assessment of planned labour legislations. More specifically, this discussion is likely to consider the conformity of the existing or planned regulatory measures with the labour commitments contained in the TSD chapter, as well as their effect on trade flows between the contracting Parties. As such, this procedure complements the *ex post* dispute settlement procedure

[480] See art. 18.16§1 of the EU-Japan FTA. Note that this request for information and clarification can also take place within the relevant specialised committee. In this regard, see art. 18.16§9 of the EU-Japan FTA.
[481] The procedure sets formal requisites to this submission of concerns. For the requesting Party must identify the regulatory measure at issue, provide a description of its concerns and, where relevant, submit questions. The responding Party must address these concerns in a written response. It should do that as soon as possible and preferably within 60 days upon receipt of the request. This delay can be exceeded, providing justification by the concerned party. In this regard, see art.18.16§2-3 of the EU-Japan FTA.
[482] This period can be extended providing justification. See art. 18.16§4 of the EU-Japan FTA.
[483] See art. 18.16§6 of the EU-Japan FTA.
[484] See art. 18.16§8 of the EU-Japan FTA.

established under the TSD chapter of the corresponding agreements.[485] Overall, while the regulatory cooperation regimes set in the CETA and in the EU-Japan FTAs do neither prevent Parties to achieve particular regulatory outcomes, nor to delay the adoption of certain regulatory measures,[486] they potentially subject their law-making process to mutual scrutiny. In other words, the regulatory cooperation mechanisms provided in both agreements make it possible for Parties to discuss and potentially to contest the appropriateness of a draft of regulation before it is adopted.[487] Thus, next to the legitimate concerns that regulatory cooperation would undercut existing standards and levels of protection,[488] it appears that the regimes set by the regulatory cooperation chapters in the CETA and in the EU-Japan FTAs also provide for review mechanisms that can be used by the Parties in order to assess each other's labour law making process, and possibly promote higher levels of protection.

4.3. Cooperation activities undertaken by the Parties

The presentation of the agreements' provisions relating to cooperation in matters of labour rights protection define the framework within which cooperation activities can be undertaken. As of July 2020, such cooperation has been undertaken under the TSD chapter of all trade agreements except for the EU-Singapore FTAs which entered into force most recently, on 21 November 2019. With respect to regulatory cooperation under the CETA and EU-Japan FTAs, no activities have been undertaken in matters of labour rights protection yet. Accordingly, this section will review the cooperation practices that have emerged under TSD chapters by presenting the findings of the CTSD reports' analysis (*Section 4.3.1. Cooperation activities under the Trade and Sustainable Development chapters*) and engage in a brief discussion of the potential relevance of regulatory cooperation in matters of labour rights protection (*Section 4.3.2. Cooperation activities under the Regulatory Cooperation chapters*).

4.3.1. Cooperation activities under the Trade and Sustainable Development chapters

As explained in *Section 4.1. Methodological clarifications*, four elements have been scrutinised in the review of the CTSD reports: (i) the labour rights subjected to cooperation; (ii) the contracting Party(ies) concerned by these cooperation activities; (iii) the specific cooperation activities that have been undertaken; and (iv) the achievements acknowledged by the Parties. The analysis of the CTSD reports

[485] For a short discussion of the dispute settlement mechanisms under TSD chapters, see fn. 362.
[486] See art. 18.16§10 of the EU-Japan FTA.
[487] Interestingly, the CETA provides for the possibility to open participation to regulatory cooperation to other international trading partners. In this regard, see art. 21.2§3 of the CETA. This mechanism thus allows for the enlargement of regulatory cooperation to other countries so as to jointly treat common regulatory concerns. Concretely this could result in the Parties to the CETA inviting other developed economies concerned with the relation between international trade and labour rights protection to discuss joint undertakings with respect to the enhancement of labour rights protection.
[488] For a discussion of these concerns in the framework of the TTIP, see: Ville, Ferdi de. "Regulatory Cooperation in TTIP. A Risk for Democratic Policy Making?" *FEPS Policy Brief*, 2016.

according to this analytical grid, has allowed to identify five recurrent cooperation practices: i) dialogue and the exchange of information; ii) calls and exhortations; iii) capacity building activities; iv) work plans; v) civil society involvement.[489] These five types of practices have developed under the cooperation provisions of the TSD chapters and have been used by the Parties for the promotion of labour rights protection. Along with *Aissi et al.* theoretical model linking labour provisions to proximate outcomes, this chapter considers that these cooperation practices constitute the transmission belt between labour provisions and various determinants of labour law. The discussion of each cooperation practice will successively consider the core characteristics of the practice, the social mechanisms it triggers, and the achievements acknowledged by the Parties. The combination of these three elements will allow to identify connection paths between the cooperation practices and the determinants of labour law. Ultimately, by identifying the ways in which cooperation activities may impact the Parties and CSOs, this dissertation fills a gap in the analysis of labour provisions' contribution to the protection of workers. The following paragraphs present the five cooperation practices.

i) Dialogue and the exchange of information

Dialogue and the exchange of information on the domestic labour situations constitute the principal cooperation practice undertaken between contracting Parties under the three reviewed agreements. Indeed, CTSD meetings allow the Parties to exchange information on the state of play of their domestic legislation as well as on their current efforts towards the ratification and the implementation of international labour instruments. The establishment of procedures ensuring the exchanges of information triggers mechanisms of "sunshine and moral suasion" – i.e. these procedures initiate control dynamics based on the exposure to the other Party(ies) and to the international community of the domestic state of play, possibly the lack of achievements of certain labour commitments and the non-compliance with international obligations. The embarrassment that it potentially entails for the concerned authorities can drive them to bringing their legislation or practice in compliance with the relevant standards.[490] In this regard, some authors have highlighted the positive contribution of this specific cooperation practice by arguing that,

[489] Note that other types of cooperative activities can be observed in other FTAs. For instances, under the CETA the contracting Parties cooperate to support the promotion of labour rights in third countries. One example of that is when, together with the US, they have collaborated to increase pressure on Viet Nam to improve its labour rights records. Each Party has used policy tools at its disposal. The US has used the influence it draws from its big economy, Canada has used the TPP, and the EU has used the PTA it has negotiated with Viet Nam. This example mentioned by a Canadian official at the CSF of the EU-Canada CETA, organised in Ottawa on 12 November 2019. For a consutlation of the meeting's records see: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2019-11-12-report-soc-civ-rapport.aspx?lang=eng (last consulted on 25/09/2020).

[490] Banks, Kevin. "Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law." *Berkeley Journal of Employment and Labor Law*, 2011, 45–142.

> **'[dialogue] between the European Commission and the Government of the Republic of Korea on labour standards […] has primarily been conducted through the Committee on Trade and Sustainable Development. There is some indication of an increased capacity to commit at the state level given that the Government of the Republic of Korea has recently taken concrete initiatives towards the ratification and implementation of ILO Conventions, in particular those relating to freedom of association, collective bargaining and forced labour (European Commission, 2015).'**[491]

In fact, Korea's concrete initiatives came after several complaints raised by the EU and by CSOs regarding South Korea's respect of the core labour standards. Furthermore, Seoul's persistent lack of progress in this regard led to the *EU-Republic of South Korea dispute on labour standards* initiated in December 2018.[492] By and large, no positive achievements have been expressly attributed in the reports to *dialogue and the exchange of information*. This seems to indicate that these cooperation practice' direct implications for the promotion and the improvement of labour rights protection is not obvious. However, it does not rule out the fact that *dialogue and the exchange of information* may be crucial for the Parties to gain access to each other's complex legal frameworks, to heighten mutual awareness of their labour situation, and to lead to the triggering of further cooperation practices, such as expressing calls and exhortations or designing targeted promotional programs.

ii) Calls and exhortations

The analysis of the CTSD reports has shown the moderate but constant use by contracting Parties of the Committees' meetings to express *calls and exhortations* upon the other Party(ies) to comply with its commitments under the TSD chapter. One can consider that these *calls and exhortations* are a logical follow-up to the dialogue and exchange of information practice discussed above. More specifically, they constitute occurrences of naming and shaming setting mechanisms of pressure and accountability on the Parties. This practice may have important implications on the actors' behaviour, especially when these actors recognise themselves as belonging to a specific normative community. As some authors argue,

> **'[shaming] is important as a simple deterrent. When […] building bonds of trust and respect among business executives, regulators […] [has succeeded] then they will be able to deter each other by communicating disapproval for breaking the law, for being unreasonable, for selling out. Social disapproval for being captured is more potent when extended by someone whose opinion we respect.**

[491] (footnotes omitted) AISSI, Rafael PEELS and Daniel SAMAAN, "Evaluating the effectiveness of labour provisions in trade agreements: An analytical and methodological framework," 689.
[492] See the Request for consultation by the European Union, of the 17th of December 2018, accessible under: http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf (last consulted on 20/03/2019).

But the more important effect of shaming is in constituting consciences, in fostering the internalization of norms.'[493]

Calls and exhortations have been expressed at almost all CTSDs meetings. While the analysis of the CTSD reports does not offer many evidence of calls and exhortation having been followed by the demanded changes, it does so in some cases. A telling example is that of law enforcement and labour inspections in the relationship between the EU and Georgia. Indeed, the report of the second meeting relayed the EU's call to Georgia towards '[…] further actions including […] strengthening the legal framework for […] labour rights enforcement (regulating the scope of supervision responsibility and labour inspectors' powers in line with ILO principles).'[494] The CTSD report of the third meeting highlights Georgia responses to this call. It stipulates indeed that '[the] EU welcomed the steps already undertaken by the Georgian government and encouraged further actions, including extension of the OSH law to all sectors of economic activity, and ensuring labour rights enforcement (a fully-fledged labour inspection).'[495] Thus, measures addressing the call made by the EU at the second meeting were welcomed at the following meeting. At the same time, the EU demanded further efforts. In turn, the fourth meeting's report indicated that '[the] EU welcomed the adoption of the revised Georgian OSH law and on-going strengthening of the Labour Inspection Department's capacity as further steps towards aligning supervision and control in this area with international and EU standards.'[496] Thus, the fourth meeting shows evidence of Georgia's response to the EU call as well. Overall, while calls and exhortations do not constitute the panacea for compliance with labour commitments under TSD chapters, they can be considered to constitute an essential stage in the process of increasing pressure on the Parties.

iii) Capacity building activities

The CTSD reports under the three FTAs also refer several times to *capacity building activities* undertaken by the contracting Parties and by CSOs within the DAGs and the CSFs. An example common to the different agreements is that of assistance provided by the ILO, sometimes in the form of

[493] (Footnotes omitted) Ayres and Braithwaite, *Responsive regulation: Transcending the deregulation debate*, 94. The authors make this comment with respect to shaming as a behavioural practice in tripartite relations.
[494] Report of the second meeting of the Georgia – European Union Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum, Brussels, 30 November 2016, 2.
[495] Report of the third meeting of the Georgia–European Union Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum. Tbilisi, 20 March 2018, 1-2. Note that "OSH" stands for Occupational Safety and Health.
[496] Report of the fourth meeting of the European Union-Georgia Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum, Brussels, 26 March 2019, 1.

workshops given by ILO experts at the opening of the CTSD meetings. For instance, the report of the third CTSD meeting under the EU-RSK FTA mentions that,

> **'[the] labour policy segment was introduced by a presentation of the International Labour Organisation (ILO) on developments regarding the ratification of fundamental (in particular those relating to forced labour, and freedom of association and the right to collective bargaining) and up-to-date ILO conventions and on lessons learned from other countries regarding obstacles to ratification and ways to address them.'**[497]

Thus, *capacity building activities* set in motion *empowerment cycles* beneficial to the participating stakeholders. As highlighted in the second report of the CTSD meeting under the EU-RSK FTA, close cooperation with the ILO may prove instrumental in the ratification and implementation of ILO Conventions. Indeed, the lack of capability or of expertise can constitute an impediment for the implementation of various labour-related commitments. In this regard, some authors have stressed that 'the problem of low [labor] standards often stems from a lack of capacity to enforce labor codes.'[498] Interestingly, research on the relationship between states' capacities and labour rights protection has shown that these capacities are only positively associated with labour rights under left-leaning or democratic governments. In countries where there is no left-leaning or democratic government, there is no empirical evidence that increases in state's capacity lead to better protection of labour rights.[499] Furthermore, ILO experts have argued that the proximate outcomes that labour provisions can best affect relate not only to states' *capacities*, but also to firms and CSOs *capacities*.[500] Hence, cooperation activities can increase the CSOs capacities to fulfil their advocating, monitoring

[497] Report of the third meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA, Brussels, 8 December 2014, 3.

[498] Elliott, K. A., & Freeman, R. B., *Can Labor Standards Improve Under Globalization?* (2003), https://ideas.repec.org/b/iie/ppress/338.html, 11 As cited in: Daniel Berliner et al., "Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries," *World development* 72 (2015): 128, https://doi.org/10.1016/j.worlddev.2015.02.018.

[499] Daniel Berliner et al., "Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries," *World development* 72 (2015): 128, https://doi.org/10.1016/j.worlddev.2015.02.018. The authors define capacity as the administrative capacity of states to monitor and to enforce labour laws, as well as budgetary and knowledge capacities to have more costly and more appropriate regime of protection. In the same vein, Ronconi finds that the increasing numbers of labour inspectors in Argentina resulted in gains for workers in terms of self-reported working conditions. See: Lucas Ronconi, "Enforcement and Compliance with Labor Regulations in Argentina," *Ilr Review* 63, no. 4 (2010). Similarly, Piore and Schrank show that more labour inspectors lead to fewer labour rights violations and to greater firm productivity as a consequence of greater efficiency and fewer accidents. See: Michael J. Piore and Andrew Schrank, "Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World," *International Labour Review* 147, no. 1 (2008).

[500] AISSI, Rafael PEELS and Daniel SAMAAN, "Evaluating the effectiveness of labour provisions in trade agreements: An analytical and methodological framework". Similarly, Ebert claims that enforcement mechanisms under TSD chapters have been rather ineffective to improve labour rights protection and that cooperative elements of labour provisions, provided that they aim at increasing states and CSOs capacities could do a better job. Ebert, "Labour provisions in EU trade agreements".

and consultancy functions.[501] Therefore, the exchanges of best practices, the organisation of thematic seminars, the redaction of joint studies etc. within the DAGs and CSFs are seen as an appropriate way to build up CSOs capacities to fulfil their missions.[502] Ultimately, these capacity building activities can contribute to rebalancing the power relationship between the different actors involved in the labour law making process and reorganise the regulatory space within which these actors are operating.[503] Yet, some authors have also stressed that cooperation needs to be appropriately designed in order to result in increased capacities. While obvious, it is not always the case.[504]

The CTSD reports make reference of positive achievements linked to capacity building activities. The report of the fourth meeting of the CTSD under the EU-Central America FTA mentions that,

> **'[the] Board discussed and evaluated the results of events undertaken as a follow-up to the work priorities identified during the III meeting of the TSD Board in Tegucigalpa, namely an event on "Global Value Chains and Sustainable Development" carried out in Costa Rica in May 2017 and on "Decent Work, Corporate Responsibility and the EU-Central America Association Agreement Contributing to a Sustainable Economic Growth" held in May 2018 in Guatemala. Overall it considered that these events had had a very positive impact on strengthening of work on these issues in the region. Costa Rica mentioned the positive impact that it had had on work and coordination of various sectors for discussion and development of the National Policy on Social Responsibility. The broad participation and interest of various sectors in the event on decent work carried out in Guatemala was also noted. Based on these experiences it was agreed to continue efforts to boost these issues in the region.'[505]**

[501] In fact, the objective of enhancing social partners' capacities has been mentioned in several FTAs. See for instance, art. 135 of the EU-Moldova agreement, art. 370 of the EU-Georgia FTA and art. 443-444 of the EU-Ukraine FTA.

[502] This has been acknowledged by the Parties at several meetings. Two examples of that are the events on "Global Value Chains and Sustainable Development" carried out in Costa Rica in May 2017 and on "Decent Work, Corporate Responsibility and the EU-Central America Association Agreement Contributing to a Sustainable Economic Growth" held in May 2018 in Guatemala. The broad participation and interest of various sectors in these events was recognised. See: Report of the fourth meeting of the CTSD under the EU-Central America FTA Brussels, 13 June 2018, 8. In the same line, a study on the involvement of CSOs in the implementation of the TSD chapters has showed that cooperation building activities within the DAGs and CSFs can constitute an appropriate means to build up CSOs capacities to fulfil their missions. The study, which was based on desk reviews and interviews with key stakeholders, has highlighted that the DAGs and the CSFs appear to have been instrumental in increasing CSOs capacities. Lore van den Putte, "Involving Civil Society in the Implementation of Social Provisions in Trade Agreements: Comparing the US and EU Approach in the CSE of South Korea," *Global Labour Journal* 6, no. 2 (2015).

[503] For a discussion of how transnational private regulation in the domain of labour standards may affect the "power of play", see: Connor Cradden and Jean-Christophe Graz, *Transnational Private Authority, Regulatory Space and Workers' Collective Competences: Bringing Local Contexts and Worker Agency Back in* (Les Cahiers de l'IEPHI, 2015), 5–6. However, as the authors highlight, it is important to emphasise that the labour law making process is not simply a matter of power relationship. It also involves a technical and normative skills as well as the capacity to exert pressure. Therefore, the labour law making requires technical capacities to elaborate arguments and make effective proposals as much as capacities to pressure other actors towards preferred positions.

[504] This means, inter alia, that cooperation must be undertaken by actors who are involved in the implementation of the FTA. On this point, see: Polaski, "Protecting labor rights through trade agreements: An analytical guide," 23–24.

[505] Report of the fourth meeting of the CTSD under the EU-Central America FTA, Brussels, 13 June 2018, 8.

Thus, the reports relay the contracting Parties' positive appreciation of capacity building activities and their belief that these activities have contributed to improving the Parties' capacities to protect labour rights. While the exact measurement of this contribution surely raises methodological issues, it remains that they have been repeatedly recognised as a source of progress. For these reasons the EU recurrently encourages the other Party(ies) to engage in a sustained technical dialogue with the ILO.

iv) Work plans

The reports of the CTSD under the EU-Georgia FTA shed light on a fourth type of practices: the adoption of a "work plan."[506] *The work plan* is a programmatic instrument setting labour-related targets to the contracting Parties. The work plan adopted under the EU-Georgia FTA includes several rubrics among which the "Planned Activity"; the "Result/Output" to be achieved; "Indicators" for assessing the achievement of *the Result/Output*; the "Responsible Institution/Supporting Institution" in charge of undertaking the planned activity; the "Implementation Timeframe" for the achievement of the *Result / Output* ; and even a rubric on "Donor funding/technical assistance ongoing/planned" to specify the institution(s) allocating resources for the realisation of the *Planned Activity*.[507] Work plans do not explicitly figure in the cooperative provisions contained in the TSD chapters. As such, they constitute a fitting example of how vaguely worded labour provisions have allowed the contracting Parties to develop good practices. The adoption of a work plan is an important achievement in the cooperation between the Parties. In the case of the EU-Georgia trade agreement, it took several years for them to agree on its specific terms. The instrument they eventually drafted sets labour-related targets for the period 2018-2020.[508]

---

[506] Note that this practice has also been adopted by the CTSD under the EU-Ukraine FTA in a slightly different format. Indeed, the CSTD adopts so-called 'Operational Conclusions' at the end of each meetings. As such this contrasts with the multi-year work plan adopted by the CTSD under the EU-Georgia FTA. The *Operational conclusions* consist in a four columns document in which the contracting Parties define an agenda item, the Party which needs to undertake actions, the specific actions to be undertaken, and the deadline for its completion. See for instance the *Operational conclusions* of the third Ukraine-EU TSD Sub-Committee meeting held in Brussels 6 November 2019.

[507] This work plan is available on the website of the Georgian government under the following URL: http://www.dcfta.gov.ge/public/filemanager/publications/EU%20Georgia%20TSD%20work%20plan_2018-2020%20.pdf (last consulted on 15/01/2020).

[508] It is also crucial to note that the *Planned Activities* compiled in the EU-Georgia *work plan* are unilateral as they all pursue labour-related *Results/Outputs* peculiar to Georgia. In other words, none of the activities planned in this work plan aim at the promotion of labour rights within the EU. For a critique of unilateralism see: Harrison et al., "Labour standards provisions in EU free trade agreements: reflections on the European Commission's reform agenda". Talking about the TTIP, *Tham et al.* highlight that EU records in matters of labour rights protection is far from flawless. The authors write:

> **'So while it would be no doubt galling to many EU member states that the US is so transparently in breach of ILO standards, the same is true of EU member states, as well as EU law itself. Neither the EU members nor the EU are thus in any position to complain. So far as the member states are**

The work plan adopted under the EU-Georgia FTA is not legally binding upon the contracting Parties. Rather, it limits itself to defining political commitments. Consequently, the non-achievement of these commitments does not, as such, engage the international responsibility of the Parties. The work plan can be seen as an *accountability tool entailing some lock-in mechanism*, however. In other words, it constitutes an instrument stakeholders can refer to, to hold the Parties politically accountable. Indeed, 'transparency and accountability mechanisms make it more likely that poor performance will be detected and criticised, thereby raising the reputational costs for the state concerned, regardless of whether a norm is legally binding.'[509] On this backdrop, it is not unthinkable that a Party's non fulfilment of the commitments contained in the work plan would be used by the other Party as a stepping stone towards more formal actions under the dispute settlement procedure of their agreement's TSD chapter.

The analysis of the CTSD reports shows that several elements of the work plan adopted under the EU-Georgia FTA have come to fruition. Indeed, the fourth CTSD meeting's report referred to the fact that '[the] EU welcomed the adoption of the revised Georgian OSH law and on-going strengthening of the Labour Inspection Department's capacity as further steps towards aligning supervision and control in this area with international and EU standards.'[510] As such, the adoption of the revised Georgian OSH law concretises one of the *Results/Output* set in the work plan. The same positive achievements have also been observed at the fourth CTSD meeting for another area mentioned in the work plan, namely equal remuneration and non-discrimination.[511] While the evidence does not allow to conclude to the existence of an exclusive causal link between the inclusion of a *Result/Output* in the work plan and its

---

concerned, the United Kingdom is a notorious example of non-compliance with ILO standards, albeit that the United Kingdom is poised to leave the EU following a referendum in June 2016. Nevertheless, as recently as 2016 (at the time TTIP negotiations were taking place), the ILO Committee of Experts told the British government that proposed trade union legislation would if enacted violate the *Convention concerning Freedom of Association and Protection of the Right to Organise ('ILO Convention* 87'). Yet the United Kingdom is not alone, a recent study showing that no fewer than 22 of 28 EU member states are in breach of the freedom of association conventions alone. Work now needs to be done on the other six fundamental conventions, though it seems unlikely that problems quite as significant as those relating to freedom of association will be revealed. But this is not the end of the matter, with EU law itself in breach of ILO standards in a manner that seems impossible to remedy.'

(references omitted) Tham, Joo-Cheong and Ewing, K. D., "Labour Clauses in the TPP and TTIP: A Comparison Without a Difference?," 25–26.

[509] Bodansky, "Legally Binding versus Non-Legally Binding Instruments," 162.

[510] Report of the fourth meeting of the European Union-Georgia Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum, Brussels, 26 March 2019, 1.

[511] Report of the fourth meeting of the European Union-Georgia Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum, Brussels, 26 March 2019, 2.

achievement, the negotiated character, the articulate arrangement of *Planned Activity – Result/Output – Indicators – Responsible Institution*, as well as the accountability dimension peculiar to work plans seem to indicate the Parties' high degrees of commitments vis-à-vis the various objectives included in it.

v) Civil society involvement

The fifth category of practices relates to the involvement of the civil society in the cooperation mechanisms provided under TSD chapters. This constitutes another potentially significant development in matters of labour rights protection as it amounts to the further institutionalisation of social dialogue between the Parties and representatives of the workers and of the employers. Next to potentially increasing the CSOs' capacities, civil society involvement in cooperation activities has at least two implications for the regimes of labour rights protection: (1) it legitimises and it shields workers and employers' representation in their domestic polity; and (2) it enhances the collaboration between CSOs and the Parties for the implementation of the TSD chapters. Overall, civil society involvement can be considered to trigger empowerment mechanisms for the concerned stakeholders.

First, the DAGs and CSFs meetings contribute to legitimising and shielding workers and employers' representation in their domestic jurisdiction. This aspect is particularly important for workers and employers organisations active in countries where they are weakly represented, not given an appropriate role in the labour law making process, or even subjected to bullying, discriminations or other exactions. Thus, the establishment of the DAGs and of the CSFs helps mainstreaming workers and employers' representation. In turn, this supports their involvement in the labour law making process, it bolsters deliberation and democratic governance, and ultimately champions the democratic legitimacy of social regulation in the concerned jurisdiction.[512] In this regard some commentators have observed that 'the DAGs provide a mechanism for promoting domestic social dialogue and have provided civil society actors with a formal channel through which they can submit comments and criticisms to the governments.'[513] Accordingly, the establishment of the DAGs and of the CSFs within the TSD chapters and the work undertaken by these bodies have been repeatedly praised for their positive effects on social dialogue. One example among many is the mention in the CTSD's second

[512] For a similar analysis see: Orbie, Jan, Lore van den Putte, and Deborah Martens. "Civil Society Meetings in EU Free Trade Agreements: The Purposes Unravelled." In *Labour Standards in International Economic Law*, 135–52. Springer, 2018; Orbie, Martens and van den Putte, "Civil society meetings in European Union trade agreements: features, purposes, and evaluation" Orbie, Jan, Deborah Martens, and Lore van den Putte. "Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation." *Centre for the Law of EU External Relations (CLEER)* 3 (2016): 1–48.

[513] AISSI, Rafael PEELS and Daniel SAMAAN, "Evaluating the effectiveness of labour provisions in trade agreements: An analytical and methodological framework," 688–89.

meeting report under the EU-Central America FTA that '[the] parties stressed the usefulness of [Domestic Advisory Groups] as a tool for strengthening public-private dialogue on trade and sustainable development.'[514] Yet, the legitimising and shielding effects resulting from the establishment of these bodies are not automatic. Indeed, in spite of the benefits that have been widely recognised to it, the establishment of DAGs and CSFs puts the participating CSOs under a new spotlight that is sometimes regarded with hostility in countries with weak democratic cultures. As a consequence, some of these organisations have yet again communicated their unease or even their worry to be critical of their authorities within the DAGs and the CSFs.

Second, civil society's involvement in cooperation activities enhances the collaboration between CSOs and the Parties for the implementation of the TSD chapters. More specifically, monitoring the implementation of the labour commitments at the CTSD meetings appears to be resources intensive, to raise issues of workload and of specific know-how.[515] On this backdrop, the Parties have called the DAGs and the CSFs to play a more substantial role in providing them with first-hand information and expertise. In the past, the DAGs have provided the CTSDs with expert reports on specific issues. This was for instance the case of the EU DAG opinion on the "Fundamental rights at work in the Republic of Korea, identification of areas for action" in 2013[516] and of the EU DAG opinion on "The European Union's vision and practice of Corporate Social Responsibility (CSR): contribution of the EU Domestic Advisory Group under the EU-Korea FTA" in 2014.[517] However, in spite of the CTSDs emphasis on the importance of good communication with strong DAGs[518] and notwithstanding the Committees' recurrent calls for an increased collaboration with the DAGs,[519] the reception and use of the DAGs work

[514] Report of the second meeting of the Board on Trade and Sustainable Development to the Civil Society Dialogue, held in Brussels on 27-28 May 2015, 1.
[515] Point raised by a Canadian official at the CSF of the EU-Canada CETA, organised in Ottawa on 12 November 2019. For a glance at the meeting records see: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2019-11-12-report-soc-civ-rapport.aspx?lang=eng (last consulted on 25/09/2020).
[516] This opinion is available on the website of the EESC under the following URL: https://www.eesc.europa.eu/en/documents/opinion-fundamental-rights-work-republic-korea-identification-areas-action (last consulted on 15 January 2020).
[517] This opinion is available on the website of the EESC under the following URL: https://www.eesc.europa.eu/sites/default/files/resources/docs/eu-dag-opinion-on-csr_en.pdf (last consulted on 15/01/2020).
[518] For instance, the report of the fourth CTSD meeting under the EU-Central America FTA mentions that, '[…] the TSD Board underlined the importance of maintaining an open channel of communication with the Advisory Groups and in turn highlighted the importance of strengthening the work they carry out. To this end, it was agreed to include the strengthening of these groups as one of the points in the work plan to be prepared by the Board.' See: Report of the fourth meeting of the CTSD under the EU-Central America FTA, Brussels, 13 June 2018, 7-8.
[519] See for instance the call made by the CTSD in this sense at the third CTSD meeting under the EU-Korea FTA. Report of the third meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA, Brussels, 8 December 2014, 1.

has been disputed. CSOs have indeed complained that their work and recommendations were not enough taken into consideration by the contracting Parties.[520] Along a similar line, the practice has developed over the years of organising the CSF and the CTSD meetings, back to back, during the same week. This allows to create a momentum on the discussion of trade and sustainable development and to bring as much stakeholders as possible together. This has also facilitated interactions between civil society and government representatives. This is most visible in the cross participation of representatives of each body to the other body's meeting. Hence, delegates of the contracting Parties attend the CSF meeting where they generally report on the CTSD meeting work and *vice versa*. CSOs have however raised complaints regarding the back to back organisation of these meetings. Namely, they regret that the CSFs meeting are generally scheduled after the CTSD meeting so that the work of the former cannot serve as input for the latter, thus undermining its relevance. Overall, the cooperation between the governmental and the nongovernmental bodies has been positively assessed and repeated calls have been made towards more of such collaboration.

Overall, the analysis of the CTSD reports has allowed to identify five cooperation practices which set into motion mechanisms that can affect the determinants of labour law. Hence, dialogue and the exchange of information trigger *sunshine and moral suasion* control dynamics; calls and exhortations activate *naming and shaming* mechanisms; capacity-building activities *initiate empowerment cycles* which can enhance states, firms and CSOs capacities; the drafting of work plans establish *accountability tools*; and civil society involvement in cooperation activities set in motion processes aiming at: (i) *legitimizing and shielding* workers and employers' representation in their domestic jurisdiction ; and (ii) *enhancing the collaboration* between CSOs and the Parties for the implementation of the TSD chapters. The Parties have acknowledged some achievements linked to these mechanisms. This indicates their recognition of possible *connection paths* between the concerned cooperation practices and achievements which may relate to the determinants of labour law.

4.3.2. Cooperation activities under the Regulatory Cooperation chapters

Cooperation activities relating to labour law under the Regulatory Cooperation chapters of the CETA and the EU-Japan FTAs have not been undertaken yet. The relatively recent entry into force of these agreements and arguably the more complex and sensitive nature of regulatory cooperation in matters of labour law may explain the absence of regulatory cooperation in this domain so far. More

[520] Complaint raised by some European CSO at the CSF of the EU-Ukraine DCFTA, organised in Brussels on 7 November 2019. For a broader discussion of the civil society perception of its involvement in the monitoring of TSD chapters see: "Evaluation of DG TRADE's Civil Society Dialogue in Order to Assess Its Effectiveness, Efficiency and Relevance." 2014. While this report dates from 2014, some of the concerns raised by CSOs are still relevant.

specifically, as of July 2020 regulatory cooperation activities have been organised twice under the CETA, in late 2018 and in early 2020.[521] In the running up to the first meeting of the Regulatory Cooperation Forum (**the RCF**), the EU and Canada had organised a call for submission, asking stakeholders to make proposals on the topics they would like to see treated by the RCF. The authorities received a relatively important number of responses.[522] Those coming from labour rights advocacy groups were few and limited themselves to enouncing general principles for good practices during the regulatory cooperation process.[523] Eventually, five subject matters were considered ripe enough to be put at the agenda of the first meeting. Labour law did not figure among them.[524] Importantly, under the regime provided in the Regulatory Cooperation chapters, while topics can be put forward by interest groups which may suggest to undertake regulatory cooperation activities on defined issues, the Parties are the one who decide in last instance whether regulatory cooperation on a certain topic will be organised or not.

Overall, it seems that a set of conditions need to be met for regulatory cooperation in matters of labour law to take place. Indeed, the knowledge of different legal systems, the expertise in the specific field of labour law, internal struggle between different interest groups at the domestic level, among others, constitute several important impediments to undertake regulatory cooperation in this specific policy domain. On this backdrop, the institutional setting established in TSD chapters including governmental and non-governmental bodies (which both call for more cooperation) potentially constitutes an appropriate venue to launch joint initiatives to cooperate in matters of labour regulation. This would however require the mobilisation of additional resources. Clearly this mechanism still needs to develop

[521] Note that the first meeting of the RCF under the EU-Japan FTA was organised on 20 January 2020. This RCF however largely aimed at launching the regulatory cooperation process between the Parties and address organisational issues. See the minutes of the meeting report: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158667.pdf (last consulted on 21/07/2020).

[522] For a glance at these submissions see: https://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=118 (last consulted on 21/07/2020).

[523] See for instance the letter sent by Vakcentrale voor professionals, 13 February 2018: file:///C:/Users/Win10%20Pro%20x64/Desktop/cooperation%20in%20EU%20PTAs/EU-Canada%20documents/2018-02%20!%20regulatory%20cooperation%20letter%20trade%20union%20tradoc_156693.pdf (last consulted on 20/06/2020)

[524] For a summary of this first meeting see the website of the Canadian government: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2018-12-14_rcf_report-rapport_fcr.aspx?lang=eng (last consulted on 21/11/2019). The report of this meeting informs that the Parties discussed the following topics: Cybersecurity and the Internet of Things; Animal Welfare – transportation of animals; "Cosmetics-like" Drug Products; Pharmaceutical Inspections and; Exchange of information between the EU RAPEX alert system and RADAR, Canada's consumer product incident reporting system. At the second RCF meeting in early 2020, three other subjects were added to this list: Wood pellet boilers; Standards Council of Canada and CEN-CENELEC Agreement; and Paediatric medicines. See: https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158818.pdf (last consulted on 23/07/2020).

and advocates of labour rights must invest substantial capacities if they want to use it to their advantage. The benefits that can potentially result from these efforts are numerous however. As already explained above, contracting Parties may ask the other Party for information or clarifications regarding some of its existing labour legislations or project drafts. Parties can consider the conformity of the existing or planned regulatory measures with the labour commitments contained in the TSD chapter and can assess their effect on trade flows. Under the EU-Japan trade agreement, a Party can even raise concerns regarding a project draft. These concerns can further lead to formal consultations between the Parties. Thus, the regimes set under the Regulatory Cooperation chapters allow to subject the labour law-making process to the mutual scrutiny of the Parties, and make it possible to discuss, and potentially contest the appropriateness of a draft of regulation before it is adopted.[525]

4.4. Findings relating to the analysis of cooperation mechanisms in EU trade agreements

International agreements are often assessed on the strength of the commitments they include. Accordingly, treaties can be adored or abhorred depending on whether they establish strong commitments towards ambitious goals, or on whether they adopt weak engagements towards vague objectives. This has not been otherwise for labour commitments in EU FTAs.[526] Yet, the EU overt preference for a so-called "cooperative approach" in matters of labour rights protection invites researchers to adjust their focal point, and to pay at least as much attention for cooperation mechanisms provided in EU trade agreements as they do for labour commitments. This was the goal pursued in this chapter – to complement the study of labour commitments with an analysis of cooperation mechanisms in labour-related matters.

This analysis has allowed to gain a detailed understanding of the regime for labour rights-related cooperation provided in the ten covered EU FTAs. In this regard, it has identified cooperation mechanisms under TSD chapters, as well as cooperation mechanisms under the Regulatory Cooperation chapters of the CETA and of the EU-Japan FTA. While the former were characterised by strict obligations to cooperate combined with vague modalities of cooperation, and a relatively

[525] Interestingly, art. 21.2§3 of the CETA provides for the possibility to open participation to regulatory cooperation to other international trading partners. This mechanism thus allows for the enlargement of regulatory cooperation to other countries so as to jointly treat common regulatory concerns. Concretely, the CETA contracting Parties can invite other like-minded countries concerned with the relation between international trade and labour rights protection to discuss joint undertakings with respect to the enhancement of labour rights protection.

[526] For analysis of the regimes of labour protection provided in EU FTAs see for instance: Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA,* University of Cambridge Faculty of Law Legal Studies (2017) PAPER NO. 13/2017; Bartels, "The EU's approach to social standards and the TTIP"; Cross, "Legitimising an unsustainable approach to trade: a discussion paper on sustainable development provisions in EU Free Trade Agreements"; Namgoong, "Two Sides of One Coin, The US-Guatemala arbitration and the dual structure of labour provisions in the CPTPP".

articulate institutional setting, the latter was distinguished by the absence of strict obligation to undertake regulatory cooperation combined with the definition of a detailed framework in case regulatory cooperation would nonetheless take place. Then, this dissertation has analysed how these cooperation mechanisms have been used by the Parties.[527] While Parties have made regular use of the cooperation mechanisms provided under TSD chapters, they have not yet taken advantage of the possibilities offered by regulatory cooperation in labour-related matters. Therefore, this chapter has focused on the former mechanisms and has reviewed the CTSD annual reports on cooperation activities under the EU-RSK, the EU-Central America, and the EU-Georgia FTAs. This review has resulted in the identification of five cooperation practices : i) dialogue and the exchange of information; ii) calls and exhortations; iii) capacity building activities; iv) work plans; and v) civil society involvement. The analysis of each of these cooperation practices has allowed to shed light on possible "connection paths" between cooperation practices and achievements acknowledged by the Parties. The following paragraphs come back on this analysis and present more specifically the different ways in which the cooperation practices may affect the determinants of labour law.

First, *dialogue and the exchange of information* trigger sunlight and moral suasion mechanisms. In other words, these practices initiate control dynamics based on the exposure of the domestic state of play, and possibly of the non-compliance with certain labour commitments. While dialogue and the exchange of information can have implications for each of the determinants of labour law depending on the specific subject they address, one may consider that the sunlight and moral suasion mechanisms they activate are most powerful with respect to the non-compliance with labour commitments, thus relating to the legal determinant of labour law. None of the positive achievements mentioned in the CTSD reports can be directly linked to this cooperation practice however. As a consequence, this specific connection path is not confirmed by the analysis of the reports. Despite the absence of acknowledged achievements, one can consider that this practice is critical for the cooperation between Parties and instrumental in establishing other cooperation activities having potential implications for the determinants of labour law and thus for the states' regulatory space.

Second, *calls and exhortations* are a logical follow-up to the dialogue and the exchange of information practice. More specifically, they entail occurrences of naming and shaming further activating accountability and pressure mechanisms. As it is the case with respect to dialogue and the exchange of information, calls and exhortations can have implications for each of the determinants depending

[527] Considering that no regulatory cooperation on labour-related matters has been undertaken yet, the analysis has focussed on the use of cooperation mechanisms provided in the TSD chapters.

the specific subject they address. However, one may consider that the accountability and pressure mechanisms they trigger are most effective with respect to the lack of compliance with labour commitments, thus relating to the legal determinant of labour law. This practice has been recurrently observed at the CTSD meetings. In several cases, this was followed by the adoption of the demanded measure. A good example is that of law enforcement in the relationship between the EU and Georgia.[528] However, the reports do allow to exclusively attribute the adoption of the measures in question to the *calls and exhortations*. As a consequence, one can hardly determine the extent to which these practices have contributed to reaching the achievements in question. Thus, while one cannot conclude that calls and exhortations constitute the panacea for compliance with labour commitments under TSD chapters, they can be considered to constitute an important stage in the process of increasing pressure on the Parties.

Third, *capacity building activities* have been pursued in order to respond to specific issues, such as the Parties' lack of expertise and their application of inefficient practices. Capacity building activities set in motion empowerment mechanisms beneficial to the participating stakeholders. CTSD reports have shown that capacity building activities relate to the resources-determinant of labour law. More specifically, the analysis of the CTSD reports has allowed to identify several positive achievements linked to capacity building activities. For example, the report of the fourth meeting of the EU-Central America CTSD relayed the Parties' positive appreciation of these activities and their belief that they have contributed to improving their capacities to protect decent work.[529] While, the reports point to the existence of relatively clear connection paths between capacity building activities and the resources-determinant of labour law, there is no automatic causal link between both. As some authors have argued, cooperation needs to be appropriately designed in order to result in increased capacities.[530] Finally, note that the effects of capacity building activities on the resources-determinant are conform with the normative reference defined in this dissertation as they guarantee and enhance the resources of the actors involved in the labour law making, monitoring and enforcement process.

Fourth, in the *work plans* Parties commit to adopt certain measures and to proceed to certain reforms. Work plans are accountability tools entailing some lock-in mechanisms. In other words, they constitute

[528] Report of the second meeting of the Georgia – European Union Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum, Brussels, 30 November 2016, 1. See also Report of the third meeting of the Georgia–European Union Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum. Tbilisi, 20 March 2018, 1-2.
[529] Report of the fourth meeting of the CTSD under the EU-Central America FTA, Brussels, 13 June 2018, 8.
[530] This means, inter alia, that cooperation must be undertaken by actors who are involved in the implementation of the FTA. On this point, see: Polaski, "Protecting labor rights through trade agreements: An analytical guide," 23–24

instruments stakeholders can refer to, to hold the Parties politically accountable. Given the diversity of 'Results/Outcomes' that can be striven for in the work plans, one may consider that they can have implications for the legal, the institutional and the resources determinants of labour law. The analysis of the CTSD reports shows that several elements of the work plan adopted under the EU-Georgia FTA have come to fruition, including the adoption of the revised Georgian OSH law and the ongoing strengthening of the Labour Inspection Department's capacity.[531] However, the reports do not provide evidence that would allow to conclude to the existence of an exclusive causal link between the inclusion of a "Result/Output" in the work plan and its achievement. Yet, the negotiated character of work plans, the articulate arrangement of "Planned Activity" – "Result/Output" – "Indicators" – "Responsible Institution" they provide for, and the accountability mechanisms they establish point to high degrees of commitments vis-à-vis the various objectives they include.

Fifth, *civil society involvement* in cooperation activities contribute to (i) legitimising and shielding workers and employers' representation in their domestic jurisdiction ; and to (ii) enhancing the collaboration between CSOs and the Parties for the implementation of the TSD chapters. Similarly to the capacity building activities, this triggers empowerment mechanisms which enhance CSOs monitoring, consultancy and advocacy functions. In this sense, civil society involvement relates to the institutional determinant of labour law. Indeed, it amounts to the further institutionalisation of social dialogue between the Parties and representatives of the workers and the employers, thus promoting tripartism. The reports include several examples of the DAGs and the CSFs positive effects on social dialogue,[532] thus allowing for the identification of a relatively clear connection path between civil society involvement and the institutional determinant of labour law. Yet, in spite of the benefits that have been widely recognised to CSOs involvement, some organisations have communicated their unease to be critical towards their authorities within the DAGs and the CSFs for a for fear of reprisals. This indicates that the effects of this practice may be, in cases, more complex than "just" empowering CSOs.

While this dissertation identified the existence of connection paths between certain cooperation practices and the determinants of labour law, three important caveats need to be made with respect to the contribution of these paths to the general assessment of states' regulatory space for labour law. To begin with, the research has limited itself to highlighting the existence of connection paths between cooperation activities and *the determinants of labour law*. As such, it does *neither* investigate the

[531] Report of the fourth meeting of the European Union-Georgia Sub-Committee on Trade and Sustainable Development Joint statement to the Civil Society Dialogue Forum, Brussels, 26 March 2019, 1.
[532] Report of the fourth meeting of the CTSD under the EU-Central America FTA, Brussels, 13 June 2018, 1.

effects of cooperation practices on *the regime of labour rights*, *nor* the effects of cooperation practices *on working conditions on the ground*. In more technical terms, this dissertation is concerned with the assessment of labour provisions' implications for *proximate outcomes*, and not with the implications for *distant outcomes*.[533] The second caveat pertains to the fact that interferences may interrupt the connection paths. More specifically, the paths connecting the cooperation practices with the determinants of labour law are constituted of two elements. First, specific social mechanisms have been linked to each cooperation practice. For instance, it has been showed that *dialogue and the exchange of information* may trigger sunlight and moral suasion mechanisms. Second, certain achievements have been linked to each cooperation practice. Overall, this has given shape to connection paths constituted of three elements: a cooperative practice, a social mechanism, and certain achievements. Yet, interferences may occur at the juncture between these different elements. In other words, the organisation of a specific cooperation activity does not *automatically* entail implications for the determinants of labour law, let alone implications that are consistent with the normative references identified in this dissertation. This can be the case for various reasons such as the inappropriateness of cooperation activities to reach the determinants of labour law, and the stakeholders' lack of willingness to integrate new practices. Third, the Parties' joint acknowledgement of certain achievements linked to specific cooperation activities appears sufficiently compelling to infer that these activities may have *some* effects on the determinants of labour law. However, it does neither allow to draw conclusions on the magnitude of these effects, nor on the fact that they are the sole factor causing the achievements in question.

In conclusion, this dissertation's key finding with respect to cooperation mechanisms under TSD chapters is that they have given shape to several practices which may affect the determinants of labour law in ways that are conform with the normative references set in this dissertation. Overall, next to the labour commitments, cooperation activities represent a second means by which labour provisions reshape the Parties' regulatory space for labour law.

[533] This terminology is borrowed from Aissi et al. development of an analytical framework for the assessment of the effectiveness of labour provisions in FTAs. See: Aissi, Jonas, Rafael Peels, and Daniel Samaan. "Evaluating the Effectiveness of Labour Provisions in Trade Agreements – an Analytical Framework." *International Labour Review*, 2017. In this article, the authors distinguish between proximate and distant outcomes for labour provisions. They argue that labour provisions generally aim to affect proximate outcomes such as CSO empowerment, states capacities etc. In turn, the modification of proximate outcomes can have implications for distant outcomes, such as the improvement of the levels of protection.

5. Conclusions

To say that free trade agreements have been harshly criticised over the past years is not a scoop. At the most it is an understatement. The claims that they are socially harmful, that they boost inequalities, and that they force countries to undercut their levels of protection feature among the most repeated complaints against these instruments. A recent *Eurobarometer survey* has put figures on the longstanding concern that trade agreements reduce states' regulatory space for labour law. 15% of the surveyed Europeans declared that FTAs 'limit the ability of their country to pass new laws which would contradict these agreements in order to protect workers, the environment, health or education.'[534] To address this lasting preoccupation, the EU has progressively developed a regime of labour rights protection in its trade agreements. This regime has now reached a certain level of maturity.[535] With labour provisions' coming of age, the question raises as to whether they appropriately address the concerns of regulatory space loss. On this backdrop, this dissertation strived to answer the following question:

How do labour provisions in EU FTAs reshape the Parties' regulatory space for labour law?

Behind this question, there is nothing less than the evaluation of the EU response to a key aspect of the backlash against its trade agreements. Whether labour provisions appropriately address this backlash or whether they amount to a kind of red-washing is ultimately what this dissertation aimed to appreciate.

While the concept of *regulatory space* has been widely used in the scientific literature for more than two decades,[536] its application to labour regulation specifically and this dissertation's coining of the term *regulatory space for labour law* are new. Therefore, the first endeavour of this work was to clarify this term. Hence, the understanding of *regulatory space for labour law* that has been handled in this dissertation is rooted in the idea that labour regulation is the output of complex interactions between several factors and that these factors define the space within which labour law making takes place. Accordingly, five determinants have been identified as crucial for the making and the transformation

[534] See: EU Commission, Special Eurobarometer 491, Europeans' attitude on trade and EU trade policy, 2019, p. 59.

[535] For a general discussion of the evolution of labour provisions in EU FTAs and of the EU proposed way forward, see: Harrison et al., "Labour standards provisions in EU free trade agreements: reflections on the European Commission's reform agenda". For the EU recent reaffirmation of its approach to labour rights protection in the TSD chapters of its trade agreements, see: "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements." February 26, 2018.

[536] The term "regulatory space" has been coined by Hancher and Moran in an article of 1998. See: Hancher and Moran, "Organizing Regulatory Space".

of labour law. These determinants are : (i) the labour market's characteristics; (ii) the institutional framework in place; (iii) the available resources; (iv) the applicable international commitments; and (v) the prevailing ideology. The relative weight of these factors, the manner they are combined, and the way they are operationalised are specific to each country and eventually give shape to different regimes of labour rights protection. The plurality of regimes that results from these different configurations raises the question of whether one of them should be considered better than the others and should therefore be universally striven for. Given the diversity of legal cultures and of socio-economic conceptions of a "good society," this dissertation did not contend that a certain regime of labour law is superior and should consequently be applied everywhere. Instead, it aimed to define the optimal framework within which each regulator could adopt the labour laws that correspond best to the domestic preferences. This framework was sketched by a specific understanding of how the determinants of labour law should be customised, thus leading to the definition of normative targets for each determinant. In other words, rather than putting forward a specific regime of labour law, this work considered that it is more appropriate to identify the optimal framework within which each regulator can define its legislation. By and large, the understanding of *regulatory space for labour law* developed in this dissertation aimed to propose to the reader a concept that would account, in a clear fashion, for the complexity of labour law, and that would offer at the same time a practical approach to consider the various ways in which labour provisions can affect regulatory space for labour law.

Overall, the specification of the analytical framework handled in this dissertation – through the identification of five determinants forming the regulatory space for labour law, and of normative references linked to each of these determinants – called for a reformulation of the research question in the following two questions :

> How do the labour provisions in EU FTAs address the determinants of labour law? And are labour provisions' implications for the determinants of labour law conform with the normative references?

This reformulation of the puzzle at the core of this work highlighted the fact that judging labour provisions in EU FTAs on the basis of whether or not they address the determinants of labour law, let alone in a manner that is consistent with the normative references, would not entirely do justice to the EU. Indeed, this assessment should be accompanied by a clarification of the Union's competences in matters of labour rights. Only then could we gain a better understanding of the extent to which the EU can address these determinants altogether. This clarification required us to investigate the division of competences provided in the EU fundamental treaties. In this regard, to say that the treaties

distribution of competences is not always clear is nearly a syllogism. In its *Opinion 2/15* of 16 May 2017, the CJEU attempted to bring some clarity in the division of competences relating to the different matters treated in the EU-Singapore FTA. With respect to labour provisions, the CJEU defined what this dissertation called a "regulation of the levels of social protection-threshold." Depending on whether labour provisions find themselves on one side or the other of this threshold, they fall under the EU exclusive competences, or under the competences shared between the EU and its Member States. More specifically, labour commitments setting new levels of social protection fall under the competences shared between the EU and its Member States. In turn, labour commitments which do *not* establish new levels of protection belong to the exclusive competences of the EU. Ultimately, this dissertation showed that the *regulation of the levels of social protection-threshold* is most relevant for the determination of the procedure applicable for the adoption of the FTA in question. While treaty provisions that fall under the exclusive competence of the EU are adopted by the EU alone, those corresponding to competences shared between the EU and its Member States are either adopted by the EU alone or by the EU and its Member States jointly.[537] To make a long story short, the design of labour provisions is not only crucial for the regime of workers' protection it provides for, but also for the definition of the procedure applicable for the adoption of the agreement, and thus for its likelihood to be adopted altogether.

Thus, two important caveats have been formulated in the prelude to the assessment of labour provisions. While the first aimed to refine our understanding of the concept of regulatory space for labour law, the second strived to specify the EU margin of action when negotiating and drafting labour provisions in its FTAs. These conceptual and legal clarifications made, the dissertation turned to the analysis of labour provisions as such. This analysis was constituted of two elements: the labour commitments and the cooperation mechanisms contained in the EU trade agreements. The following paragraphs present the findings of this research with respect to each element.

Regarding labour commitments, this dissertation has identified eleven types of clauses disseminated around ten FTAs. These clauses have been classified into four categories: (i) the clauses defining the Parties' rights to regulate; (ii) the clauses defining commitments towards minimum levels of protection; (iii) the clauses defining commitments towards the enhancement of the levels of protection; and (iv) the clauses defining commitments towards upholding of levels of protection. The analysis of these four categories of clauses has highlighted their wide diversity of legal character.

[537] As explained in *Section 2.2.3. The EU regulatory space for labour law and the "regulation of the levels of social protection-threshold"*, the decision to follow the EU alone or the co-decision procedure is ultimately a political choice made by the EU Council. So far, the co-adoption procedure has always been preferred.

Eventually, this dissertation made two key findings regarding labour commitments included in the EU trade agreements. First, labour commitments mainly relate to *the legal determinant of labour law* and have only marginal implications for it, thus barely reshaping states' regulatory space for labour law.[538] As a matter of consequence, labour commitments minimally address the concern that trade agreements reduce states' regulatory space for labour law. Second, labour commitments give shape to a what this dissertation called a "dual structure of domestic labour law." More specifically, the analysis of the legal character of the labour commitments showed that TSD chapters establish a strong protection for a limited set of internationally recognised standards, and a much softer protection for the remaining labour rights. These observations allowed us to question labour commitments' capacity to protect a big chunk of labour rights altogether. While these findings may appear intuitive to the informed reader, their specification in this dissertation constitutes an important contribution to understanding the regime of labour rights protection provided in EU FTAs.

Regarding the implications of cooperation mechanisms for the determinants of labour law, this dissertation set the focus on cooperation activities conducted under the TSD chapters. In this regard, it reviewed the annual reports of the meetings organised under the EU-RSK, the EU-Central America and the EU-Georgia FTAs. These three trade agreements are among the earliest EU FTAs including a TSD chapter and their longer period of application has enabled the development of more extensive cooperation activities. The review of the CTSD reports has resulted in the identification of five cooperation practices which may have implications for the various determinants of labour law : i) dialogue and the exchange of information; ii) calls and exhortations; iii) capacity building activities; iv) work plans; and v) civil society involvement. The analysis of each of these cooperation practices has allowed to shed light on "connection paths" between cooperation practices and the determinants of labour law. In other words, this dissertation has demonstrated that cooperation activities feature as a way for the contracting Parties to reshape the determinants of labour law. Three caveats were however expressed with respect to the inferences that could be drawn from the existence of connection paths. First, the connection paths do not allow us to make findings on how cooperation activities affect the regime of labour rights and labour conditions on the ground. Second, interferences may interrupt the connection paths. Therefore, the organisation of a specific cooperation activity does not *automatically* entail implications for the determinants of labour law. Third, the method used in

[538] We noted an important exception to this finding, namely the commitments towards the approximation of the laws to EU practices included in the EU-Ukraine, in the EU-Georgia, and in the EU-Moldova FTAs. In these three agreements, the commitments apply exclusively to the EU respective trading partners and imply a substantial modification of their legal determinant of labour law.

this research for the identification of connection paths does not allow to draw conclusions on the magnitude of cooperation actives' effects on the determinants of labour law.

Thus, two elements of labour provisions have been considered to answer the research question, labour commitments and cooperation mechanisms. Both elements have proven to entail different implications for the Parties' regulatory space. While labour commitments have displayed only marginal implications for the legal determinant of labour law, the analysis of cooperation activities has revealed potential implications for several determinants. *Figure 5* below represents how the labour provisions in EU FTAs act upon the determinants of labour law, thus reshaping the Parties' regulatory space for labour law.

FIGURE 5: CONCEPTUAL REPRESENTATION OF THE LABOUR PROVISIONS IMPLICATIONS ON REGULATORY SPACE FOR LABOUR LAW

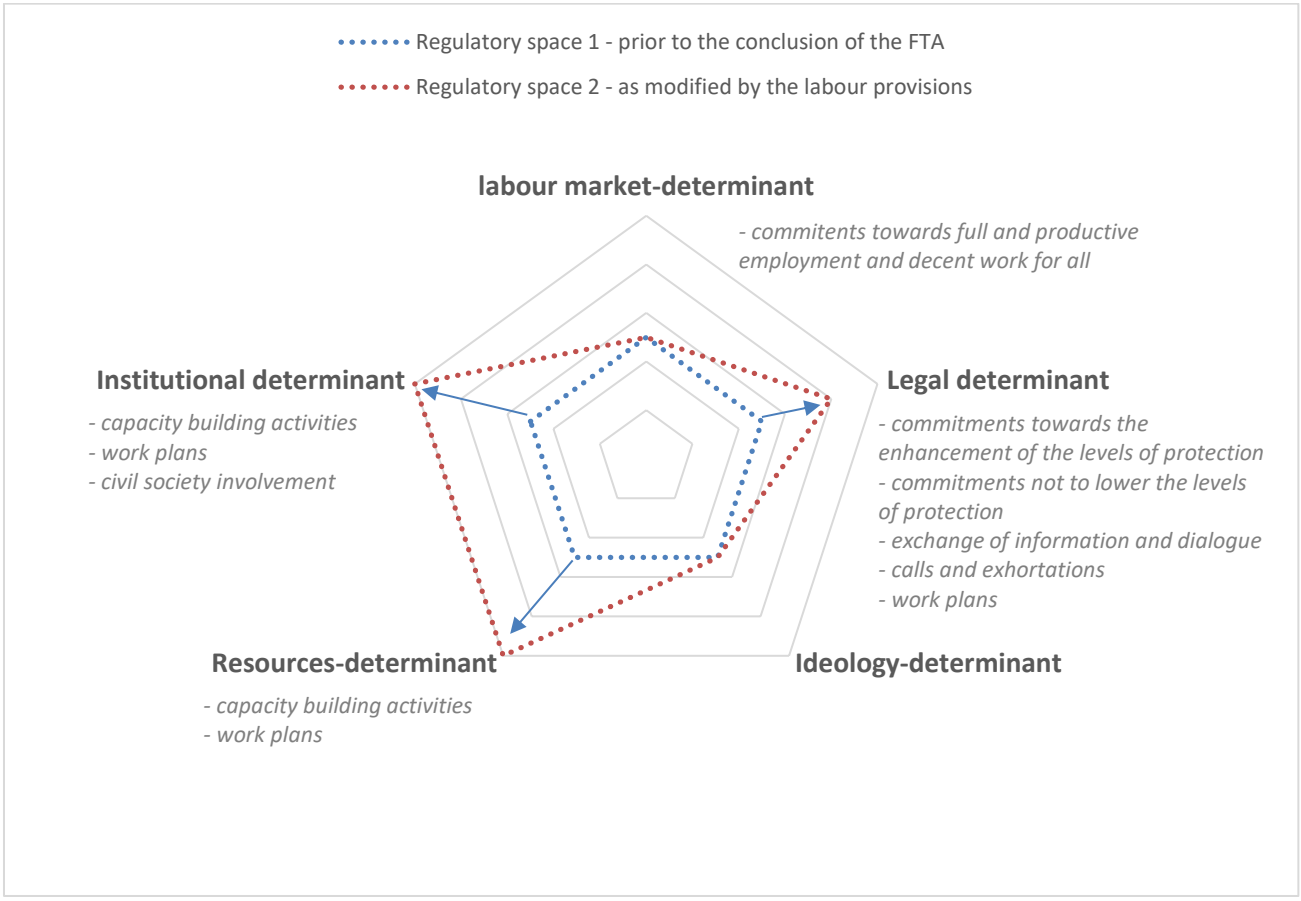


Figure 5 schematises the potential implications of the labour commitments and the cooperation practices for the determinants of labour law. The evolution from *regulatory space 1* (the blue shape) to *regulatory space 2* (the red shape) is represented "in a gross sense" and aims to depict the general effects of the labour commitments and of the cooperation activities on each determinant.

Consequently, the increase in the surface from *regulatory space 1* to *regulatory space 2* is neither scaled nor proportional, and a more accurate representation of this evolution would most likely result in a marginal increase of the superficies. Moreover, the increases are most likely to be different depending on the considered country. Indeed, one can expect labour provisions to have varying effects on the regulatory space depending on the original position of the concerned country, and on the way the cooperation practices affect its determinants of labour law. For instance, civil society involvement and capacity building activities have hypothetically different effects for the institutional determinant of labour law in Central American countries than they have for the most advanced European economies. The following paragraphs briefly discuss the evolutions of the regulatory space for each determinant.

Regarding the labour market determinant, commitments towards full and productive employment (and decent work for all) touch upon the characteristics of the labour market. These commitments, which can be found in all agreements but the CETA, have a relatively weak legal character however. What is more, they replicate pre-existing commitments. Hence, while the commitments towards full and productive employment correspond to the normative reference endorsed by this dissertation – according to which countries must adopt measures striving towards full employment –, the replication of pre-exiting commitments entails that they do not have implications for the labour market determinant.

With respect to the institutional determinant, none of the labour commitments discussed in this dissertation directly addressed this determinant. In turn, this dissertation has highlighted that three types of cooperation practices trigger mechanisms that can have implications for the institutional framework: the capacity building activities, the work plans, and the civil society involvement. Moreover, it has been shown that each of these cooperation practices can contribute to guaranteeing and enhancing tripartism, thus conforming the corresponding normative reference.[539]

Regarding the resources-determinant, none of the labour commitments discussed in this dissertation directly addresses this factor. With respect to the cooperation practices, this dissertation has outlined capacity building activities and work plans as possible instruments to improve the resources-determinant of labour law. The analysis of the CTSD reports has allowed to identify several positive achievements linked to work plans and capacity building activities and a widespread appreciation of

[539] Tripartism has been characterised in this research as a cooperation process, where state authorities, representatives of the employers and representatives of the workers jointly engage in consultation and in co-decision.

these practices by the concerned stakeholders. As such, these practices and the acknowledged achievements correspond to the normative position adopted by this dissertation according to which appropriate measures need to be taken in order to guarantee and enhance resources for all actors involved in the labour law making, monitoring and enforcement process.

With respect to the legal determinant, the analysis of the labour commitments has shown that the commitments towards the enhancement of the levels of protection, and the commitments not to reduce the levels of protection are the only commitments setting *new* obligations for the contracting Parties. However, these commitments have a weak legal character and have therefore only marginal implications for the legal determinant of labour law. As a matter of consequence, it appears that labour provisions in EU trade agreements do not have significant effects for the Parties' regulatory space for labour law. With respect to the cooperation activities, this dissertation has shown that three types of practices may have implications for the legal determinant of labour law: the exchange of information on the Parties' domestic situation in matters of labour rights protection; calls and exhortations; and work plans. Though, the direct contribution of dialogue and the exchange of information, and of calls and exhortations could not be formally identified. Furthermore, examples have highlighted that the undertaken cooperation practices were conform with the normative reference defined in this dissertation. As such, the cooperation practices in question appear as an appropriate instrument in order to help countries further adjust their legal determinant according to the normative targets.

Finally, regarding the ideology-determinant neither the labour commitments nor the cooperation activities have demonstrated to have direct implications for this determinant.

Overall, this research finds that labour commitments have marginal implications for states' regulatory space for labour law, thus minimally addressing the concern that trade agreements reduce regulatory space. In turn, cooperation mechanisms provided in EU trade agreements have demonstrated to have the potential to affect the various determinants of labour law in a manner that is conform with the normative references. These findings allow to conclude that the EU response to a key aspect of the backlash against its trade agreements shows some positive developments. However, the extent of these development may not prove sufficient in order to address public concerns. Indeed, the weak protection of a substantial part of what constitutes domestic labour law, highlighted by the concept of the *dual structure of domestic labour law*, the unsystematic effects of cooperation activities on the determinants of labour law, as well as the unclear extent of these effects reveal several weaknesses of the current regime of labour rights protection under EU FTAs.

While we may all wish for rapid and significant betterments of labour rights across the world, such achievement is rather unsure, and improvements may just as well take the form of piecemeal developments, here and there, over a long period of time, if at all. Labour legislations and labour related practices largely correspond to the DNA of a legal culture, not to say of a culture more fundamentally. In this regard, new legislations and new practices can hardly be imposed on authorities and other stakeholders against their will. Changes in these domains must above all be mind changes. Hence, merely relying on labour commitments to improve the labour rights on the ground appears to be both philosophically and methodologically unsatisfactory. In fact, the interpretation key offered by this dissertation in order to understand the design of labour provisions in EU FTAs – namely that the regime of labour rights protection provided in EU trade agreements is dependent upon the distribution of competences between the EU and its Member States – offers additional arguments to further enhance the cooperative approach to labour rights protection. Indeed, the *regulation of the levels of social protection-threshold* sets a clear yardstick that can hardly be circumvented when designing labour provisions. As such, it represents a major obstacle for the upgrading of labour commitments. Therefore, in the absence of a modification of the distribution rules, cooperation mechanisms feature as the most effective way to further reshape states' regulatory space for labour law. Even better, cooperation mechanisms feature as the most appropriate way in order to bring about mind changes.

On this backdrop, this dissertation pleads for a revamping of cooperation activities under the EU FTAs and for a more intensive use of the connection paths identified in this research. This can take place both through cooperation mechanisms provided in the TSD chapters, as well as through the use of regulatory cooperation under the relevant trade agreements. The following five policy recommendations aim to enhance these cooperation activities: (1) redesigning cooperation provisions so as to be more specific; (2) improving the coordination between the different actors promoting labour rights; (3) setting intermediary targets through the generalisation of work plans; (4) strengthening communication on the achievements of TSD chapters and further involving CSOs; and (5) enabling regulatory cooperation in matters of labour rights.

First, cooperation mechanisms in labour provisions should be redesigned. The regime defining the modalities of cooperation in matters of labour rights leaves too much flexibility to the Parties. The qualification 'as appropriate' specifying the commitments to cooperate, the open and often exemplative lists of areas for cooperation included in the FTAs, and the provisions' relative silence on most modalities of cooperation do not bind the Parties to specific activities. On the contrary, this regime grants them a broad margin of discretion regarding the practical organisation of labour-related cooperation. Hence, the types of activities to be undertaken, their frequency, the specific area of

cooperation, the resources made available, together with the outcomes of cooperation, largely depend on the Parties' continuous goodwill and priorities, as well as on sufficient resources for CSOs. While flexible regimes offer the some agility to address changing circumstances and may thus be seen as an appropriate approach, the problem is that in certain years CTSD and of CSF meetings have not been organised, that the nomination of representatives within the DAGs has repeatedly taken too much time, that some governments remain unwilling to engage with CSOs. These elements along others do not fit well with the important role cooperation should play in TSD chapters. This ultimately undermines the effectiveness of the whole regime of labour rights protection under EU FTAs. Thus, the absence of comprehensive and ambitious cooperation provisions does not offer a framework for cooperation proportionate to the key function it should arguably fulfil. Cooperation provisions should be more specific. This could be the case through the inclusion of clauses compelling the Parties to the adoption of multi-year work plans specifying policy objectives and the related cooperation activities to be carried out;[540] through the systematisation of certain activities, such as yearly workshops with ILO experts or vocational training programs for workers suffering from the conclusion of FTAs; through more frequent CTSD and CSF meetings etc. Moreover, cooperation provisions should further enhance the different bodies they create – i.e. the CTSDs, the CSFs and the DAGs – by providing means to hire permanent staff working full time on TSD issues. This would contrast positively with rather irregular meetings between stakeholders often constrained by modest funding. As such, these measures would arguably address the general perception 'that the EU resources assigned to labour standards-related development cooperation are rather scant, particularly by comparison with the programmes established by the Government of the United States'.[541]

Second, coordination between the different actors promoting labour rights should be enhanced. Several intergovernmental organisations appear to undertake parallel, sometimes redundant or even conflicting efforts in matters of labour rights protection. Indeed, labour rights protection is pursued within several fora, including the ILO, the UN Committee on economic, social and cultural rights, the UNCTAD, the OECD, various regional organisations, and bodies established under many FTAs. By and large, this leads to a spaghetti bowl of (partly) disorganised undertakings towards the improvement of labour rights. In a context of limited resources, it appears crucial to coordinate the actions of these organisations so as to avoid redundancy and ensure complementarity, thus swapping the spaghetti bowl for a better looking lasagne where several layers of actions come in an orderly fashion. Successful

[540] For a similar recommendation see: Ebert, "Labour provisions in EU trade agreements," 426.
[541] van den Putte, "Involving civil society in the implementation of social provisions in trade agreements: comparing the US and EU approach in the CSE of South Korea," 225.

examples of good coordination between different actors in matters of labour rights protection exist.[542] In fact, the EU already makes efforts to ensure a certain level of coordination, mainly but not exclusively, with the ILO. In its recent consultation round on the future of TSD chapters, the Commission reaffirmed this commitment by stating that,

> **'[during] the debate, strong and recurrent messages, notably received during consultations with Member States, called on the Commission to continue to maintain the TSD chapters in a multilateral context (i.e. based on the rules and principles of the International Labour Organisation (ILO) and of Multilateral Environmental Agreements (MEAs)) and to intensify work with the relevant bodies to strengthen this mutually beneficial relationship. The Commission services see the need to systematically coordinate with these bodies and ensure coherence with their activities in support of TSD implementation. The Commission services will start working closely during an early implementation phase to benefit from their expertise and assistance. Such close cooperation with the relevant international bodies will also ensure coherence in interpretation of the international labour and environmental agreements included in the TSD provisions. This approach can help to avoid any risk of introducing parallel labour and environmental standards and being seen as undermining the multilateral governance in these areas.'[543]**

Thus, synergies between like-minded countries and intergovernmental organisations need to be enhanced. This could for instance be the case through the inclusion in labour provisions of clauses allowing for the invitations of other States and international organisations at CTSD and CSF meetings.[544] During these meetings, the other States and organisations could make presentations of the support programs they offer, submit reports, link specific issues encountered by the Parties to existing initiatives they may know about, exchange good practices, or offer any other type of cooperation.

Third, intermediary targets coherent with the labour commitments should be determined. This should happen through the generalisation of work plans under TSD chapters. Work plans such as the one adopted by the CTSD under the EU-Georgia FTA have several advantages. First, when drafted with the participation of the relevant stakeholders, work plans can coordinate their actions, thus offering a way to address the coordination issues underlined in the previous point. Second, work plans can draw a multi-year roadmap for the promotion of labour rights under TSD chapters. As such, they would set a clearer dynamic with respect to the implementation of labour commitments. Third, work plans have the advantage to *not* be legally binding. This arguably eases their endorsement by the relevant Parties. At the same time, the political accountability they generate can also operate as a lock-in mechanism

[542] This was for instance the case when the US, Canada and the EU joined force to improve the labour rights situation in Vietnam in recent years. For more details see fn. 489.
[543] EU Commission, "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements" (2018) p. 4.
[544] A similar clause providing for the possibility to invite other parties to cooperation activities is provided in the Regulatory Cooperation chapter of the CETA. See art. 21.6.(3) of the CETA.

putting additional pressure on the Parties to reach the intermediary targets. Finally, the generalisation of work plans would also fit nicely with the recent establishment of a position of chief enforcement officer (**the CEO**) within the EU Commission. The CEO functions are, inter alia, to monitor EU trading partners' correct implementation of the relevant EU FTAs, including the TSD chapters.[545] Yet, labour commitments often contain relatively underdeterminate obligations of conduct and recurrently use vague language. The assessment of the Parties' compliance with these commitments may therefore cause genuine headaches to the CEO services, let alone raise disagreements between the Parties. On this backdrop, the determination of intermediary targets in work plans would facilitate the CEO's job as it would define points of reference to assess the Parties' compliance with their commitments. Ultimately, work plans have the potential to set positive dynamics in matters of labour rights protection and to define yardsticks in order to make the appreciation of TSD chapters' implementation easier.

Fourth, Parties should strengthen communication on the achievements of labour provisions. TSD chapters have been included in EU FTAs because the EU cares both about the protection of its standards at home, and about the promotion of high standards abroad. Yet, TSD chapters have also been included in EU FTAs to address public mistrust vis-à-vis agreements that are widely seen as neoliberal tools serving the interest of export oriented multinational corporations to the detriment of social and environmental standards. This research has showed that labour provisions in EU trade agreements have resulted in some positive developments. Given the existing concerns about the effects of FTAs, it is crucial that the Parties better communicate on these achievements. No or bad communication in this domain equals no achievements in the eyes of the wider public, thus not improving their perception of FTAs altogether. Considering the key role played by CSOs in public opinion shaping, to ensure their strong involvement in the process of labour rights protection under EU FTAs appears pivotal. In fact, the EU already offers several ways for CSOs to partake in TSD procedures.[546] However, critical aspects of the regime of labour rights protection are still out of CSOs' reach. Typically, CSOs repeated demands to play a more active role in dispute settlement procedure under TSD chapters should be further accommodated. The current regime grants the Parties an exclusive right to initiate consultations under TSD chapters. This has raised legitimate concerns that

[545] For a description of the CEO's functions, see: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1409 (last consulted on 18/08/2020).

[546] Next to establishing DAGs and CSFs in its FTAs, it also regularly organises sessions of dialogue with the civil society in Brussels. Note that this process is currently subject to monitoring: https://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11566 (last consulted on 18/08/2020). For a comprehensive analysis of CSOs involvement under TSD chapters, see: Martens et al., "Mapping variation of civil society involvement in EU trade agreements: a CSI index".

political opportunity may bug the procedure when a Party would refrain to undertake steps against another Party because it could potentially disturb their blooming trade relationship. In fact, this concern has been partly addressed by the Commission in the response to the round of consultations it published in February 2018.[547] Point 15 "Time-bound response to TSD submissions" of this response sketches an embryonic form of CSOs involvement in the dispute settlement procedure. Indeed, it recognises CSOs possibility to raise concerns relating to the implementation or the interpretation of labour commitments before the Commission's services. Moreover, it commits to respond to these concerns within a short period of time. However, this procedure does not fully address the worry that the Commission could take arbitrary decisions as to whether or not it triggers the dispute settlement procedure. Therefore, this dissertation suggests to create a mechanism allowing for the establishment of a panel of experts to assess CSOs demands to launch a dispute settlement procedure. This panel would review the case *prima facie* and make recommendations as to whether or not the dispute settlement mechanisms under TSD chapters should be activated. The experts constituting such panel could be co-selected by the EU Commission and by CSOs, and the costs of this procedure could be shared. Overall, this would constitute a substantial development in CSOs' involvement under TSD chapters and give further opportunities to these opinion makers to play a role in the achievements of TSD chapters.

Fifth, Parties should undertake regulatory cooperation on labour law. Regulatory cooperation has been primarily conceived of in order to further open markets through the alignment of regulations. Regulatory cooperation has faced a storm of criticism pointing among other things to the possibility for multi-national corporations and other profit seeking interests to capture the regulatory process. However, this dissertation goes further and shows that mechanisms of regulatory cooperation under the CETA and the EU-Japan FTA create interesting opportunities for the protection of labour rights. Indeed, they establish new means for the Parties (and CSOs alike) to exert pressure on each other's legislative process. In fact regulatory cooperation on labour law, and the *ex-ante* joint review of draft proposals it allows for appear all too legitimate in a context where policy decisions taken in a country may have negative externalities in other countries.[548] Ultimately, if properly used, regulatory

[547] EU Commission, "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements" (2018) p. 12.

[548] While one may argue that this constitutes a blunt case of state inference, this dissertation rather considers that such procedure allows countries that have decided to integrate their markets, to have at least the occasion to express their views whenever one of them undertakes a deliberate modification of its legal framework through an amendment of its labour legislation. In other words, given the preferential trade relationship that binds the Parties to a FTA, it is all too legitimate for a Party to express its opinion on labour reforms when these reforms can have effects its socio-economic situation. For a similar argument, see: Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, 256–57.

cooperation would have the double advantage to strengthen the protection of labour rights and to make it possible to identify and to condemn occurrences of races to the bottom in social standards.

By way of conclusion, this dissertation has shown that labour provisions have offered some response to the peoples' concern about regulatory space loss in matters of labour rights protection. It has also claimed that labour provisions have much more potential to address the backlash against FTAs. In, this sense, five policy recommendations have been made: (1) redesigning cooperation provisions so as to be more specific; (2) improving the coordination between the different actors promoting labour rights; (3) setting intermediary targets through the generalisation of work plans; (4) strengthening communication on the achievements of TSD chapters and further involving CSOs; and (5) enabling regulatory cooperation in matters of labour rights. These recommendations largely aim to revamp cooperation under TSD chapters. Ultimately, this features as the best way to bring about mind changes. However, changing the others' minds may require to change our own minds first. It may require to no longer understand the conclusion of FTAs in terms of opening new markets and creating new opportunities for businesses solely. It may require to also see the conclusion of FTAs as the moment of entering into a well-structured program of labour rights-related cooperation. A program that would include regular monitoring, negotiation of work plans, defined capacity building activities, vocational training for workers suffering from the conclusion of FTA, schemes coordinating support from different institutions, additional capacities for CSOs etc. Without any doubts, further ambitious developments are needed for peoples to consider FTAs as instruments of economic globalisation as much as of social globalisation. Ultimately, such developments may be the key to a new bold vision, the vision that the peoples and the CSOs then critical of economic globalisation would no longer be in the frontline of the backlash against FTAs. But that these peoples and these CSOs would become the first supporters of joining them.

Kurzübersicht

Freihandelsabkommen (**FHA**) sind in den letzten Jahrzehnten heftig kritisiert worden. Die Behauptungen, dass sie sozial schädlich sind, dass sie Ungleichheiten verstärken und dass sie Länder zwingen, ihr Schutzniveau zu unterschreiten, gehören zu den am häufigsten vorgebrachten Klagen gegen diese Instrumente. Um diesen dauerhaften Problemen zu begegnen, hat die Europäische Union (**EU**) in ihren FHAs schrittweise ein System zum Schutz der Arbeitnehmerrechte entwickelt. Verschiedene Aspekte der sozialen Folgen von FHAs wurden in der wissenschaftlichen Literatur schon bewertet, darunter die Auswirkungen der Handelsliberalisierung auf die Arbeitnehmerrechte, die Auswirkungen von Handelsabkommen auf den verbleibenden Regulierungsspielraum („regulatory space“) der Staaten in verschiedenen Politikbereichen und die unterschiedlichen Merkmale der „labour clauses“ in FHAs. Die wissenschaftlichen Literatur hat jedoch nicht untersucht, wie diese *labour clauses* auf Bedenken reagieren, dass Handelsabkommen den Regulierungsspielraum der Staaten für das Arbeitsrecht insgesamt beeinträchtigen. Allerdings haben die *labour clauses* in EU FHAs einen gewissen Reifegrad erreicht. In diesem Kontext kann man sich fragen, ob es der Sorge des Verlustes an Regulierungsspielraum angemessen Rechnung trägt. Vor diesem Hintergrund soll diese Dissertation die folgende Frage beantworten: Wie gestalten die *labour clauses* in den Freihandelsabkommen der EU den Regulierungsspielraum der Vertragsparteien für das Arbeitsrecht neu? Zur Beantwortung der Forschungsfrage werden in dieser Dissertation die *labour clauses* bewertet, die in den Kapiteln über Handel und Nachhaltige Entwicklung (**HNE-Kapitel**) der seit 2010 zwischen der EU und anderen Handelspartnern abgeschlossen zehn FHA vorgesehen sind. Insbesondere werden zwei Elemente von *labour clauses* analysiert: arbeitnehmerrechtliche Verpflichtungen (*labour commitments*) und arbeitsbezogene Kooperationsmechanismen. Bei der Überprüfung der arbeitnehmerrechtlichen Verpflichtungen wird berücksichtigt, inwieweit ihr „rechtlicher Charakter“ – d.h. die verwendeten Formulierungen, ihr Anwendungsbereich und ihr Präzisionsgrad – den Regulierungsspielraum der Staaten neu gestalten. Mit der Analyse arbeitsbezogener Kooperationsmechanismen untersucht diese Dissertation die Jahresberichte der Kooperationstreffen, die im Rahmen der EU-Süd Korea FHA, EU-Zentralamerika FHA und EU-Georgien FHA organisiert wurden. Letztendlich ist das Ziel dieser Forschung die Bewertung der Antwort der EU auf einen zentralen Aspekt der Kritik an ihren Handelsabkommen. Tragen *labour clauses* dieser Kritik angemessen Rechnung oder kommen sie einer Art arbeitsrechtlichem Etikettenschwindel gleich?

Zwei wichtige Elemente bestimmen den analytischen Rahmen dieser Arbeit: das Konzept des arbeitsrechtsbezogenen Regulierungsspielraums sowie der Handlungsspielraum der EU bei der Aushandlung von *labour clauses* in ihren FHA. Erstens wurzelt das in dieser Dissertation behandelte

Verständnis des arbeitsrechtlichen Regulierungsspielraum für in der Vorstellung, dass die Arbeitsregulierung das Ergebnis komplexer Interaktionen zwischen mehreren Faktoren ist und dass diese Faktoren den Raum definieren, in dem Arbeitsrechtsetzung stattfindet. Dementsprechend identifiziert diese Dissertation fünf Faktoren, die für die Gestaltung des Arbeitsrechts von entscheidender Bedeutung sind: (i) die Merkmale des Arbeitsmarkts; (ii) der bestehende institutionelle Rahmen; (iii) die verfügbaren Ressourcen; (iv) die anwendbaren internationalen Verpflichtungen; und (v) die vorherrschende Ideologie. Zweitens erfasst diese Dissertation den Handlungsspielraum der EU bei der Aushandlung von *labour clauses* in ihren FHA mit dem Konzept der "Reglementierung des Niveaus des sozialen Schutzes-Schwellenwerte". Je nachdem, ob *labour clauses* das Niveau des Sozialschutzes im Hoheitsgebiet der Vertragsparteien regeln oder nicht, fallen sie unter die ausschließlichen Zuständigkeiten der EU beziehungsweise unter die zwischen der EU und ihren Mitgliedstaaten geteilten Zuständigkeiten. Insgesamt ist diese Schwelle für die Bestimmung des Verfahrens, das für die Annahme des betreffenden FHA anwendbar ist, und damit für die Wahrscheinlichkeit, dass es angenommen wird, am relevantesten. Die Definition des Regulierungsspielraum für Arbeitnehmerrechte sowie des Handlungsspielraums der EU bei der Aushandlung von *labour clauses* in ihren FHA verdeutlicht somit die Parameter dieser Untersuchung. Daher wird die Forschungsfrage weiter spezifiziert als die Analyse, wie arbeitnehmerrechtliche Verpflichtungen und Kooperationsmechanismen in den zehn untersuchten FHAs die verschiedenen Faktoren berücksichtigen, die den staatlichen Regulierungsspielraum für das Arbeitsrecht prägen. Die in dieser Untersuchung durchgeführte Analyse der beiden Elemente von *labour clauses* führt zu folgenden Ergebnissen:

Erstens berücksichtigt diese Dissertation, wie arbeitnehmerrechtliche Verpflichtungen den Regelungsraum der Vertragsparteien für das Arbeitsrecht prägen. Sie identifiziert elf Arten von Verpflichtungen, die in den zehn erfassten FHAs verbreitet sind. Diese Verpflichtungen wurden in vier Kategorien eingeteilt: Verpflichtungen, die (i) das Recht der Parteien auf Regulierung definieren; (ii)die ein Mindestschutzniveau definieren; (iii) die zur Erhöhung des Schutzniveaus verpflichten; und (iv) die Aufrechterhaltung des Schutzniveaus erfordern. Die Analyse dieser vier Kategorien von Verpflichtungen macht die große Vielfalt ihres rechtlichen Charakters deutlich. Die Dissertation kam schließlich zu zwei wichtigen Ergebnissen hinsichtlich der in den EU-Handelsabkommen enthaltenen arbeitnehmerrechtlichen Verpflichtungen. Erstens beziehen sich logischerweise die arbeitnehmerrechtlichen Verpflichtungen hauptsächlich auf die anwendbaren internationalen Verpflichtungs-Faktoren des Arbeitsrechts. Außerdem stellen sie kaum neue Verpflichtungen dar, an welchen die Vertragsparteien nicht schon gebunden waren, so dass der Regelungsspielraum der Staaten für das Arbeitsrecht kaum verändert wird. Folglich gehen die arbeitnehmerrechtlichen

Verpflichtungen nur minimal auf die Sorge ein, dass FHAs den Regelungsspielraum der Staaten im Arbeitsrecht einschränken. Zweitens verleihen arbeitnehmerrechtliche Verpflichtungen einer, wie diese Dissertation es nennt, "dualen Struktur des innerstaatlichen Arbeitsrechts" Gestalt. Genauer gesagt zeigt die Analyse des rechtlichen Charakters der arbeitnehmerrechtlichen Verpflichtungen, dass die HNE-Kapitel einen starken Schutz für einen begrenzten Satz international anerkannter Normen und einen viel weicheren Schutz für die übrigen Arbeitsrechte vorsehen. Diese Beobachtungen erlauben es uns, die Fähigkeit der arbeitnehmerrechtlichen Verpflichtungen, einen großen Teil der Arbeitsrechte insgesamt zu schützen, in Frage zu stellen.

Mit Blick auf die Auswirkungen von Kooperationsmechanismen auf den arbeitsrechtlichen Regulierungsspielraum von Staaten, identifiziert die Untersuchung der Sitzungsberichte fünf Kooperationspraktiken, die Auswirkungen auf die verschiedenen Einflussfaktoren des Arbeitsrechts haben können: (i) Dialog und Informationsaustausch, (ii) Aufrufe und Ermahnungen, (iii) Aktivitäten zum Aufbau von Kapazitäten, (iv) Arbeitspläne und (v) Beteiligung der Zivilgesellschaft. Die Analyse jeder dieser Kooperationspraktiken wirft ein Licht auf mögliche Auswirkungen von Kooperationspraktiken auf den Einflussfaktoren des Arbeitsrechts. Verbindungswege sind ein Hinweis auf die Existenz gelegentlicher Auswirkungen von Kooperationspraktiken auf die Faktoren des Arbeitsrechts. Insgesamt zeigt die vorliegende Dissertation, dass Kooperationsaktivitäten für die Vertragsparteien eine Möglichkeit darstellen, den staatlichen Regelungsraum für das Arbeitsrecht neu zu gestalten.

Zur Frage „wie gestalten die *labour clauses* in den Freihandelsabkommen der EU den Regelungsraum der Vertragsparteien für das Arbeitsrecht neu?“, zeigt diese Untersuchung, dass die arbeitnehmerrechtlichen Verpflichtungen und die in den *labour clauses* der zehn erfassten Handelsabkommen festgelegten Kooperationsaktivitäten unterschiedliche Auswirkungen auf die fünf Faktoren haben, die den Regelungsspielraum der Staaten im Bereich des Arbeitsrechts bestimmen. Erstens haben weder die arbeitnehmerrechtlichen Verpflichtungen noch die Kooperationsaktivitäten Auswirkungen auf den Arbeitsmarktfaktor. Zweitens, obwohl keine der arbeitnehmerrechtlichen Verpflichtungen direkt die institutionellen Faktoren betrifft, lösen drei Arten von Kooperationspraktiken Mechanismen aus, die Auswirkungen auf den institutionellen Rahmen haben können: die Aktivitäten zum Aufbau von Kapazitäten, die Arbeitspläne und die Beteiligung der Zivilgesellschaft. Drittens bezieht sich keine der arbeitnehmerrechtlichen Verpflichtungen direkt auf die Ressourcenfaktoren. In dieser Dissertation werden jedoch Aktivitäten zum Kapazitätsaufbau und Arbeitspläne als Kooperationspraktiken skizziert, die sich auf diese Arbeitsrechtsfaktoren auswirken können. Viertens legen einige arbeitnehmerrechtliche Verpflichtungen - nämlich die Verpflichtungen zur Verbesserung des Schutzniveaus und die Verpflichtungen zur Aufrechterhaltung des Schutzniveaus

- neue Verpflichtungen für die Parteien fest. Diese Verpflichtungen haben jedoch einen schwachen rechtlichen Charakter und zeitigen daher nur marginale Auswirkungen auf die rechtlichen Arbeitsrechtsfaktoren. Im Hinblick auf die Kooperationsaktivitäten zeigt diese Dissertation, dass drei Arten von Praktiken Auswirkungen auf die rechtliche Faktoren haben können: der Austausch von Informationen über die innerstaatliche Situation der Parteien in Fragen des Schutzes der Arbeitsrechte, Aufforderungen und Ermahnungen sowie Arbeitspläne. Was schließlich den ideologiebestimmenden Faktor anbelangt, so haben weder die arbeitnehmerrechtlichen Verpflichtungen noch die Kooperationsaktivitäten nachweislich direkte Auswirkungen auf diese Faktoren.

Insgesamt stellt die Arbeit fest, dass die arbeitnehmerrechtlichen Verpflichtungen nur marginale Auswirkungen auf den Regelungsspielraum der Staaten im Bereich des Arbeitsrechts haben. Damit findet die Sorge, dass Handelsabkommen den Regulierungsspielraum einschränken, kaum Anhaltspunkte. Allerdings haben die in den EU-Handelsabkommen vorgesehenen Kooperationsmechanismen das Potenzial, die verschiedenen Arbeitsrechtsfaktoren zu beeinflussen. Diese Ergebnisse lassen den Schluss zu, dass die Reaktion der EU auf einen Schlüsselaspekt der Kritik an ihren Handelsabkommen einige positive Entwicklungen aufweist. Das Ausmaß dieser Entwicklungen könnte sich jedoch als nicht ausreichend erweisen, um auf die Bedenken der Öffentlichkeit einzugehen. Der schwache Schutz eines wesentlichen Teils des innerstaatlichen Arbeitsrechts, das auf dem Konzept der *dualen Struktur des innerstaatlichen Arbeitsrechts* beruht, die unsystematischen Auswirkungen von Kooperationsmaßnahmen auf Arbeitsrechtsfaktoren sowie das unklare Ausmaß dieser Auswirkungen lassen in der Tat mehrere Schwächen des derzeitigen Systems des Schutzes der Arbeitnehmerrechte im Rahmen der Freihandelsabkommen der EU erkennen.

Vor dem Hintergrund dieser Ergebnisse plädiert die vorliegende Dissertation für eine Neugestaltung der Zusammenarbeit im Rahmen der EU-Freihandelsabkommen und gibt fünf rechtspolitische Empfehlungen ab: (i) Neugestaltung und Spezifizierung der Kooperationsbestimmungen; (ii) Verbesserung der Koordination zwischen den verschiedenen Akteuren, die Arbeitnehmerrechte fördern; (iii) Festlegung von Zwischenzielen durch die Verallgemeinerung von Arbeitsplänen; (iv) Verstärkung der Kommunikation über die Errungenschaften der HNE-Kapitel und weitere Beteiligung der zivilgesellschaftlichen Organisationen; und (v) Ermöglichung der regulatorischen Zusammenarbeit in Fragen der Arbeitnehmerrechte. Diese politischen Empfehlungen zielen auf die verschiedenen Arbeitsrechtsfaktoren ab. Ihr Ziel ist es, die Fähigkeit der Arbeitsgesetzgebung weiter zu verbessern und das Problem des Verlustes an Regulierungsspielraum anzugehen.

Annexes 1: Relevant provisions of the ten covered EU FTAs

For each of the ten covered agreements, the three following provisions are presented:

(1) **Right to regulate and levels of protection**

(2) **Upholding levels of protection**

(3) **Multilateral labour standards and agreements**

EU-Republic of South Korea FTA

Article 13.3 **Right to regulate and levels of protection**
Recognising the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements referred to in Articles 13.4 and 13.5, and shall strive to continue to improve those laws and policies.

Article 13.7 **Upholding levels of protection in the application and enforcement of laws, regulations or standards**
1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

2. A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.

Article 13.4 **Multilateral labour standards and agreements**
1. The Parties recognise the value of international cooperation and agreements on employment and labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. They commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest.

2. The Parties reaffirm the commitment, under the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.

3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO

Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO.

EU-Central America FTA

ARTICLE 285 **Right to Regulate and Levels of Protection**
1. The Parties reaffirm the respect for their respective Constitutions42 and for their rights there under to regulate in order to set their own sustainable development priorities, to establish their own levels of domestic environmental and social protection, and to adopt or modify accordingly their relevant laws and policies.

2. Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of environmental and labour protection, appropriate to its social, environmental and economic conditions and consistent with the internationally recognised standards and agreements referred to in Articles 286 and 287 to which it is a party, and shall strive to improve those laws and policies, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on international trade.

ARTICLE 291 **Upholding Levels of Protection**
1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental and labour laws.

2. A Party shall not waive or derogate from, or offer to waive or offer to derogate from, its labour or environmental legislation in a manner affecting trade or as an encouragement for the establishment, acquisition, expansion or retention of an investment or an investor in its territory.

3. A Party shall not fail to effectively enforce its labour and environmental legislation in a manner affecting trade or investment between the Parties.

4. Nothing in this Title shall be construed to empower a Party's authorities to undertake law enforcement activities in the territory of the other Party.

ARTICLE 286 **Multilateral Labour Standards and Agreements**
1. Recalling the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, the Parties recognise that full and productive employment and

decent work for all, which encompass social protection, fundamental principles and rights at work and social dialogue, are key elements of sustainable development for all countries, and therefore a priority objective of international cooperation. In this context, the Parties reaffirm their will to promote the development of macroeconomic policies in a way that is conducive to full and productive employment and decent work for all, including men, women and young people, with full respect for fundamental principles and rights at work under conditions of equity, equality, security and dignity.

The Parties, in accordance with their obligations as members of the ILO, reaffirm their commitments to respect, promote, and realise in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights which are the subject of the fundamental ILO Conventions, namely:
(a) the freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

2. The Parties reaffirm their commitment to effectively implement in their laws and practice the fundamental ILO Conventions contained in the ILO Declaration of Fundamental Principles and Rights at Work of 1998, which are the following:
(a) Convention 138 concerning Minimum Age for Admission to Employment;
(b) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;
(c) Convention 105 concerning the Abolition of Forced Labour;
(d) Convention 29 concerning Forced or Compulsory Labour;
(e) Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value;
(f) Convention 111 concerning Discrimination in Respect of Employment and Occupation;
(g) Convention 87 concerning Freedom of Association and Protection of the Right to Organise; and
(h) Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

3. The Parties will exchange information on their respective situation and advancements as regards the ratification of the other ILO Conventions.

4. The Parties stress that labour standards should never be invoked or otherwise used for protectionist trade purposes and that the comparative advantage of any Party should not be questioned.

5. The Parties commit to consult and cooperate as appropriate, on trade-related labour issues of mutual interest.

EU-Peru-Colombia-Ecuador FTA

Article 268 R**ight to Regulate and Levels of Protection**
Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels of environmental and labour protection, **(2)** consistent

with the internationally recognised standards and agreements referred to in Articles 269 and 270, and to adopt or modify accordingly its relevant laws, regulations and policies; **(6)** each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection.

Article 277 **Upholding Levels of Protection**

1. No Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment.

2. A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

3. The Parties recognise the right of each Party to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental and labour regulations and standards, while not undermining the fulfilment of the obligations undertaken under this Title.

4. Nothing in this Title shall be construed to empower the authorities of a Party to undertake labour and environmental law enforcement activities in the territory of another Party.

Article 269 **Multilateral Labour Standards and Agreements**

1. The Parties recognise international trade, productive
employment and decent work for all as key elements for managing the process of globalisation, and reaffirm their
commitments to promote the development of international trade in a way that contributes to productive employment and decent work for all.

2. The Parties will dialogue and cooperate as appropriate on trade-related labour issues of mutual interest.

3. Each Party commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation (hereinafter referred to as the 'ILO'):
(a) the freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

4. The Parties will exchange information on their respective situation and advancements as regards the ratification of priority ILO Conventions as well as other conventions that are classified as up-to-date by the ILO.

5. The Parties stress that labour standards should not be used for protectionist trade purposes and in addition, that the comparative advantage of any Party should in no way be called into question.

EU-Ukraine FTA

Article 290 **Right to regulate**
1. Recognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, in line with relevant internationally recognised principles and agreements, and to adopt or modify their legislation accordingly, the Parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation.

2. As a way to achieve the objectives referred to in this Article, Ukraine shall approximate its laws, regulations and administrative practice to the EU acquis.

Article 296 **Upholding levels of protection**
1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

2. A Party shall not weaken or reduce the environmental or labour protection afforded by its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.

Article 291 **Multilateral labour standards and agreements**
1. The Parties recognise full and productive employment and decent work for all as key elements for trade in the context of globalisation. The Parties reaffirm their commitments to promote the development of trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.

2. The Parties shall promote and implement in their laws and practices the internationally recognised core labour standards, namely:
(a) the freedom of association and the effective recognition of the right to collective bargaining;
(b) elimination of all forms of forced or compulsory labour;
(c) effective abolition of child labour; and
(d) elimination of discrimination in respect of employment and occupation.

3. The Parties reaffirm their commitment to effectively implement the fundamental and priority ILO Conventions that they have ratified, and the ILO 1998 Declaration on Fundamental Rights and Principles at Work. The Parties will also consider ratification and implementation of other ILO Conventions that are classified as up to date by the ILO.

4. The Parties stress that labour standards should not be used for protectionist trade purposes. The Parties note that their comparative advantage should in no way be called into question.

EU-Georgia FTA

Article 228 **Right to regulate and levels of protection**
1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant law and policies, consistently with their commitment to the internationally recognised standards and agreements referred to in Articles 229 and 230 of this Agreement.

2. In that context, each Party shall strive to ensure that its law and policies provide for and encourage high levels of environmental and labour protection and shall strive to continue to improve its law and policies and the underlying levels of protection.

Article 235 **Upholding levels of protection**
1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labour law.

2. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour law as an encouragement for trade or the establishment, the acquisition, the expansion or the retention of an investment of an investor in its territory.

3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour law, as an encouragement for trade or investment.

Article 229 **Multilateral labour standards and agreements**
1. The Parties recognise full and productive employment and decent work for all as key elements for managing globalisation, and reaffirm their commitment to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all. In this context, the Parties commit to consulting and cooperating as appropriate on trade-related labour issues of mutual interest.

2. In accordance with their obligations as members of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, the Parties commit to respecting, promoting and realising in their law and practice and in their whole territory the internationally recognised core labour standards, as embodied in the fundamental ILO conventions, and in particular:
(a) the freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

3. The Parties reaffirm their commitment to effectively implement in their law and practice the fundamental, the priority and other ILO conventions ratified by Georgia and the Member States respectively.

4. The Parties will also consider the ratification of the remaining priority and other conventions that are classified as up-to-date by the ILO. The Parties shall regularly exchange information on their respective situation and developments in this regard.

5. The Parties recognise that 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.

EU-Moldova FTA

Article 364 **Right to regulate and levels of protection**
1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant law and policies, consistently with their commitment to the internationally recognised standards and agreements referred to in Articles 365 and 366 of this Agreement.

2. In that context, each Party shall strive to ensure that its law and policies provide for and encourage high levels of environmental and labour protection and shall strive to continue to improve those law and policies and the underlying levels of protection.

Article 371 **Upholding levels of protection**
1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labour law.

2. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour law as an encouragement for trade or the establishment, the acquisition, the expansion or the retention of an investment of an investor in its territory.

3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour law, as an encouragement for trade or investment.

Article 365 **Multilateral labour standards and agreements**
1. The Parties recognise full and productive employment and decent work for all as key elements for managing globalisation, and reaffirm their commitment to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all. In that context, the Parties commit to consulting and cooperating, as appropriate, on trade-related labour issues of mutual interest.

2. In accordance with their obligations as members of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998, the Parties commit to respecting, promoting and realising in their law and practice and in their whole territory the internationally recognised core labour standards, as embodied in the fundamental ILO conventions, and in particular:
(a) the freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

3. The Parties reaffirm their commitment to effectively implement in their law and in practice the fundamental, the priority and other ILO conventions ratified by the Member States and the Republic of Moldova, respectively.

4. The Parties will also consider the ratification of the remaining priority and other conventions that are classified as up-to-date by the ILO. In that context, the Parties shall regularly exchange information on their respective situation and advancement in the ratification process.

5. The Parties recognise that 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.

EU-CANADA FTA

Article 23.2 **Right to regulate and levels of protection**
Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments, including those in this Chapter, each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection.

Article 23.4 **Upholding levels of protection**
1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards.

2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.

3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment.

Article 23.3 **Multilateral labour standards and agreements**
1. Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work which are listed below. The Parties affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization (the "ILO") and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session:
(a) freedom of association and the effective recognition of the right to collective

bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

2. Each Party shall ensure that its labour law and practices promote the following objectives included in the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference at its 97th Session, and other international commitments:
(a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness;
(b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and,
(c) non-discrimination in respect of working conditions, including for migrant workers.

3. Pursuant to sub-paragraph 2(a), each Party shall ensure that its labour law and practices embody and provide protection for working conditions that respect the health and safety of workers, including by formulating policies that promote basic principles aimed at preventing accidents and injuries that arise out of or in the course of work, and that are aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority. When preparing and implementing measures aimed at health protection and safety at work, each Party shall take into account existing relevant scientific and technical information and related international standards, guidelines or recommendations, if the measures may affect trade or investment between the Parties. The Parties acknowledge that in case of existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a person, a Party shall not use the lack of full scientific certainty as a reason to postpone cost-effective protective measures.

4. 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.

EU-SADC FTA

Article 9 **Right to regulate and levels of protection**

1. The Parties recognise the right of each Party to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, consistently with internationally recognised standards and agreements to which they are a party.

2. The Parties reaffirm the importance of protection as afforded in domestic labour and environmental laws.

3. Recognising that it is inappropriate to encourage trade or investment by weakening or reducing

domestic levels of labour and environmental protection, a Party shall not derogate from, or persistently fail to effectively enforce, its environmental and labour laws to this end.

Upholding levels of protection

NONE

Article 8 **Multilateral environmental and labour standards and agreements**
1. The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems as well as decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation.

2. Taking into account the Cotonou Agreement, and in particular its Articles 49 and 50, the Parties, in the context of this Article, reaffirm their rights and their commitment to implement their obligations in respect of the Multilateral Environmental Agreements ('MEAs') and the International Labour Organisation ('ILO') conventions that they have ratified respectively.

COTONOU, ARTICLE 50 **Trade and Labour Standards**
1. The Parties reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment.

2. They agree to enhance cooperation in this area, in particular in the following fields:
— exchange of information on the respective legislation and work regulation;
— the formulation of national labour legislation and strengthening of existing legislation;
— educational and awareness raising programmes;
— enforcement of adherence to national legislation and work regulation;

3. The Parties agree that labour standards should not be used for protectionist purposes.

<u>EU-JAPAN FTA</u>

ARTICLE 16.2 Right to regulate and levels of protection

1.Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.

2. The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

3. The Parties shall not use their respective environmental or labour laws and regulations in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on international trade.

Upholding levels of protection

NONE

ARTICLE 16.3 International labour standards and conventions

1. The Parties recognise full and productive employment and decent work for all as key elements to respond to economic, labour and social challenges. The Parties further recognise the importance of promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all. In that context, the Parties shall exchange views and information on trade-related labour issues of mutual interest in the meetings of the Committee on Trade and Sustainable Development established pursuant to Article 22.3, and as appropriate in other fora.

2. The Parties reaffirm their obligations deriving from the International Labour Organisation (hereinafter referred to as "ILO") membership1[549]. The Parties further reaffirm their respective commitments with regard to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Accordingly, the Parties shall respect, promote and realise in their laws, regulations and practices the internationally recognised principles concerning the fundamental rights at work, which are: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

3. Each Party shall make continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions and other ILO Conventions which each Party considers appropriate to ratify.

4. The Parties shall exchange information on their respective situations as regards the ratification of ILO Conventions and Protocols, including the fundamental ILO Conventions.

5. Each Party reaffirms its commitments to effectively implement in its laws, regulations and practices ILO Conventions ratified by Japan and the Member States of the European Union respectively.

6. The Parties recognise that the violation of the internationally recognised principles concerning the fundamental rights at work referred to in paragraph 2 cannot be invoked or otherwise used as a

[549] "For the European Union, "ILO membership" means the ILO membership of the Member States of the European Union."

legitimate comparative advantage, and that labour standards should not be used for protectionist trade purposes

EU-Singapore FTA

ARTICLE 12.2 **Right to Regulate and Levels of Protection**

1. The P arties recognise the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify its relevant laws and policies accordingly, consistent with the principles of the internationally recognised standards or agreements to which it is party, referred to in Articles 12.3 (Multilateral Labour Standards and Agreements) and 12.6 (Multilateral Environmental Standards and Agreements).

2. The Parties shall continue to improve those laws and policies, and shall strive towards providing and encouraging high levels of environmental and labour protection.

ARTICLE 12.3 **Multilateral Labour Standards and Agreements**[550]

1. The Parties recognise the value of international cooperation and agreements on employment and labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. They commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest.

2. The P arties affirm their commitments, under the Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All of 2006, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation. The Parties resolve to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all.

3. In accordance with the obligations assumed under the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference at its 86th Session in Geneva, June 1998, the Parties commit to respecting, promoting and effectively implementing the principles concerning the fundamental rights at work, namely:

(a) the freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

The Parties affirm the commitment to effectively implementing the ILO Conventions that Singapore and the Member States of the Union have ratified respectively.

[550] When 'labour' is referred to in this Chapter, it includes the issues relevant to the Decent Work Agenda as agreed on in the ILO and in the Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All of 2006

4. The P arties will make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions, and they will exchange information in this regard. The Parties will also consider the ratification and effective implementation of other ILO conventions, taking into account domestic circumstances. The Parties will exchange information in this regard.5. The Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage.

ARTICLE 12.12 **Upholding Levels of Protection**

1. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws, in a manner affecting trade or investment between the Parties.

2. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, where such failure to effectively enforce would affect trade or investment between the Parties.

Annexes 2: Annex of the commitment towards the approximation of the law to EU practices of the EU-Ukraine FTA

Labour laws	
Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship	Timetable: the Directive's provisions shall be implemented within 4 years of the entry into force of this Agreement.
Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP	Timetable: the Directive's provisions shall be implemented within 4 years of the entry into force of this Agreement.
Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies	Timetable: the Directive's provisions shall be implemented within 4 years of the entry into force of this Agreement.
Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Anti-discrimination and gender equality	
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin	Timetable: the Directive's provisions shall be implemented within 4 years of the entry into force of this Agreement.
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation	Timetable: the Directive's provisions shall be implemented within 4 years of the entry into force of this Agreement.
Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Health and Safety at Work	

Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement. Workplaces already in use before the final date on which this Directive is to be implemented must satisfy the minimum safety and health requirements laid down in Annex II at the latest six years after the entry into force of this Agreement.
Council Directive 89/655/EEC of 30 November 1989, concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement. Work equipment already provided to workers in the undertaking and/or establishment by the final date on which this Directive is to be implemented must comply with the minimum requirements laid down in the Annex no later than 7 years after the entry into force of this Agreement.
Directive 2001/45/EC of the European Parliament and of the Council of 27 June 2001 amending Council Directive 89/655/EEC concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 2 years of the entry into force of this Agreement. Workplaces already in use before the date on which this Directive is implemented must satisfy the minimum safety and health requirements laid down in the Annex as soon as possible and at the latest 5 years after that date.
Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 2 years of the entry into force of this Agreement. Workplaces already in use before the date on which this Directive is implemented must satisfy the minimum safety and health requirements laid down in the Annex as soon as possible and at the latest 9 years after that date.
Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eight individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Council Directive 83/477/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Council Directive 91/382/EEC of 25 June 1991 amending Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Directive 2003/18/EC, of the European Parliament and of the Council of 27 March 2003 amending Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Directive 2004/37/EC of the European Parliament and of the Council of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (sixth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Codification of Directive 90/394/EEC	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.

Directive 2000/54/EC of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) - Codification of Directive 90/679/EEC	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Council Directive 92/58/EEC of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 7 years of the entry into force of this Agreement.
Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Directive 1999/92/EC of the European Parliament and of the Council of 16 December 1999 on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres (fifteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risk arising from physical agents (vibration) (sixteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risk arising from physical agents (noise) (seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Directive 2004/40/EC of the European Parliament and of the Council of 29 April 2004 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Directive 2006/25/EC of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Commission Directive 91/322/EEC of 29 May 1991 on establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Commission Directive 2000/39/EC establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/E on the protection of the health and safety of workers from the risks related to chemical agents at work	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Commission Directive 2006/15/EC establishing a second list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Directives 91/322/EEC and 2000/39/EC	Timetable: the Directive's provisions shall be implemented within 10 years of the entry into force of this Agreement.
Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)	Upon the entry into force of this Agreement, the Association Council shall define the timetable for implementation by Ukraine of the following directives:

Bibliography

Scientific litterature used for this research:

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. "The Concept of Legalization." *International organization* 54, no. 3 (2000): 401–19.

Abbott, Kenneth W., and Duncan Snidal. "Hard and Soft Law in International Governance." *International organization* 54, no. 3 (2000): 421–56.

Abugattas, Luis, and Eva Paus. "Policy Space for a Capability-Centered Development Strategy for Latin America." In *The Political Economy of Hemispheric Integration*, 113–43. Springer, 2008.

Agustí-Panareda, Jordi, Franz Christian Ebert, and Desirée LeClercq. *Labour Provisions in Free Trade Agreements: Fostering Their Consistency with the ILO Standards System*. International Labour Office, 2014.

Aissi, Jonas, Marva Corley-Coulibaly, Elizabeth Echeverria Manrique, Marialaura Fino, Laetitia Fourcade, Takaaki Kizu, Rafael Peels, Daniel Samaan, Pelin Sekerler Richiardi, and Christian Viegelahn. "Assessment of Labour Provisions in Trade and Investment Arrangements." International Labour Office, Research Department, 2016.

Aissi, Jonas, Rafael Peels, and Daniel Samaan. "Evaluating the Effectiveness of Labour Provisions in Trade Agreements – an Analytical Framework." *International Labour Review*, 2017.

AISSI, Jonas I., Rafael PEELS, and Daniel SAMAAN. "Evaluating the Effectiveness of Labour Provisions in Trade Agreements: An Analytical and Methodological Framework." *International Labour Review* 157, no. 4 (2018): 671–98. https://doi.org/10.1111/ilr.12125.

Alesina, Alberto, Carlo Favero, and Francesco Giavazzi. *Austerity: When It Works and When It Doesn't*. Princeton University Press, 2019.

Alston, Philip. "'Core Labour Standards' and the Transformation of the International Labour Rights Regime." *European Journal of International Law* 15, no. 3 (2004): 457–521.

Alston, Philip. "Facing up to the Complexities of the ILOrsquo S Core Labour Standards Agenda." *European Journal of International Law* 16, no. 3 (2005): 467–80.

Alter, Karen J. "The Contested Authority and Legitimacy of International Law: The State Strikes Back." 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204382.

ANGOT, Jean-Luc, Geneviève BASTID BURDEAU, Christophe BELLMANN, Sophie DEVIENNE, Lionel FONTAGNÉ, Roger GENET, Géraud GUIBERT, Sabrina ROBERT-CUENDET, and Katheline SCHUBERT. "L'impact De L'accord Économique Et Commercial Global Entre L'union Européenne Et Le Canada (AECG/CETA) Sur L'environnement, Le Climat Et La Santé." Rapport au Premier ministre, September 7, 2018.

Ankersmit, Laurens. "Opinion 2/15 and the Future of Mixity and ISDS." https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/.

Anneke Slob, Smakman, Floor. "A Voice, Not a Vote: Evaluation of the Civil Society Dialogue at DG Trade." ECORYS Nederland BV, 2007.

In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR. Arbitral panel established pursuant to chapter twenty of the CAFTA-DR, 2017, June 14.

Aryada, Estella. *Emerging Disciplines on Labour Standards in Trade Agreements*., 2016; TCS Emerging Issues Briefing Note (4) March 2016.

Aseeva, Anna. "Retour vers le futur la politique étrangère de l'Union européenne, le commerce international et le développement durable dans l'avis 2/15." *Revue juridique de l'environnement* 42, no. 4 (2017): 785–94. https://www.cairn.info/revue-revue-juridique-de-l-environnement-2017-4-page-785.htm.

Aust, Helmut Philipp. "The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective." In *The Double-Facing Constitution*. Edited by Jacco Bomhoff, David Dyzenhaus and Thomas Poole, 345–75. Cambridge: Cambridge University Press, 2020.

Ayres, Ian, and John Braithwaite. *Responsive Regulation: Transcending the Deregulation Debate*. Oxford University Press, USA, 1992.

Bagwell, Kyle, Petros C. Mavroidis, and Robert W. Staiger. "It's a Question of Market Access." *American Journal of International Law* 96, no. 1 (2002): 56–76.

Bagwell, Kyle, and Robert W. Staiger. “The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues.” *The Journal of Economic Perspectives* 15, no. 3 (2001): 69–88.

Banks, Kevin. “Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law.” *Berkeley Journal of Employment and Labor Law*, 2011, 45–142.

Barral, Virginie. “Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm.” *European Journal of International Law* 23, no. 2 (2012): 377–400.

Bartels, Lorand. “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements.” In, *Global Governance Through Trade*.

Bartels, Lorand. “The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction.” *American Journal of International Law* 109 (2015): 95–908.

Bartels, Lorand. “The EU's Approach to Social Standards and the TTIP.” *The Transatlantic Trade and Investment Partnership (TTIP) Negotiations between the EU and the USA*, 2015, 83.

Bartels, Lorand. *Human Rights, Labour Standards and Environmental Standards in CETA.* University of Cambridge Faculty of Law Legal Studies., 2017 PAPER NO. 13/2017.

Berliner, Daniel, Anne Greenleaf, Milli Lake, and Jennifer Noveck. “Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries.” *World development* 72 (2015): 127–39. https://doi.org/10.1016/j.worlddev.2015.02.018.

Bhagwati, Jagdish. “Trade Liberalisation and ‘Fair Trade’ Demands: Addressing the Environmental and Labour Standards Issues.” *The World Economy* 18, no. 6 (1995): 745–59.

Bhagwati, Jagdish. *In Defense of Globalization*. Oxford University Press, 2004.

Bhatia, Vijay K. “Cognitive Structuring in Legislative Provisions.” In *Language and the Law*. Edited by John P. Gibbons, pp. 136--155. Routledge, 2014.

Blustein, Paul. *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambitions, and the Great Shambles of the World Trade System*. Public Affairs, 2009.

Bodansky, Daniel. *The Art and Craft of International Environmental Law*. Cambridge, Mass: Harvard University Press, 2010.

Bodansky, Daniel. “Legally Binding Versus Non-Legally Binding Instruments.” In *Towards a Workable and Effective Climate Regime*. Edited by Barrett, Scott, Carlo Carraro and Jaime de Melo. VoxEU eBook, 2015.

Bodansky, Daniel. “The Legal Character of the Paris Agreement.” *Review of European, Comparative & International Environmental Law* 25, no. 2 (2016): 142–50. https://doi.org/10.1111/reel.12154.

Bodansky, Daniel, Jutta Brunnée, and Lavanya Rajamani. *International Climate Change Law*. First edition. Oxford, New York, NY: Oxford University Press, 2017.

Bodson, Thibaud, and Neophytos Loizides. “Consociationalism in the Brussels Capital Region.” In *Power-Sharing: Empirical and Normative Challenges*. Edited by Allison McCulloch and John McGarry, 87–100. Taylor & Francis, 2017.

Bolle, Mary Jane. *Overview of Labor Enforcement Issues in Free Trade Agreements*., 2016.

Boonekamp, Clemens. “Regional Trade Agreements and the WTO.” In *Future of the Global Trade Order*. Edited by Carlos A. P. Braga and Bernard Hoekman, 113., 2016.

Bourgeois, Jacques, Kamala Dawar, and Simon J. Evenett. “A Comparative Analysis of Selected Provisions in Free Trade Agreements.” *DG Trade, Brussels: European Commission*, 2007.

Braithwaite, John. “Rules and Principles: A Theory of Legal Certainty.” *Austl. J. Leg. Phil.* 27 (2002): 47.

Broude, Tomer. “From Seattle to Occupy: The Shifting Focus of Social Protest.” In *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times*. Edited by Daniel Drache and Lesley A. Jacobs, 91–107. Cambridge: Cambridge University Press, 2014.

Broude, Tomer, Yoram Z. Haftel, and Alexander Thompson. “Who Cares About Regulatory Space in BITs? A Comparative International Approach.” In *Comparative International Law*. Edited by Anthea Roberts et al. New York, NY: Oxford University Press, 2018.

Brown, Drusilla K. “Labor Standards: Where Do They Belong on the International Trade Agenda?” *The Journal of Economic Perspectives* 15, no. 3 (2001): 89–112.

Bungenberg, Marc. “Die Gemeinsame Handelspolitik, Parlamentarische Beteiligung Und Das Singapur-Gutachten Des EuGH.” In *Die Welt Und Wir: Die Aussenbeziehungen Der Europäischen Union*. Edited by

Stefan Kadelbach. 1. Auflage, 133–50. Schriften zur Europäischen Integration und internationalen Wirtschaftsordnung Band 42. Baden-Baden: Nomos, 2017.
Carrère, Céline, Marcelo Olarreaga, and Damian Raess. "Labor Clauses in Trade Agreements: Worker Protection or Protectionism?," 2017.
Charnovitz, Steve. "The Influence of International Labour Standards on the World Trading Regime: A Historical Overview." *International Labour Review* 126, no. 5 (1987): 565–84.
Charny, David. "Regulatory Competition and the Global Coordination of Labor Standards." *Journal of International Economic Law* 3, no. 2 (2000): 281–302.
Chovanec, Jan. "Grammar in the Law." *The Encyclopedia of Applied Linguistics*, 2012.
Cochrane, Feargal, Neophytos Loizides, and Thibaud Bodson. *Mediating Power-Sharing: Devolution and Consociationalism in Deeply Divided Societies*. Routledge, 2018.
Compa, Lance. "Labor Rights and Labor Standards in Transatlantic Trade and Investment Negotiations: An American Perspective." *The Transatlantic Trade and Investment Partnership (TTIP): Implications for labor. Munchen: Rainer Hampp Verlag*, 2014, 120–36.
Cradden, Connor, and Jean-Christophe Graz. *Transnational Private Authority, Regulatory Space and Workers' Collective Competences: Bringing Local Contexts and Worker Agency Back in*. Les Cahiers de l'IEPHI, 2015.
Cross, Ciaran. "Legitimising an Unsustainable Approach to Trade: A Discussion Paper on Sustainable Development Provisions in EU Free Trade Agreements." *Berlin: International Centre for Trade Union Rights*, 2017.
Cuyvers, Ludo. "The Sustainable Development Clauses in Free Trade Agreements of the EU with Asian Countries: Perspectives for ASEAN?" *Journal of Contemporary European Studies* 22, no. 4 (2014): 427–49.
Davidov, Guy. "The Capability Approach and Labour Law: Identifying the Areas of Fit." In *The Capability Approach to Labour Law*. Edited by Brian Langille. Oxford University Press, 2019.
Davidov, Guy, and Brian A. Langille, eds. *The Idea of Labour Law*. Oxford: Oxford Univ. Press, 2011.
Deleuze, Gilles, and Félix Guattari. *Qu'est-Ce Que La Philosophie?* Minuit, 2013.
Dundon, Tony, Tony Dobbins, Niall Cullinane, Eugene Hickland, and Jimmy Donaghey. "Employer Occupation of Regulatory Space of the Employee Information and Consultation (I&C) Directive in Liberal Market Economies." *Work, employment and society* 28, no. 1 (2014): 21–39.
Ebert, Franz Christian. "Labour Provisions in EU Trade Agreements: What Potential for Channelling Labour Standards-Related Capacity Building?" *International Labour Review* 155, no. 3 (2016): 407–33. https://doi.org/10.1111/j.1564-913X.2015.00036.x.
Ebert, Franz Christian, and Anne Posthuma. *Labour Provisions in Trade Arrangements: Current Trends and Perspectives*. ILO, 2011.
Elliott, K. A., & Freeman, R. B. *Can Labor Standards Improve Under Globalization?*, 2003. https://ideas.repec.org/b/iie/ppress/338.html.
EU Commission. *Global Europe*., 2006.
EU Commission. *Trade for All: Towards a More Responsible Trade and Investment Policy*., 2015.
EU Commission. "Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements." February 26, 2018.
"Evaluation of DG TRADE's Civil Society Dialogue in Order to Assess Its Effectiveness, Efficiency and Relevance." 2014.
Flanagan, Robert J. *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy*. Oxford University Press, 2006.
French, D., and L. Rajamani. "Climate Change and International Environmental Law: Musings on a Journey to Somewhere." *Journal of Environmental Law* 25, no. 3 (2013): 437–61. https://doi.org/10.1093/jel/eqt022.
Fudge, Judy. "Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law." In Davidov; Langille, *The Idea of Labour Law*, 120–36.
Gallagher, Kevin, ed. *Putting Development First: The Importance of Policy Space in the WTO and IFIs*. London: Zed Books, 2005.
Gallagher, Kevin P. "Globalization and the Nation-State: Reasserting Policy Autonomy for Development." In *Putting Development First: The Importance of Policy Space in the WTO and IFIs*. Edited by Kevin Gallagher. London: Zed Books, 2005.

Gáspár-Szilágyi, Szilárd. “Opinion 2/15: Maybe It Is Time for the EU to Conclude Separate Trade and Investment Agreements.” https://europeanlawblog.eu/2017/06/20/opinion-215-maybe-it-is-time-for-the-eu-to-conclude-separate-trade-and-investment-agreements/.

Gerstetter, Christiane. “The Appellate Body’s Response to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation.” *C. Joerges and E.-U. Petersmann, Constitutionalism, Multilateral Trade Governance and Social Regulation. Hart Publishing, Oxford*, 2006.

Gheyle, Niels and Deborah Martens. *Understanding the Debate About Policy Space: From the WTO to EU FTAs*. https://www.researchgate.net/publication/308300010_Understanding_the_debate_about_policy_space_from_the_WTO_to_EU_FTAs.

Giegerich, Thomas. “What Kind of Global Actor Will the Member States Permit the EU to Be?” *ZEuS Zeitschrift für Europarechtliche Studien* 20, no. 4 (2017): 397–420.

Global Governance Through Trade. Edward Elgar Publishing, 2015.

Golberg, Elizabeth. “Regulatory Cooperation – a Reality Check.” *Harvard Kenedy School, M-RCBG Associate Working Paper Series | No. 115*, 2019.

Goldstein, Judith, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter. “Introduction: Legalization and World Politics.” *International organization* 54, no. 3 (2000): 385–99.

Greenhill, Brian, Layna Mosley, and Aseem Prakash. “Trade-Based Diffusion of Labor Rights: A Panel Study, 1986–2002.” *American Political Science Review* 103, no. 4 (2009): 669–90.

Gstöhl, Sieglinde, and Dirk de Bièvre. *The Trade Policy of the European Union*. Macmillan International Higher Education, 2017.

Häberli, Christian, Marion Jansen, and José-Antonio Monteiro. “Regional Trade Agreements and Domestic Labour Market Regulation.” In *Policy Priorities for International Trade and Jobs*, 287.

Häberli, Christian Martin. “An International Regulatory Framework for National Employment Policies.” *Journal of World Trade* volume no. 50, issue number no. 2 (2016): pages 167–192. SSRN: https://ssrn.com/abstract=2756911.

Hamwey, Robert. “Expanding National Policy Space for Development: Why the Multilateral Trading System Must Change.” University Library of Munich, Germany, 2005.

Hancher, L., and M. Moran. “Organizing Regulatory Space.” In *A Reader on Regulation*. Edited by Robert Baldwin, Colin Scott and Christopher Hood, 148–71. Oxford readings in socio-legal studies. Oxford: Oxford University Press, 1998.

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

Harrison, James, Mirela Barbu, Liam Campling, Ben Richardson, and Adrian Smith. “Governing Labour Standards Through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters.” *JCMS: Journal of Common Market Studies* 57, no. 2 (2019): 260–77.

Henckels, Caroline. “Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP.” *Journal of International Economic Law* 19, no. 1 (2016): 27–50.

Hepple, Bob. “Factors Influencing the Making and Transformation of Labour Law in Europe.” In Davidov; Langille, *The Idea of Labour Law*, 30–42.

Hepple, Bob A., ed. *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945.* Studies in labour and social law. London: Mansell, 1986.

Hepple, Bob, Bruno Veneziani, ed. *The Transformation of Labour Law in Europe A Comparative Study of 15 Countries 1945–2004*. Hart Publishing, 2009.

Hiltunen, Risto. “The Grammar and Structure of Legal Texts.” In *The Oxford Handbook of Language and Law.,* 2012.

Hirst, Paul, Grahame Thompson, and Simon Bromley. *Globalization in Question: The International Economy and the Possibilities of Governance, Fully Revised and Updated*. Cambridge: Thompson Polity Press, 2009.

Hoekman, Bernard, Chad P. Bown, Andreas Esche, Lionel FONTAGNÉ, Merit Janow, Stephen Karingi, and Margaret Liang et al. “Revitalizing Multilateral Governance at the World Trade Organization: Report of the High-Level Board of Experts on the Future of Global Trade Governance.” 2018. https://www.bertelsmann-stiftung.de/en/publications/publication/did/revitalizing-multilateral-governance-at-the-world-trade-organization/.

Howse, Robert, Brian Langille, and Julien Burda. “The World Trade Organization and Labour Rights: Man Bites Dog.” *INTERNATIONAL STUDIES IN HUMAN RIGHTS* 84 (2006): 157.
Hradilová, Kateřina & Svoboda, Ondřej. “Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness.” *Journal of World Trade* 52, no. 6 (2018): 1019–42.
Huberman, Michael, ed. *International Labor Standards and Market Integration Before 1913: A Race to the Top?*, 2002.
Huberman, Michael. *Odd Couple: International Trade and Labor Standards in History*. Yale University Press, 2012.
International Labour Office. “Rules of the Game: A Brief Introduction to International Labour Standards.” ILO, 2009.
International Labour Office. “Assessment of Labour Provisions in Trade and Investment Arrangements.” Studies on Growth with Equity, ILO, Geneva, 2016.
International Labour Office. *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*. Geneva, 2017.
International Labour Organization. *Social Dimensions of Free Trade Agreements*. Revised edition. Geneva, 2015.
Inversi, Cristina, Lucy Ann Buckley, and Tony Dundon. “An Analytical Framework for Employment Regulation: Investigating the Regulatory Space.” *Employee Relations* 39, no. 3 (2017): 291–307.
Kamata, Isao. “Regional Trade Agreements with Labor Clauses: Effects on Labor Standards and Trade.” 2014.
Kaufmann, Christine. *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law*. Bloomsbury Publishing, 2007.
Kentikelenis, Alexander E., Thomas H. Stubbs, and Lawrence P. King. “IMF Conditionality and Development Policy Space, 1985–2014.” *Review of International Political Economy* 23, no. 4 (2016): 543–82.
Klamert, Marcus. *New Conferral or Old Confusion? The Perils of Making Implied Competences Explicit and the Example of the External Competence for Environmental Policy*. TMC Asser Institute, 2011.
Koivusalo, Meri, Ted Schrecker, and Ronald Labonté. “Globalization and Policy Space for Health and Social Determinants of Health.” In *Globalization and Health: Pathways, Evidence and Policy*. Edited by Labonté Ronald, Ted Schrecker, Corinne Packer, Vivien Runnels, 105–30. Routledge studies in health and social welfare 4. London [u.a.]: Routledge, 2012.
Kolben, Kevin. “Labor Rights as Human Rights.” *Va. J. Int'l L.* 50 (2009): 449.
Krajewski, Markus, and Rhea Tamara Hoffmann. “Alternative Model for a Sustainable Development Chapter and Related Provisions in the Transatlantic Trade an Investment Partnership (TTIP).” *Commissioned by The Greens/European Free Alliance in the European Parliament. Available at: reinhardbuetikofer. eu/wp…/Model-SD-Chapter-TTIP-Second-Draft-July_final. pdf*.
Lazo Grandi, Pablo. “Trade Agreements and Their Relation to Labour Standards: The Current Situation.” Issue Paper: ICTSD EPAs and Regionalism Series, 2009.
Leblond, Patrick, and Crina Viju-Miljusevic. “EU Trade Policy in the Twenty-First Century: Change, Continuity and Challenges.” *Journal of European Public Policy* 26, no. 12 (2019): 1836–46.
Louis, Marieke. *Qu'est-Ce Qu'une Bonne Représentation? L'organisation Internationale Du Travail De 1919 À Nos Jours*. Dalloz, 2016.
Lukas, Karin, Astrid Steinkellner. *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements*., 2010.
Madsen, Mikael Rask, Pola Cebulak, and Micha Wiebusch. “Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts.” *International Journal of Law in Context* 14, no. 2 (2018): 197–220.
Manger, Mark S., and Clint Peinhardt. “Learning and the Precision of International Investment Agreements.” *International Interactions* 43, no. 6 (2017): 920–40.
Martens, Deborah, den Putte, Lore Van, Myriam Oehri, and Jan Orbie. “Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index.” *European Foreign Affairs Review* 23, no. 1 (2018): 41–62.
Marx, Axel, Bregt Natens, Dylan Geraets, and Jan Wouters. “Global Governance Through Trade: An Introduction.” In, *Global Governance Through Trade*.
Mayer, Jörg. “Policy Space: What, for What, and Where?” *Development Policy Review* 27, no. 4 (2009): 373–95.

McGuire, Donna, and Christoph Scherrer. “Developing a Labour Voice in Trade Policy at the National Level.” Global Labour University Working Paper, 2010.
Meunier, Sophie, and Kalypso Nicolaïdis. “The European Union as a Conflicted Trade Power.” *Journal of European Public Policy* 13, no. 6 (2006): 906–25.
Morgan, Bronwen, and Karen Yeung. *An Introduction to Law and Regulation*. Cambridge: Cambridge University Press, 2007.
Morin, Jean Frédéric, Joost Pauwelyn, and James Hollway. “The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements.” *Journal of International Economic Law* 20, no. 2 (2017): 365–90.
Mosley, Layna, and Saika Uno. “Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights.” *Comparative Political Studies* 40, no. 8 (2007): 923–48.
Nakagawa, Junji. *International Harmonization of Economic Regulation*. Oxford University Press, USA, 2011.
Namgoong, June. “Two Sides of One Coin, the US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP.” *International Journal of Comparative Labour Law and Industrial Relations* 35, no. 4 (2019): 483–510.
Neumayer, Eric, and Indra de Soysa. “Trade Openness, Foreign Direct Investment and Child Labor.” *World development* 33, no. 1 (2005): 43–63.
Neumayer, Eric, and Indra de Soysa. “Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis.” *World development* 34, no. 1 (2006): 31–49.
Nils Meyer-Ohlendorf, Christiane Gerstetter, Inga Bach. “Regulatory Cooperation Under CETA.”
Oehri, Myriam. *US and EU External Labor Governance: Workers’ Rights Promotion in Trade Agreements and in Practice*. Springer, 2017.
Ogus, Anthony. “Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law.” *International & Comparative Law Quarterly* 48, no. 2 (1999): 405–18.
Orbie, Jan, Deborah Martens, and Lore van den Putte. “Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation.” *Centre for the Law of EU External Relations (CLEER)* 3 (2016): 1–48.
Orbie, Jan, Lore van den Putte, and Deborah Martens. “Civil Society Meetings in EU Free Trade Agreements: The Purposes Unravelled.” In *Labour Standards in International Economic Law*, 135–52. Springer, 2018.
Orbie, Jan, Hendrik Vos, and Liesbeth Taverniers. “EU Trade Policy and a Social Clause: A Question of Competences?” *Politique européenne*, no. 3 (2005): 159–87.
Paiement, Phillip. “Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute.” *Georgetown Journal of International Law* 49 (2018): 675–92.
Peters, Anne. “The Competition Between Legal Orders.” *International law research* 3, no. 1 (2014).
Piore, Michael J., and Andrew Schrank. “Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World.” *International Labour Review* 147, no. 1 (2008): 1–23.
Polaski, Sandra. “Protecting Labor Rights Through Trade Agreements: An Analytical Guide.” *UC Davis J. Int'l L. & Pol'y* 10 (2004): 13.
Posner, Eric A. *The Twilight of Human Rights Law*. Oxford University Press, USA, 2014.
Postnikov, Evgeny, and Ida Bastiaens. “Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements.” *Journal of European Public Policy* 21, no. 6 (2014): 923–40.
Radaelli, Claudio M. “The Puzzle of Regulatory Competition.” *Journal of Public Policy* 24, no. 1 (2004): 1–23.
Rajamani, Lavanya. “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations.” *Journal of Environmental Law* 28, no. 2 (2016): 337–58. https://doi.org/10.1093/jel/eqw015. https://academic.oup.com/jel/article/28/2/337/2404195.
Rajamani, Lavanya. “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations.” *Journal of Environmental Law* 28, no. 2 (2016): 337–58.
Risse, Thomas. “Limited Statehood: A Critical Perspective.” In *The Oxford Handbook of Transformations of the State*. Edited by Stephan Leibfried et al. First edition, 1–20. Oxford handbooks. Oxford, New York: Oxford University Press, 2015.
Rodrik, Dani. “Has Globalization Gone Too Far?” *Challenge* 41, no. 2 (1998): 81–94.
Rodrik, Dani. *The Globalization Paradox: Democracy and the Future of the World Economy*. New York and London: W.W. Norton, 2011.

Ronconi, Lucas. “Enforcement and Compliance with Labor Regulations in Argentina.” *Ilr Review* 63, no. 4 (2010): 719–36.

Rosas, Allan. “Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?” In *The European Union in the World: Essays in Honour of Professor Marc Maresceau*. Edited by Inge Govaere et al., 17–43. Leiden: Martinus Nijhoff Publishers, 2014.

Schömann, Isabelle. “Réformes Nationales Du Droit Du Travail En Temps De Crise: Bilan Alarmant Pour Les Droits Fondamentaux Et La Démocratie En Europe.” *Revue Interventions économiques. Papers in Political Economy*, no. 52 (2015).

Schutter, Olivier de. *Economic, Social and Cultural Rights as Human Rights*. Edward Elgar, 2013.

Schutter, Olivier de. *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards*. Bloomsbury Publishing, 2015.

Scott, Colin. “Analysing Regulatory Space: Fragmented Resources and Institutional Design.” *Public law*, 2001, 283–305.

Shaffer, Gregory. “Retooling Trade Agreements for Social Inclusion.” *UNIVERSITY OF ILLINOIS LAW REVIEW*, 2019.

Shelton, Dinah. “Introduction: Law, Non-Law and the Problem of ‘Soft Law’.” In *Commitment and Compliance*. Edited by Dinah Shelton, 1–18. Oxford University Press, 2003.

Slobodian, Quinn. *Globalists: The End of Empire and the Birth of Neoliberalism*. Harvard University Press, 2020.

Spears, Suzanne A. “The Quest for Policy Space in a New Generation of International Investment Agreements.” *Journal of International Economic Law* 13, no. 4 (2010): 1037–75.

Stiglitz, Joseph E. *Globalization and Its Discontents*. New York Norton, 2002.

Stoll, Peter-Tobias, Henner Gött, and Patrick Abel. “A Model Labour Chapter for Future EU Trade Agreements.” In *Labour Standards in International Economic Law*, 381–430. Springer, 2018.

Tham, Joo-Cheong and Ewing, K. D. “Labour Clauses in the TPP and TTIP: A Comparison Without a Difference?” *Melbourne Journal of International Law* 17, no. 2 (2016). Available at SSRN: https://ssrn.com/abstract=2892982.

Thompson, Alexander, Tomer Broude, and Yoram Z. Haftel. “Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design.” *International organization* 73, no. 4 (2019): 859–80.

Thüsing, Gregor. *European Labour Law*. Nomos Verlagsgesellschaft mbH & Co. KG, 2013.

Titi, Catharine. *The Right to Regulate in International Investment Law*. 1. ed. Studies in international investment law 10. Baden-Baden: Nomos, 2014. Zugl.: Siegen, Univ., Diss., 2013.

Trachtman, Joel P. “Review Essay: The Antiglobalisation Paradox - Freedom to Enter into Binding International Law Is Real Freedom.” *The World Economy* 36, no. 11 (2013): 1442–54.

UNCTAD. *Global Governance and Policy Space for Development.* Trade and development report 2014. New York, NY: United Nations, 2014.

van den Bossche, Peter, and W. Zdouc. “The Law and Policy of the World Trade Organization.” *Text, cases and Materials*, 2017.

van den Putte, Lore. “Involving Civil Society in the Implementation of Social Provisions in Trade Agreements: Comparing the US and EU Approach in the CSE of South Korea.” *Global Labour Journal* 6, no. 2 (2015): 221–35.

van den Putte, Lore, and Jan Orbie. “EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions.” *International Journal of Comparative Labour Law and Industrial Relations* 31, no. 3 (2015): 263–83.

Verellen, Thomas. “Het Hof Van Justitie En Het EU-Singapore Handelsakkoord, of De Kunst Van Het Koorddansen Advies 2/15.” *SEW: Tijdschrift voor Europees en Economisch Recht.* Uitgeverij Paris. https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1854979&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1.

Ville, Ferdi de. “Regulatory Cooperation in TTIP. A Risk for Democratic Policy Making?” *FEPS Policy Brief*, 2016.

Ville, Ferdi de, Jan Orbie, and Lore van den Putte. “TTIP and Labour Standards.” 2016.

Vinjamuri, Leslie. “Human Rights Backlash.” In *Human Rights Futures*. Edited by Jack L. Snyder, Leslie Vinjamuri and Stephen Hopgood, 114–34. Cambridge: Cambridge University Press, 2017.

Voeten, Eric. “Liberalism, Populism, and the Backlash Against International Courts.” 2017. https://global.upenn.edu/sites/default/files/voetenpaper.original.pdf.
Wagner, Markus. “Regulatory Space in International Trade Law and International Investment Law.” *U. Pa. J. Int'l L.* 36 (2014): 1.
Werksman, Jacob. “The Legal Character of International Environmental Obligations in the Wake of the Paris Climate Change Agreement’ (Brodies Environmental Law Lecture Series, 2016.” Brodies Environmental Law Lecture Series, September 02, 2016. Accessed July 4, 2020. https://www.law.ed.ac.uk/sites/default/files/2019-06/BrodiesLectureontheLegalCharacteroftheParisAgreementFinalBICCLEdinburgh.pdf.
Wolfrum, Rüdiger. “Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations.” In *Looking to the Future*, 363–84. Brill, 2010.
Zürn, Michael. *A Theory of Global Governance: Authority, Legitimacy, and Contestation*. Oxford University Press, 2018.

Reports of the Committees on Trade and Sustainable Development analysed in this research:

For the EU-Republic of South Korea FTA:

Trade and Sustainable Development Committee under the Korea-EU Free Trade Agreement Joint statement to the Civil Society Forum on the outcomes of the 1st Trade and Sustainable Development Committee, Brussels, Belgium, 27 June 2012.
Joint Statement of the 2nd Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA, Seoul, Republic of Korea, 11 September 2013.
Joint Statement of the 3rd Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA, Brussels, Belgium, 8 December 2014.
Joint Statement of the 4th Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA, Seoul, Republic of Korea, 9 September 2015.
The Minutes of the 5th meeting of the Committee on Trade and Sustainable Development under the EU-Korea FTA, Brussels, Belgium, 24 March 2017.
Summary of Discussions of the 6th Committee on Trade and Sustainable Development under the EU-Korea FTA, Seoul, Republic of Korea, 13 April 2018.

For the EU-Central America FTA:

Report of the Board on Trade and Sustainable Development to the Civil Society Dialogue Forum, Central America – European Union Association Agreement, 19th November 2014.
Report of the second meeting of the Board on Trade and Sustainable Development to the Civil Society Dialogue Forum, Association Agreement between the European Union and Central America, 27-28 May 2015.
Report of the third meeting of the Board on Trade and Sustainable Development to the Civil Society Dialogue Forum, Association Agreement between the European Union and Central America, Tegucigalpa DC, Honduras, 17 June 2016.
Report to the Civil Society Forum of the Fourth Meeting of the Board of Trade and Sustainable Development, Association Ageements Between Central America and the European Union, Brussels, Belgium, 13 June 2018.
Minutes of the Fifth Metting of the Board of Commerce and Sustainable Development, Association Agreement Between Central America and the European Union, Antigua, Guatemala, 24-25 June 2019.

For the EU-Georgia FTA:

First meeting of the Georgia – European Union Trade and Sustainable Development (TSD) Sub-Committee (SC) Joint statement of the Parties to the Joint Civil Society Forum, Brussels, Belgium, 27 January 2016.
2nd meeting of the Georgia – European Union Sub-Committee (SC) on Trade and Sustainable Development (TSD) Joint statement to the Civil Society Dialogue Forum, Brussels, Belgium, 30 November 2016.
3 rd meeting of the Georgia – European Union Sub-Committee (SC) on Trade and Sustainable Development (TSD) Joint statement to the Civil Society Dialogue Forum, Tbilisi, Georgia, 20 March 2018.

4 th meeting of the European Union-Georgia Sub-Committee (SC) on Trade and Sustainable Development (TSD)
Joint statement to the Civil Society Dialogue Forum, Brussels, Belgium, 26 March 2019.

Selbständigkeitserklärung

Hiermit bestätige ich, dass ich die vorliegende Arbeit selbstständig angefertigt habe. Ich versichere, dass ich ausschließlich die angegebenen Quellen und Hilfsmittel in Anspruch genommen habe.

Berlin, den 10.10.2020

Thibaud Bodson