Human Rights and Sustainable Development Obligations in EU Free Trade Agreements

Lorand Bartels
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1. 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,1 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.2 This article considers a slightly different question, which is 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 the human rights and democratic principles, on the one hand, and labour and environmental standards, on the other, and the extent to which these different approaches risk undermining the EU’s obligation to respect the indivisibility of all human rights.

2. Human rights clauses in trade agreements

2.1 Origins

The EU has long insisted that accession countries comply with human rights and democratic principles, a notable instance being its rebuff in 1962 of Spain’s desire for accession on the basis that a non-democratic country could not be considered a ‘European country’.3 But it was only later that the EU made this a

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condition of its external relations with non-accession countries. An important
catalyst occurred in 1977, when the EU sought to terminate Stabex payments to
Uganda in response to human rights obligations, and discovered that this was
not technically possible under the ACP-EU Lomé Convention. This particular
situation was resolved informally, but it led the EU to attempt to persuade its
ACP partners to introduce a clause into the Lomé Convention that would enable
the suspension or termination of the agreement in the event of human rights
abuses. For a variety of reasons, the EU’s efforts in this regard were essentially
unsuccessful, and even a much lauded human rights clause finally introduced
into the Lomé IV Convention 1989 was of little operative value.

Other countries, however, proved more receptive to the EU’s policy goals. A
properly effective human rights clause appeared in the 1990 Argentina-EU
Cooperation Agreement, interestingly, at the behest of Argentina, itself newly
emerged from dictatorship; and over the next few years similar clauses were
included in new cooperation agreements with other countries. This
development was paralleled closer to home, where following the collapse of
communism in 1989, the EU was busy building relations with its central and
eastern European neighbours. The EU adopted a formal external human rights
policy in 1991 and set about including operative human rights clauses in new
cooperation and association agreements with these countries, and others around
the world. It was against this background that in 1995, after almost two decades
of negotiations, the revised Lomé IV Convention finally included an operative
human rights clause, a more elaborate version of the model developed in

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International Agreements (Oxford: OUP, 2005), 8-11.
5 ibid, 11-15.
7 Bartels, above at n 4, 16-17.
8 Commission Communication on Human Rights, Democracy and Development Cooperation
Policy, SEC (91) 6; Resolution of the Council and of the Member States meeting in the Council on
agreements with other countries,\textsuperscript{9} which now exists as Articles 9 and 96 of the 2000 Cotonou Agreement.\textsuperscript{10}

The year 1995 also saw the formal adoption by the EU Council of a concrete policy of adopting operative human rights clauses in all future cooperation and trade agreements.\textsuperscript{11} The EU has adhered to this policy ever since, although in more recent cases it has done so by cross-referencing (sometimes by implication)\textsuperscript{12} human rights clauses in existing agreements between the parties.\textsuperscript{13} In addition, the EU has expanded its external human rights conditionality policies to its autonomous instruments granting trade preferences (including the EU’s Generalised System of Preferences (GSP) program)\textsuperscript{14} and financial and technical cooperation,\textsuperscript{15} as well as to financing agreements with developing countries.\textsuperscript{16}

\textsuperscript{9} Article 5(1)(3) and Article 36a of the revised Lomé IV Agreement (commonly known as the Lomé IVbis Agreement), introduced by the Agreement amending the fourth ACP-EC Convention of Lomé [1998] OJ L156/3.

\textsuperscript{10} Cotonou Agreement [2000] OJ L317/3, amended in 2005 and 2010. Article 8, establishing a political dialogue, is also relevant.

\textsuperscript{11} 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).

\textsuperscript{12} 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.’

\textsuperscript{13} 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.

\textsuperscript{14} Reg 732/2008 [2008] OJ L211/1.


2.2 Obligations

2.2.1 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.17

The EU’s early agreements contain little else, and it is unfortunate, in some respects, that it was one of these agreements – the 1993 EU-India cooperation agreement – that is the best known, thanks to an ECJ case on the human rights clause in this agreement in 1996.18 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.19

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’.20 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 the EU Member States, including the

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19 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, eg, recently, Khaliq, above at n 2, 112-13.
20 Eg Article 355(1) of the EU-Central America agreement, above at n 17.
obligation to take steps to ensure the effective application of EU law.\textsuperscript{21} This is not to say that an ‘implementation clause’ in an international agreement should be read in exactly the same way as in EU law. On the other hand, such a clause must have some meaning beyond redundantly restating the principle \textit{pacta sunt servanda}.\textsuperscript{22} Quite what it might mean is difficult to say outside of the context of a specific case, but it could have the effect of imposing on the parties not only a negative duty to ensure that human rights and democratic principles are \textit{respected} but also a positive duty to ensure that these norms are \textit{ensured} and \textit{fulfilled}.\textsuperscript{23} Such an interpretation could, of course, also arise from an interpretation of the human rights and democratic principles at issue in any case.

\textbf{2.2.2 Monitoring}

To date, the agreements containing human rights clauses have not established any specific organs for monitoring the implementation of the clauses. This contrasts with the many other subject specific organs, including organs with a sustainable development mandate, established by these agreements. On the other hand, in some agreements subcommittees on human rights and democratic principles have been established on an \textit{ad hoc} basis.\textsuperscript{24}

However, even in the absence of such specific organs, issues arising under human rights clauses can be discussed within some of the organs that established by the agreement. Most obviously, these would include the primary bilateral organ, namely the Association Council or Joint Council (the names differ). Indeed, in many of the human rights clauses (though not in the clause in the 2012 EU-Colombia/Peru agreement),\textsuperscript{25} it is mandatory, except in cases of special urgency, wishing to react by adopting ‘appropriate measures’, ‘to submit to the Association Council within thirty days all relevant information required for a thorough examination of the situation with a view to seeking a solution

\textsuperscript{21} For a useful summary, see Christophe Hillion and Ramses Wessel, ‘Restraining External Competences of EU Member States under CFSP’ in Marise Cremona and Bruno de Witte (eds), \textit{EU Foreign Relations Law} (Oxford: Hart, 2008), 92, with further references.
\textsuperscript{22} Jan Klabbers, \textit{An Introduction to International Institutional Law} (Cambridge: CUP, 2002), 195.
\textsuperscript{23} Bartels, above at n 4, at 147-149.
\textsuperscript{24} The first of these was established in the EU-Morocco Association Agreement, by Association Council Decision No 1/2003 [2003] OJ L79/14, Annex 1.
\textsuperscript{25} Article 8(3) of the EU-Colombia/Peru Trade Agreement, signed 26 June 2012, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=691.
acceptable to the Parties.’\textsuperscript{26} Human rights and democracy issues may also be discussed in other generic organs, where these exist, such as bilateral parliamentary committees and, depending on their mandate, civil society consultative committees.

\subsection*{2.2.3 Bilateral implementation}
In most cases, an issue arising under a human rights clause to be resolved by one of the parties acting domestically. However, there may also be cases in which the issue arises as a result of the agreement itself. One could envisage market access commitments that encourage deforestation (to use the previous example), or intellectual property obligations that are unduly restrictive of free speech or other human rights, or non-discrimination obligations that prevent a party from legislating in favour of minority groups. Even in these cases, there may be a unilateral solution to the problem. However, in other cases it may be necessary to suspend or amend certain provisions of the agreement.

The question is whether this can be done without need for a renegotiation of the treaty. This depends on the existence of any amendment procedures under the agreement, and, failing these (which do not exist in the relevant agreements), the powers of the organs established under the agreement to revise the agreement. The widest such powers belong to the Joint Council established under the EU-Cariforum agreement, which enjoys ‘the power to take decisions in respect of all matters covered by the Agreement.’\textsuperscript{27} By contrast, the Association Council in the EU-Central America agreement only has the more limited power ‘to take decisions in the cases provided for in this Agreement’.\textsuperscript{28} In the absence of any such ‘cases’ in the agreement relevant to human rights issues, the Association Council does not appear to have the power to revise the agreement to ensure that the parties are able to comply with their human rights obligations, should this prove necessary.

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\textsuperscript{26} Eg Article 355(2) of the EU-Central America Agreement, above at n 17.

\textsuperscript{27} Article 229(1) of the EU-Cariforum Economic agreement, above at n 1. The revision clause in Article 246 of the EU- also implies that the Joint Council has the power to revise the agreement.

\textsuperscript{28} Article 6(1) of the EU-Central America agreement, above at n 17.

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2.2.3 Unilateral enforcement

The cases just mentioned are the exception. In fact, human rights violations most commonly occur when a state fails to take action that it has the power legally to take. It is for these cases that human rights clauses are designed, insofar as they authorise 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’ automatically entitling the other party to adopt ‘appropriate measures’ under a so-called ‘non-execution’ clause. 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.’

There are conditions on the adoption of ‘appropriate measures’. These measures must be taken in accordance with international law; priority must be given to measures that least disrupt the functioning of the agreement; it is usually agreed that ‘suspension would be a measure of last resort’, and it is sometimes also said that the measures must be revoked as soon as the reasons for their adoption have disappeared. As to the nature of such measures, these conditions clearly indicate that a wide range of measures is envisaged, including...

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29 The wording is unfortunate. The phrase ‘special urgency’ implies temporal urgency, not material gravity.
30 Eg Article 355(2)-(5) of the EU-Central America agreement, above at n 17.
31 Article 8 of the EU-Colombia/Peru Agreement, above at n 25.
32 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 measures that least affect the other party. See Bartels, above at n 4, 24.
33 But not in the EU-Colombia/Peru agreement, above at n 25.
34 Article 8(3) of the EU-Colombia/Peru agreement, ibid. This wording derives from Article 96(2)(a) of the Cotonou Agreement, above at n 10.
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.\footnote{Annex 2 of COM (95) 216, above at n 11.}

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 to 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 free trade agreement would therefore have to contain its own non-execution clause to ensure that the human rights clause can have full effect.

2.2.4 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’.\footnote{Article 355(5) of the EU-Central America Agreement, above at n 17.}

The 2012 agreement concluded with Peru/Colombia 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 does 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.

2.3 The EU’s practice

Over the past twenty years, human rights clauses have been applied on numerous occasions. In terms of the countries and conduct that has triggered a reaction, the EU’s practice has been limited in a number of respects. First, there has never been any action under a human rights clause in an agreement other than the Cotonou Agreement, except for the suspension of technical meetings under the Uzbekistan Partnership and Cooperation Agreement, a measure taken in response to the Andijan massacre in 2005.37 Second, the occasions on which the clause has been invoked have involved political coups or other violations of democratic principles, in some cases along with human rights abuses. As to the types of measures applied, these have been rather extensive in scope, including delays and suspension of financial cooperation. The effectiveness of these measures has recently been subject to a lengthy examination.38 But more important for present purposes, as will be discussed below, the practice of the EU falls far short in virtually all respects of what is legally possible under these clauses.

37 Article 4 of Council Common Position 2005/792/CFSP concerning restrictive measures against Uzbekistan [2005] OJ L299/72, which however does not cite the human rights clause.

3. Sustainable development chapters

3.1 Origins

The EU’s practice of including ‘sustainable development chapters’ in its free trade agreements has more recent origins. The principle of sustainable development is commonly attributed to the 1987 Brundtland Report, 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’. 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. 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, 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’.

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, and

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30 For a full discussion, see Virginie Barral, ‘Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm’ (2012) 23 EJIL 377. She notes at 379, n 9, 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).’
34 Article 21(3), referring to Article 21(2)(d) of the Treaty on European Union.
the principle 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.’ 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.’

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’. Rather, under 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. Such chapters are now found in the 2008 EU-Cariforum agreement, the 2010 EU-Korea agreement, and the 2012 EU-Central America and EU-Peru/Colombia agreements, and are reportedly being included in agreements still under negotiation. 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.

3.2 Obligations

As noted, the sustainable development chapters contain provisions on labour standards and environmental standards. In both cases, the obligations are of two

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45 Article 9 of the Cotonou Agreement, above at n 10.
46 This is quite common: see Barral, above at n 39, 385.
47 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 Lorand Bartels, ‘Social Issues: Labour, Environment and Human Rights’ in Simon Lester and Bryan Mercurio (eds), Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies (Cambridge: CUP, 2008), 342-366.
types: minimum obligations to implement certain multilateral obligations, and above this a set of other 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 and to certain multilateral environmental agreements, and they also undertake to ‘effectively implement’ the fundamental ILO Conventions referred to in the ILO Declaration of Fundamental Principles and Rights at Work of 1998.

Beyond this, 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; 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. The first of these obligations is an effective guarantee against retrogression, when this relates to trade or investment under the agreement.

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48 Article 286(1) of the EU-Central America agreement, above at n 17. 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.

49 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.

50 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.

51 Article 291, ibid.

52 Article 285, ibid.
The second is weaker, in the sense that it is only a best endeavours provision, but 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.

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’.\(^{53}\) 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 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 obligations, 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.\(^{54}\) 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 of 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

\(^{53}\) Article 286(4), ibid.

\(^{54}\) Articles 72 and 73 of the EU-Cariforum agreement, above at n 1.
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.

2.3 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 to 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. More narrowly, 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 be otherwise have a 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

55 Article 230(3)(a) of the EU-Cariforum agreement, above at n 1.
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 broad definition of ‘sustainable development’ adopted in the Cotonou Agreement is applied.56 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.

2.4 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.

2.5 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

56 See above at n 45.
dispute settlement involving consultations, and then referral to a Panel of Experts.

Such a 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, which ‘shall make their best efforts to accommodate advice or recommendations ... on the implementation of [the sustainable development] chapter’, and to the Domestic Advisory Group. 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.

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. 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.

5. Assessment

5.1 EU obligations

It is important to place the EU’s treaty practice, as here described, in its proper legal context. Since the Treaty of Lisbon, 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 ... the principles of the United Nations

58 Article 301 of the EU-Central America agreement, above at n 17.
59 Article 213(2) of the EU-Cariforum agreement, above at n 1.
60 Article 21(3) TEU and Article 205 and 208(1) TFEU.
Charter and international law\textsuperscript{61} and must also pursue a set of further objectives, including, as mentioned, ‘[the fostering of] sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.’\textsuperscript{62} Seen from this perspective, the EU’s human rights clauses and sustainable development chapters are not simply a matter of discretionary foreign policy. They are mechanisms that, in theory, enable the EU to comply with its obligations under the EU Treaty. But are these mechanisms effective? In the case of the EU’s obligations with respect to human rights and democratic principles, the answer is that they are. Despite certain infelicities in wording, the human rights clause is sufficiently robust and flexible to enable the EU to ensure that it can withdraw from any commitment that would imperil its obligation to respect human rights and democratic principles in its external relations. It is more difficult to answer this question in the context of the EU’s commitment to sustainable development and the eradication of poverty. What would happen if the agreement turned out to have negative effects on sustainable development or poverty? In this case, the EU would have little power to withdraw from commitments that contribute to this situation, nor could it take coercive steps with a view to enforcing the other country’s own obligations in this regard. But this comparative weakness does not matter, because the EU is required merely to pursue the objectives of sustainable development and the eradication of poverty. So long as the EU does not act in a manner that has a high likelihood of contradicting these objectives, it is unlikely to fall foul of this obligation.

5.2 Internal coherence

What, then, of the question of internal coherence? Here the situation appears is more mixed. In some respects, of course, the two sets of provisions are indeed different. There is no equivalent for ‘democratic principles’ in the sustainability chapter; nor does the human rights clause necessarily prevent a treaty party from reducing the level of protection offered by domestic labour and

\textsuperscript{61} These principles are set out in Article 21(1) TEU.

\textsuperscript{62} These objectives are set out in Article 21(2) TEU.
environment legislation.\textsuperscript{63} However, from a substantive point of view there are also significant areas of overlap between the human rights clause and the provisions concerning labour and environmental standards. In particular, International Labour Organization (ILO) core labour standards are also human rights;\textsuperscript{64} and, as the European Commission has itself has said, core labour standards are covered by the standard human rights clauses.\textsuperscript{65} Nor is the issue theoretical: US administrators once rejected a petition under the US Generalised System of Preferences in relation to the murder of a trade union leader on the basis that this constituted a violation of ‘human rights’ rather than of ‘worker rights’.\textsuperscript{66} Exactly the same question could arise in the context of the EU’s current model for human rights clauses and sustainability chapters.

The question, then, is whether in such cases it makes sense for such different provisions on implementation and remedies to apply to the same state conduct. Arguably, it is not sensible that, if seen as a violation of core labour standards, state conduct cannot be subjected to dispute settlement or counteracted by a suspension of trade concessions, but if it is seen as a violation of human rights violation it can. Arguably, it is equally lacking in sense that such conduct would be subject to a dedicated monitoring mechanism if it is seen in terms of labour standards, but not if it is seen in human rights terms. Indeed, the problem might not stop there. Article 21 TEU requires the EU to treat all human rights as indivisible. If the EU treats human rights of different types so differently, depending on how they are categorised, it might find itself in violation of this obligation as well.

\textsuperscript{63} Human rights law provides limited guarantees against ‘retrogression’. See, for a relevant discussion, Gillian Moon, ‘Fair in Form, but Discriminatory in Operation – WTO Law’s Discriminatory Effects on Human Rights In Developing Countries’ (2011) 14 JIEL 553.


In sum, the EU's practice with respect to the regulation of social standards in its free trade agreements is a successful in terms of its obligation to conduct an ethical foreign policy. But in terms of internal coherence, which is also in some respects, legally required, this practice leaves much to be desired.