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### Introduction

Since the early 1990s, the EU's trade agreements have included a 'human rights clause' requiring the parties to respect human rights and democratic principles. More recently, beginning with the 2008 EU-Cariforum Economic Partnership Agreement,<sup>1</sup> they have also included 'sustainable development' chapters, which contain obligations to respect labour and environmental standards. These sets of provisions are a central means by which the EU achieves its 'ethical' foreign policy objectives (Khaliq, 2008).

Similar provisions are also likely to feature in, or otherwise apply to, the TTIP. This article considers the extent to which, legally, these two sets of provisions give the EU the means of implementing its obligations to ensure that its external activities respect human rights and pursue the objective of promoting sustainable development. It also considers the differences in the EU's approach to human rights and democratic principles on the one hand and labour and environmental standards on the other.

### Human rights clauses in trade agreements

Since 1995 the EU has adopted a policy of ensuring that all cooperation and trade agreements are subject to human rights clauses (European Commission, 1995). Traditionally, it did this by inserting human rights clauses directly into these agreements. More recently, it has done this by cross-referencing (sometimes by implication)<sup>2</sup> human rights clauses in existing agreements between the parties.<sup>3</sup> Similarly, the EU has specific human rights clauses and other similar clauses in its autonomous instruments granting trade preferences (including the EU's Generalised Scheme of Preferences (GSP) programme)<sup>4</sup> as well as in financing agreements with developing countries.<sup>5</sup>

Whether the TTIP will be subject to a human rights clause is still an open question. The following proceeds on the basis that it will.

1. EU-Cariforum Economic Partnership Agreement [2008] OJ L289/I/3.
2. Article 15.14 of the EU-Korea Free Trade Agreement [2011] OJ L127/6 states that "[u]nless specified otherwise, previous agreements between the Member States of the European Union and/or the European Community and/or the European Union and Korea are not superseded or terminated by this Agreement".
3. This policy is understood to be set out in the confidential EU documents: 7008/09, 7008/09 COR 1 and 10491/1/09 REV 1 (RESTREINT UE). See EU Council Document 12450/11 rejecting an application for public access to these documents.
4. Reg 732/2008 [2008] OJ L211/1.
5. E.g. Annex I of the 2012 Model General Conditions to Financing Agreements and Article 23(1) of the European Development Fund, at [http://ec.europa.eu/europeaid/work/procedures/financing/financing\\_agreement/index\\_en.htm](http://ec.europa.eu/europeaid/work/procedures/financing/financing_agreement/index_en.htm).

## Obligations

### *The 'essential elements' clause*

The core of all human rights clauses is an 'essential elements' clause, which is in relatively standard wording. The following, from the 2012 EU-Central America agreement, is a good example:

Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.<sup>6</sup>

The EU's early agreements contain little else and it is unfortunate, in some respects, that it is one of these agreements – the 1993 EU-India cooperation agreement – that is the best known, thanks to an ECJ case on its human rights clause in 1996.<sup>7</sup> In fact, the human rights clause in this agreement is quite unrepresentative of later human rights clauses, which have quite different forms and legal effects, and much of what the court said about this clause is of limited relevance to these clauses in general.<sup>8</sup>

One of these later changes, now a standard feature of human rights clauses, is the inclusion of an 'implementation' clause, which states that "[t]he Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement".<sup>9</sup> This clause derives from what is now Article 4(3) TEU, which has in the context of EU law been interpreted as imposing a variety of additional obligations on EU member states, including the obligation to take steps to ensure the effective application of EU law.<sup>10</sup>

### *Enforcement*

The human rights clause is designed for the situation where a state violates human rights. In that event, a human rights clause authorises the other party to respond by means of unilateral "appropriate measures". In most cases, this may be done without even the need for prior consultations.

This is achieved in most of the post-1996 agreements in a somewhat unwieldy way. These agreements deem a violation of the essential elements of the agreement to be a "material breach" of the agreement, which is in turn deemed to be a "case of special urgency"<sup>11</sup> automatically entitling the other party to adopt "appropriate measures" under a so-called "non-execution" clause.<sup>12</sup> More efficiently, the 2012 EU-Peru/Colombia agreement states that "any Party may immediately adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement".<sup>13</sup>

There are conditions on the adoption of "appropriate measures": they must be taken in accordance with international law; priority must

6. Article 1 of the EU-Central America Association Agreement [2012] L346/3.

7. Case C-268/94, *Portugal v Council* [1996] ECR I-6177.

8. To take an example, Article 60 of the Vienna Convention on the Law of Treaties, referred to by the Advocate-General and the parties to the case, is, by its own terms, only a default clause and therefore inapplicable to later versions of the human rights clause, which expressly regulate the consequences of violations of the norms in the essential elements clause. Of course, strictly speaking, Article 60 would not be relevant anyway, given that the EU is not a party to the Vienna Convention 1969, and the Vienna Convention 1986 is not in force. It is the customary international law rule reflected in this provision that would be relevant. Invariably, the academic commentary misses this point, e.g., recently, Khaliq (2008), pp.112-13.

9. E.g. Article 355(1) of the EU-Central America agreement.

10. For a useful summary, see Hillion and Wessel (2008).

11. The wording is unfortunate. The phrase 'special urgency' implies temporal urgency, not material gravity.

12. E.g. Article 355(2)-(5) of the EU-Central America agreement.

13. Article 8 of the EU-Colombia/Peru Agreement [2012] L354/3.

be given to the measures that least disrupt the functioning of the agreement;<sup>14</sup> it is usually agreed that suspension would be a measure of last resort;<sup>15</sup> and it is sometimes also said that the measures must be revoked as soon as the reasons for their adoption have disappeared.<sup>16</sup> As to the nature of such measures, these conditions clearly indicate that a wide range of measures is envisaged, including the suspension of the agreement in whole or in part. This corresponds to the purpose of these clauses, which listed a range of measures including trade sanctions.<sup>17</sup>

It is worth noting that non-execution clauses mentioning ‘appropriate measures’ also permit the suspension not only of the agreement containing the clause, but also other agreements between the parties (and presumably also obligations between the parties under customary international law). This means that, for example, free trade agreements which do not themselves contain an operative human rights clause, or do not cross-reference an existing human rights clause, are in any case subject to any otherwise binding human rights clause with a non-execution clause. Here, however, it is relevant to note that the 1993 EU-India cooperation agreement, predating the 1996 model, contains an essential elements clause but not a “non-execution” clause. Any EU-India FTA would therefore have to contain its own non-execution clause to ensure that the human rights clause can have full effect.

### *Dispute settlement*

While the post-1996 human rights clauses are relatively similar in substance, they differ significantly in the extent to which they, or “appropriate measures”, are subject to dispute settlement under the agreement. The Cotonou Agreement and all of the Euro-Mediterranean association agreements in force provide for dispute settlement in relation to the interpretation and application of their human rights clauses, including appropriate measures adopted under these clauses. By contrast, certain others, including, most recently, the EU-Central America agreement, only permit an affected party to “ask that an urgent meeting be called to bring the Parties together within 15 days for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties”.<sup>18</sup>

The 2012 agreement concluded with Colombia and Peru presents something of a puzzle in this regard. The normal rule (expressed as a jurisdiction clause in Article 299(1) and as an exclusive jurisdiction clause in Article 8(2)) is that the dispute settlement system established in the agreement applies to all disputes relating to the interpretation and application of the agreement. But Article 8(3) provides for an urgent meeting in the same terms as that in the Central America agreements. The question is whether, without more, this should operate as a carve-out from dispute settlement. On balance, the answer is that it probably should not. The ‘urgent meeting’ by no means displaces or renders redundant the otherwise applicable consultation or dispute settlement proceedings in the event of appropriate measures. Indeed, a party that calls such a meeting might have an interest in having these measures subjected to formal dispute settlement. It would therefore appear that, in contrast to the situation in certain of the EU’s free trade agreements, in these agreements disputes relating to the human rights clause are fully subject to dispute settlement proceedings.

14. This second condition is entirely counterintuitive insofar as an appropriate measure under a human rights clause is adopted specifically to disrupt the normal implementation of the agreement. The explanation is that the condition originates in safeguards clauses, where the measures chosen are defensive, not offensive. In this original context, it makes perfect sense to oblige parties imposing restrictive measures to adopt the measures that least affect the other party. See Bartels (2005), p.24.
15. But not in the EU-Colombia/Peru agreement.
16. Article 8(3) of the EU-Colombia/Peru agreement, *ibid.* This wording derives from Article 96(2)(a) of the Cotonou Agreement [2000] OJ L 317/3, amended in 2005 and 2010.
17. Annex 2 of European Commission (1995).
18. Article 355(5) of the EU-Central America Agreement.

## Sustainable development chapters

### Origins

The EU's practice of including sustainable development chapters in FTAs is relatively recent in origin. The principle of sustainable development is commonly attributed to the 1987 Brundtland Report,<sup>19</sup> and has been an important element of EU policy since the European Commission's 2001 Communication 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development'.<sup>20</sup> The emphasis in this Communication (adopted at the 2001 Göteborg European Council) was on the internal dimensions of the EU's strategy. The external dimensions were then elaborated in the commission's 2002 Communication "Towards a global partnership for sustainable development", issued prior to the 2002 UN World Summit on Sustainable Development held in Johannesburg.<sup>21</sup> The principle of sustainable development also featured prominently in the 2005 European Consensus on Development, which defined common principles for the development policies of the EU and the member states,<sup>22</sup> and stated that "the primary and overarching objective of EU development cooperation is the eradication of poverty in the context of sustainable development". More recently, since the 2009 Lisbon Treaty, the EU's external policies must pursue the objective of "foster[ing] sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty".<sup>23</sup>

The first of the EU's free trade agreements to make reference to the principle of sustainable development was the 1993 EU-Hungary Europe Agreement,<sup>24</sup> and it has appeared regularly as an objective, or in an incidental or interpretive context, in agreements since then. The principle was given an unusually broad definition in the 2000 Cotonou Agreement, which states that "[r]espect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development".<sup>25</sup> More conventionally, the EU-Central America agreement states that: "[t]he Parties reaffirm their commitment to achieving sustainable development, whose pillars – economic development, social development and environmental protection – are interdependent and mutually reinforcing".<sup>26</sup>

It is notable that the principle of sustainable development has never been treated as a concrete obligation in itself: none of the agreements admit the possibility of violating the "principle of sustainable development".<sup>27</sup> Rather, in the context of this principle and sometimes under its banner, the agreements contain provisions on cooperation as well as, relevantly, concrete obligations to respect and "strive" to improve multilateral and domestic labour and environmental standards.<sup>28</sup> Such chapters are now found in the 2008 EU-Cariforum agreement, the 2010 EU-Korea agreement, and the 2012 EU-Central America and EU-Colombia/Peru agreements, the EU-Canada Comprehensive Economic and Trade Agreement (initialled 2014, not yet signed), and others. The EU is now seemingly committed, as a matter of policy, to including these provisions in future free trade agreements. But questions remain as to what value this brings, and, for reasons to be explained, how these chapters relate to the EU's existing policy on human rights clauses.

19. For a full discussion, see Barral (2012), p.379, no. 9. She notes that "[a]lthough the term 'sustainable development' is fully articulated and disseminated by the Brundtland Report, the expression was borrowed from the 1980 World Conservation Strategy (a joint IUCN/WWF/ UNEP document)".
20. COM (2001) 264, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0264&rid=2>.
21. COM (2002) 82, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0082&rid=1>.
22. Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy [2006] OJ C46/1.
23. Article 21(3), referring to Article 21(2)(d) of the Treaty on European Union.
24. The principle of 'sustainable development' first appeared in an international trade instrument in the EU-Hungary Agreement [1993] OJ L347/2.
25. Article 9 of the Cotonou Agreement.
26. Article 284(2) of the EU-Central America agreement.
27. This is quite common: see Barral (2012), p.385.
28. These are not new clauses: in fact, they originate in the NAFTA labour and environment side agreements, and have become common in North and South American trade agreements since then. For account of their evolution, see Bartels (2008), pp.342-366.

## Obligations

As noted, the sustainable development chapters contain provisions on labour standards and environmental standards. In both cases, the obligations are of two types: a) minimum obligations to implement certain multilateral obligations, and b) a set of other additional obligations requiring the parties not to reduce their levels of protection, and encouraging them to raise their levels of protection, subject to a proviso that this is not done for protectionist purposes.

The sustainable development chapter in the EU-Central America agreement is typical. The parties affirm their commitments to the ILO core labour principles<sup>29</sup> and they also affirm their commitment to “effectively implement” the fundamental ILO Conventions referred to in the ILO Declaration of Fundamental Principles and Rights at Work of 1998,<sup>30</sup> as well as a set of multilateral environmental agreements.<sup>31</sup> 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.

Beyond this basic provision concerning minimum standards, the parties undertake not to lower their levels of protection to encourage trade or investment, or to fail to effectively enforce their labour and environmental legislation in a manner affecting trade or investment between the parties;<sup>32</sup> and they undertake that they will “strive to ensure” that their laws and policies provide for and encourage appropriate but high levels of labour and environmental protection and that they will “strive to improve” these laws and policies.<sup>33</sup> The first of these obligations is an effective guarantee against retrogression, when this relates to trade or investment under the agreement.<sup>34</sup> The second is weaker, in the sense that it is only a best endeavours provision, but it is also broader in scope in that it applies to labour and environmental standards even when trade and investment is not affected. But, 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.<sup>35</sup>

The sustainable development chapters also contain clauses preventing abuse: for example, the EU-Central America agreement states that “labour standards should never be invoked or otherwise used for protectionist trade purposes and ... the comparative advantage of any Party should not be questioned”.<sup>36</sup> Interestingly, sometimes (as in this example) there is only such a clause in relation to labour standards; while in the Korea and Cariforum agreements there is an equivalent clause for environmental standards. It is likely, however, that any such standards would in any case need to be justified under the general exceptions to the agreement, which contain provisions preventing this type of abuse.

Unlike the other agreements so far concluded containing sustainable development chapters, the EU-Cariforum agreement regulates investment in goods, and in this part of the agreement includes additional sustainable development obligations. The parties are required to act in accordance with core labour standards, not to operate their investments in a manner that circumvents international labour or environmental obli-

29. Article 286(1) of the EU-Central America agreement. These 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.

30. Article 286(2), *ibid.* These are: (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.

31. Article 287(2), *ibid.* These are (a) Montreal Protocol on Substances that Deplete the Ozone Layer; (b) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; (c) Stockholm Convention on Persistent Organic Pollutants; (d) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); (e) Convention on Biological Diversity; (f) Cartagena Protocol on Biosafety to the Convention on Biological Diversity; and (g) Kyoto Protocol to the United Nations Framework Convention on Climate Change. Article 287(3) and (4) provide that the Amendment to Article XXI of CITES must be ratified, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade must be ratified and implemented.

32. Article 291, *ibid.*

33. Article 285, *ibid.*

34. This term is currently the subject of litigation in See Guatemala (2015), paras 454-472.

35. Cf. the US letter (6.5.2013) requesting consultations with Bahrain for violations of ‘strive to ensure’ obligations: <http://www.dol.gov/lab/reports/pdf/20130506BahrainLetter.pdf>.

36. Article 286(4), *ibid.*

gations, and to ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.<sup>37</sup> These provisions reiterate the obligations set out in the sustainable development chapter, and their existence is probably explained in terms of a complicated negotiating dynamic. However, the fact that these provisions are located outside the usual chapter raises interesting questions, discussed below, as to their implementation and enforcement.

How, then, do these provisions relate to the parties' existing obligations, including those under the human rights clause? In terms of the applicable standards (as opposed to implementation and remedies), their novelty concerns the provisions requiring the parties not to undermine their existing labour and environmental standards. It is quite conceivable that a measure may reduce the level of domestic protection in these areas without this amounting to a violation of the norms set out in the human rights clause, or indeed in any applicable multilateral environmental agreement. 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. The situation with the multilateral environmental agreements is a little different: the obligation to implement these agreements amounts to no more than a reaffirmation of obligations already binding on the parties under those agreements. It seems, then, that the provisions are not as original as they seem. The question, addressed below, is whether such duplication comes at a cost.

### Monitoring

The sustainable development obligations are specifically monitored by a variety of organs established under the agreements. Most important are the bilateral committees established specifically for sustainable development issues. These have mandates of varying breadth. The Trade and Development Committee established by the EU-Cariforum agreement has a broad mandate to discuss sustainable development issues and is not therefore limited to discussing issues only insofar as they concern the implementation of the sustainable development chapter.<sup>38</sup> More narrowly, the Trade and Sustainable Development Board in the EU-Central America agreement has a mandate to oversee the implementation of the sustainable development chapter, but may otherwise have limited jurisdiction.

These bilateral meetings and organs are accompanied by civil society mechanisms in various forms, ranging from unilateral advisory groups to bilateral meetings of civil society groups (in the case of the EU-Cariforum agreement these meetings take place within a civil society consultative committee specifically designed for this purpose). Interestingly, the mandate of these groups is described in terms of "trade-related aspects of sustainable development". Bearing in mind the wide definition of sustainable development, it is not inconceivable that these organs might legitimately discuss certain issues relating to these matters. Indeed, this could include matters falling under the human rights clause, if the

37. Articles 72 and 73 of the EU-Cariforum agreement.

38. Article 230(3)(a) of the EU-Cariforum agreement.

broad definition of ‘sustainable development’ adopted in the Cotonou Agreement is applied. There may ordinarily be no warrant for such a reading, but in the case of the Cariforum agreement this would be entirely proper, given that the parties are all parties to the Cotonou Agreement as well.

### **Bilateral implementation**

As mentioned in the context of the human rights clause, it may be that the agreement itself stands in the way of sustainable development principles. For example, a party may have adopted high labour standards, consistent with its right to do so, which have a disproportionate effect on products from the other party. The question would be whether such standards would thereby violate the national treatment obligation in the agreement ensuring that those products must not be granted less favourable treatment than domestic products. It may be that the problem can be resolved by means of interpretation; on the other hand, it may be that there is a violation and the most appropriate solution is for the parties to agree bilaterally on a solution that permits such standards in the name of sustainable development. Again, the powers of the organs established under the agreement will determine whether such a course of action is possible, and as mentioned, this depends on the agreement.

### **Dispute settlement**

None of the sustainable development chapters gives the parties the right of unilateral enforcement of the sustainable development obligations, nor (except in the EU-Cariforum agreement, on which see below) is it permissible to resort to the normal dispute settlement procedures established under the agreements. Rather, disputes on these matters are to be resolved in a self-contained system of dispute settlement involving consultations followed by referral to a panel of experts.

This panel has the power to examine whether there has been a failure to comply with the relevant obligations and to draw up a report and to make non-binding recommendations for the solution of the matter. The next steps differ according to the agreement at issue. In the EU-Korea agreement, the report goes to the parties, who “shall make their best efforts to accommodate advice or recommendations ... on the implementation of [the sustainable development] chapter”, and to the Domestic Advisory Group.<sup>39</sup> In the EU-Central America agreement, the report is published and the relevant party must respond with an appropriate action plan, the implementation of which is then monitored by the Trade and Sustainable Development Board.<sup>40</sup>

Once again, the EU-Cariforum agreement differs from this model. In this agreement, the normal dispute settlement procedures apply, but the suspension of concessions is ruled out.<sup>41</sup> On the other hand, this remedies carve-out only applies to violations of obligations set out in the sustainable development chapter. It does not apply to violations of the sustainable development obligations set out in the chapter on investment in goods. Perhaps by oversight, these obligations are fully subject not only to dispute settlement but also to the usual remedies available under the agreement.

**39.** Article 13.15(2) of the EU-Korea Free Trade Agreement [2011] L127/6.

**40.** Article 301 of the EU-Central America agreement.

**41.** Article 213(2) of the EU-Cariforum agreement.

## Implications for the TTIP

Along with the EU-Canada CETA, the TTIP represents the first time that the EU has negotiated provisions on social standards with another state that also has its own tradition of negotiating provisions of this type. The precedent of CETA also shows that the outcome might be some combination of both parties' traditional sets of provisions, at least where this does not conflict with a red line policy on either side. To predict the outcome of TTIP negotiations therefore requires some brief analysis of the US position on social provisions in free trade agreements. This is in fact simpler than it might otherwise have been, because, as noted, in large measure the EU's model provisions concerning labour and environmental standards are taken –in most cases verbatim –from earlier US practice. It suffices therefore to mention certain areas of divergence.

The first, and most significant, area of divergence is that the United States has no tradition of subjecting its agreements to broad human rights clauses, let alone clauses that are enforceable by means of sanctions. It is currently impossible to know what will emerge on this point from the negotiations, but given the EU's stated policy concerning human rights clauses it would be remarkable and significant if the EU gave this up in this instance.

The second area of divergence, somewhat ironically, perhaps concerns the enforceability of the sustainable development obligations. Here the positions are reversed. The US, now by legislative mandate, has a negotiating objective of ensuring that all labour and environmental obligations in its free trade agreements are enforceable by ordinary dispute settlement procedures.<sup>42</sup> In recent US agreements, labour obligations are subject to ordinary dispute settlement, with ordinary remedies (suspension of trade concessions equal to the benefits nullified or impaired, or a monetary assessment equal to 50% of this amount).<sup>43</sup> This may be directed to be spent, relevantly, on "assisting a disputing Party in carrying out its obligations under this Agreement".<sup>44</sup> By contrast, as noted, the EU's sustainable development obligations are not enforceable, except insofar as the parties agree to take into account the recommendations and advice of a panel of experts appointed to determine disputes under the relevant provisions. Which model prevails will be interesting to observe.

Beyond this, the differences are minor. For example, the US insists that it is only the core labour standards in the ILO Declaration that can be enforceable as minimum standards; the EU sometimes has a more generous approach to these standards. But, as noted, it is not entirely certain that the provisions concerning this larger set of standards are properly obligatory.

42. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 USC 4201(b)(10)(H).

43. Article 22.13 (5) US-Korea FTA (2010); Article 21.16(6) US-Peru FTA (2007).

44. Article 22.13 (6) US-Korea FTA (2010); Article 21.16(7) US-Peru FTA (2007). It is unclear whether this possibility is excluded by the new US negotiating objectives set out in the Bipartisan Congressional Trade Priorities and Accountability Act.

## Conclusion

The EU has for many years developed a consistent policy of conditioning its FTAs in compliance with human rights norms. This is likely to prove a stumbling block in TTIP negotiations, because the US has no equivalent tradition and is unlikely to want to commit to such a possibility. On the other hand, the US has an evolved practice concerning labour and

environmental provisions, similar to the EU's, but which, unlike the EU's provisions, are subject to robust enforcement by means of sanctions and monetary penalties. There will probably be little disagreement on the basic labour and environmental standards to be included in the TTIP, but their enforcement is likely to be something of a controversial issue.

## References

Bartels, L. *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford, 2005.

Bartels, L. "Social Issues: Labour, Environment and Human Rights". In: Lester, S. and Mercurio, B. (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies*, CUP, Cambridge, 2008.

Barral, V. "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm", 23 EJIL 377 (2012).

European Commission. "Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries", COM (95) 216 and EU Council Conclusions of 29 May 1995 (reported in *EU Bulletin* 1995-5, point 1.2.3).

Guatemala. *Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission by Guatemala, 2 February 2015, paras 454-472 (online) <https://ustr.gov/sites/default/files/enforcement/labor/NON-CONFIDENTIAL%20-%20Guatemala%20-%20Initial%20written%20communication%20%202-02-2015.pdf>

Hillion, C. and Wessel, R. "Restraining External Competences of EU Member States under CFSP". In: Cremona, M. and de Witte, B. (eds), *EU Foreign Relations Law*, Hart, Oxford, 2008, p.92.

Khaliq, U. *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal*, CUP, Cambridge, 2008.

