IASP-AIPS

DP-15/2025

Social clauses in free trade and investment protection agreements

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§ 7. SUMMARY.

§ 1: SOCIAL CLAUSES IN TRADE AND INVESTMENT PROTECTION AGREEMENTS

I. Overview of historical developments

During the Second World War, the United States, Great Britain and other Allied States agreed on the Atlantic Charter of 1941, which advocated the expansion of international free trade and the elimination of the protectionist measures that had been applied in the interwar period[3]. This charter formed the basis for the Bretton Woods Conference of 1944, at which the agreement to create the International Monetary Fund (IMF) was signed. The 1947 Havana Conference established a broad legal framework for the creation of a global economic order, which, however, excluded socialist countries. This so-called Havana Charter[4] contained, in addition to numerous provisions aimed at promoting global free trade by removing obstacles, a series of provisions on dependent labour, the protection of which was to become an integral part of the envisaged order. For example, Article 2(1) of the Charter stated that the prevention of unemployment and underemployment was not an exclusive task of national states, but was a condition for a prosperous world economy that included the expansion of world trade. Article 7 advocated fair labour standards, which implied full respect for international agreements and declarations on workers' rights. It is worth noting the statement that unfair working conditions, especially in export-oriented production, are detrimental to international trade; therefore, each Member State must take the necessary measures to prevent or

[3] Herdegen, *Internationales Wirtschaftsrecht*, 10th ed. 2014, § 4, no. 3; Tietje, in: idem (ed.), *Internationales Wirtschaftsrecht*, § 1 Rn. 47.

[4] https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (21.9.2016).

eliminate such conditions within its territory. This can be interpreted as a prohibition on social dumping. The text reads:

> "Members recognise that measures relating to employment should take full account of the rights of workers under declarations, conventions and intergovernmental agreements. They recognise that all countries have a common interest in achieving and maintaining fair labour standards related to productivity and, therefore, in improving wages and working conditions to the extent that productivity permits. Members recognise that unfair working conditions, particularly in export production, create difficulties in international trade and, consequently, each Member shall take appropriate and feasible measures to eliminate such conditions in its territory."

The Havana Charter never came into force because the US Congress had to approve the provisions and because large sectors of the US economy had reservations about such broad commitments[5]. Instead, a small-scale solution was agreed upon, consisting of provisionally implementing, with effect from 1 January 1948, the General Agreement on Tariffs and Trade (GATT), signed on 31 October 1947, which was originally intended to form part of the Havana Charter. Given its provisional nature, the US president could act without the consent of Congress. The GATT established rules for the elimination of tariffs and other barriers to trade, the concrete implementation of which took place in eight "rounds" at intervals of several years[6]. The position of dependent labour receded into the background in the following years. Reflections on this issue were carried out, particularly within the framework of the United Nations; the most important legally binding acts were the International Covenant on Civil and Political Rights of 19 December 1966[7] and the International Covenant on Economic, Social and Cultural Rights of 19 December 1966[8]. In addition, within the UN, the "Group of 77" in particular developed the concept of a new international economic order which, among other things, aimed to take into account the interests of developing countries. In terms of content, this involved, in particular, facilitating the possibilities for expropriation of foreign investors, improving the possibilities for exporting raw materials and agricultural products, transferring technology to developing countries and cancelling debt. An important document was the Charter of Economic Rights and Duties of States, adopted on 12 December 1974 by the United Nations General Assembly by 120 votes in favour, 6 against and 10 abstentions[9]. The votes against came from the United States, Great Britain, the Federal Republic of Germany, Belgium, Luxembourg and Denmark, while Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain abstained. General Assembly resolutions are not legally binding, but they can be an expression of the general attitude of the vast majority of states, which can be important when interpreting legally binding rules.

Legal norms can become important. In special cases, General Assembly decisions can become customary international law, which is accepted in particular in some parts of the 1948 Universal Declaration of Human Rights. Developments at the United Nations level did not in any way preclude the Federal Republic of Germany, like other Western

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[5] Herdegen, op. cit., § 10, no. 1; the Vienna Convention has not yet been ratified by the United States.

[6] Herdegen, op. cit., § 10, nos. 2 and 5.

[7] *BGBl* 1973 II, p. 1534.

[8] *BGBl* 1973 II, p. 1570. Both are also included in Däubler/Kittner/Lörcher, *Internationale Arbeits- und Sozialordnung. Ausgewählte und eingeleitete Dokumente*, 2nd ed., Cologne 1994, nos. 120 and 130

[9] For further details on this, see Tomuschat, *ZaöRV* 1976, 444 et seq.

European States and the United States, from concluding trade and investment protection agreements with developing countries which, for example in the area of protection against expropriation, provided for the opposite of what was the majority opinion at the United Nations. The first relevant agreement is considered to be the Treaty 'for the Promotion and Protection of Investments between the Federal Republic of Germany and Pakistan' of 25 November 1959[10],76 which, as expected, did not contain any social policy provisions. However, arbitral tribunals were only intended to resolve disputes between the contracting states. Numerous agreements of this type were subsequently concluded[11]. The question of whether dependent labour can enjoy protection under the rules of a global market, and to what extent, became the subject of global debate once again with the creation of the WTO in 1994[12]. However, due to opposition from developing countries, a "social clause" could not be included in the WTO Agreement. At the WTO Ministerial Conference held from 9 to 13 December 1996 in Singapore, a decision was adopted, in a sense as a "substitute", which, in paragraph 4, under the heading "core labour standards", stated the following:

> 'We reaffirm our commitment to respect internationally recognised core labour standards. The International Labour Organisation (ILO) is the competent body for establishing and dealing with these standards, and we reaffirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and greater trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes and agree that the comparative advantage of countries, particularly low-wage developing countries, should not be called into question in any way. In this regard, we note that the WTO and ILO secretariats will continue their current collaboration."

The recognition of the ILO's competence seems convincing, but it has the disadvantage that the ILO does not have the means to enforce the standards agreed within its framework, even within its sphere of competence, if this would reduce the possibilities for companies to make profits on the market or restrict their freedom of action. In addition, the question has rightly been raised as to whether the social standards established by the ILO are compatible with the GATT (reformed in 1994) or whether they constitute an unacceptable interference with free trade when non-compliance gives rise to trade sanctions[13]. This potential obstacle would not have arisen if the WTO, by including a provision to this effect in its statutes, had itself established an express or tacit exception to the rules of the 1994 GATT. Finally, the resolution refers to cooperation between the WTO and the ILO as a recognised fact, which, according to general opinion, does not correspond to reality. The rejection of a social clause at the WTO level was based essentially on the reservations of India and other developing countries[14]. Binding social standards could be used by industrialised (rich) countries for protectionist purposes, which would have a lasting impact on the export of products manufactured in developing countries[15]. It was argued that this would in no way lead to a change in internal structures in such a situation. Rather, the welfare losses resulting

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[10] BGBl 1961 II p. 793.
[11] See, for example, the agreement with Indonesia, supra note 47
[12] Agreement establishing the World Trade Organisation (WTO) of 15 April 1994, *BGBl* 1994 II p. 1625. This was supplemented by the reformed GATT and numerous additional agreements; see a summary at http://www.bmwi.de/DE/Themen/ Aussenwirtschaft/Handelspolitik/wto,did=615546.html (21.9.2016).
[13] See Hofmann/Hänlein, in: Scherrer/Hänlein (eds.), *Sozialkapitel in Handelsabkommen*, op. cit., p. 103 et seq.
[14] Adriaensen/González-Garibay, *Journal of Contemporary European Research*, 9 (2013), p. 544.
[15] Critical on this point Perulli, Social Rights, p. 7.

from the new trade barriers would fall precisely on the poorest. The situation at the WTO has, after some time, led to a kind of evasive strategy. Social clauses were increasingly included in bilateral trade and investment protection agreements[16]. This occurred in agreements concluded by both the EU and the US; similar agreements can also be found with other partners. Further research is needed to understand why this "renaissance" has occurred (and continues to occur)[17].

II. EU practice

The competence to conclude trade treaties lay with the EEC and the EC in the Community bodies, but investment protection agreements remained the exclusive competence of the Member States. It was only with the Treaty of Lisbon and the transformation of the European Community into the European Union that the Union's competence was extended to international treaties.

The regulation of "direct investments" is extended (see Article 206 et seq. TFEU). The social clauses that concern us here are mainly found in treaties concluded by the Community or the Union, in which, as a rule, the Member States were listed as additional contracting parties, since it was (and still is) unclear where the limits of "direct investment" or other Union competences ended. As regards the content of the social clauses, legal doctrine distinguishes between two phases[18]. The first covers the agreements with the southern Mediterranean countries in the early 1990s up to the agreement with Chile in 2003. The second begins with the so-called CARIFORUM Agreement of 1994 and continues to the present day. It is characterised by a broadening and deepening of commitments in the field of social policy, which were previously (still) more general in nature.

1. The period between 1992 and 2003

The so-called Euro-Mediterranean Agreements between the EC and Tunisia (1995)[19], Morocco (1996), Israel (1995) and Jordan (1997) are, on the one hand, unique in that they are association agreements. Therefore, in principle, they grant full equality with national workers to all workers legally residing in the other State[20]. This constitutes an 'inherent' right, in principle enforceable in court, which, by its nature, differs fundamentally from the usual forms of 'social clauses'. However, the agreements contain other social policy provisions, such as Articles 63 to 66 of the Association Agreement with Israel[21] and Articles 64 to 73 of the Association Agreement with Tunisia[22]. In a fairly traditional manner, they do not go beyond cooperation obligations relating to numerous social policy issues. The agreement between the EU and Mexico is

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[16] In favour of this, Kolben, *Indiana Journal of Global Legal Studies*, 13 (2006), p. 225 et seq.
[17] See, for example, below, § 6. See also Perulli, Social Rights, p. 7: Market self-regulation and the regulatory possibilities of nation states are no longer sufficient to address the problems.
[18] Van den Putte/Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions', The Journal of Comparative Labour Law and Industrial Relations vol. 31 (2015) p. 263, 265, also on the following.
[19] See Kuschel, Hans-Dieter: "Tunesien, das Europa-Mittelmeerabkommen zwischen der Europäischen Gemeinschaft (EG) und Tunesien". *Bundesstelle für Außenhandelsinformation* (=BfAI), 1995.
[20] In this regard, the discussion by Van den Putte/Orbie, op. cit., pp. 263 and 266, is somewhat confusing.
[21] Available at trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146089.pdf (22.9.2016).
[22] OJ of 30.3.1998 – L 097/2 – 183.

limited from the outset to this area[23], where, for example, Article 36 states: "Cooperation on social matters and poverty 1. The Parties shall maintain a dialogue on all aspects of the social agenda that are of interest to either Party. This dialogue shall include issues related to vulnerable groups and regions, such as: indigenous peoples, the rural poor, low-income women and other population groups living in poverty. 2. The Parties recognise the importance of harmonising economic and social development, taking into account the need to respect the fundamental rights of the groups mentioned in the previous paragraph. The new basis for growth should create employment and ensure a better standard of living for the less favoured sections of the population. 3. The Parties shall hold regular consultations on cooperation activities involving civil society and aimed at providing opportunities for job creation, vocational training and income growth. If the dialogue does not produce results, no consequences of any kind are envisaged. The Association Agreement between the EC and Chile is similar in nature[24]. Unlike the Euro-Mediterranean Agreements, it does not provide for equal treatment directly applicable to nationals of one party legally residing in the territory of the other party. Rather, this is considered solely as an objective of the dialogue. Thus, for example, Title V contains a series of provisions on "cooperation in the social field" and states in Article 43, under the heading "Social dialogue": 'The Parties recognise (a) that, with regard to living conditions and integration into society, the participation of the social partners should be encouraged; (b) that particular account should be taken of the need to avoid discrimination in the treatment of nationals of one Contracting Party legally resident in the territory of the other Contracting Party'. Discriminatory treatment is therefore not prohibited, but its prevention must be taken into account, which amounts to an "obligation to make an effort". Article 44, entitled "Cooperation in the social field", is similar in nature:

'1. The Contracting Parties recognise the importance of social development, which must go hand in hand with economic development. They shall give priority to job creation and respect for fundamental social rights and, to this end, shall promote the relevant conventions of the International Labour Organisation on freedom of association, the right to collective bargaining and the prohibition of discrimination, the abolition of forced labour and child labour, and equal treatment for men and women. (2) Cooperation may cover all areas of interest to the Parties.

3. Measures may be coordinated with those of Member States and international organisations competent in the field concerned.

4. The Parties shall give priority to measures aimed at: (a) promoting human development, poverty reduction and the fight against social exclusion through the development of innovative and replicable projects involving disadvantaged and marginalised groups of the population. Particular attention shall be paid to low-income families and persons with disabilities; (b) promoting the role of women in economic and social development and encouraging special programmes for young people; (c) developing and modernising relations between the social partners, working conditions, social protection and job security; d) improving the formulation and management of social policies, including housing policy, and facilitating access for beneficiaries; e) developing an effective and balanced health system based on principles of solidarity; f)

[23] OJ of 28.10.2000, L 276/45.
[24] OJ of 30.12.2002, L 352/3 – available at http://eur-lex.europa.eu/resource.html? uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF.

promoting vocational training and human resource development; g) promoting projects and programmes that offer job creation opportunities in micro, small and medium-sized enterprises; h) Promoting land-use planning programmes, paying particular attention to the most socially and ecologically vulnerable areas; i) Promoting measures that contribute to social dialogue and consensus-building; j) Promoting respect for human rights, democracy and citizen participation.

The remarkably long list of topics shows that the contracting parties were aware of social problems and were oriented towards laudable goals. However, it was not specified how these goals were to be achieved. The fact that even governments that are fully 'committed to the agreement' and are making sincere efforts cannot pursue all these objectives at the same time due to a lack of sufficient budget and infrastructure was not raised as a possible problem. This already rules out, in principle, the imposition of sanctions for (foreseeable) non-compliance. Of course, no such sanctions are envisaged either. Benevolent observers will point out that, according to Article 11 of the agreement, civil society organisations must also be involved in the dialogue on achieving the objectives of the agreement and that Article 16 essentially establishes equality between social and economic development and environmental protection[25].

2. The period from 2003 onwards

a) CARIFORUM

On 30 October 2008, the so-called CARIFORUM Agreement between the EU and numerous Caribbean states[26] was published in the Official Journal of the EU, giving social issues much greater importance than before. This is already reflected in Article 3 of the Agreement, entitled "Sustainable Development", which states that the implementation of the Agreement shall take full account of the social and health interests of the population concerned[27]. The declarations in Articles 191 to 196 of the Agreement are more specific. Article 191(1) contains a clear commitment to the ILO's core labour standards, stating:

"The Parties reaffirm their commitment to internationally recognised core labour standards, as defined in the relevant ILO conventions, and in particular freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and non-discrimination in employment. The Parties also reaffirm their obligations as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)."

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[25] Under the heading 'General objectives', Article 16 states: '(1) The Contracting Parties shall establish close cooperation with a view, inter alia, to: (a) strengthening institutional capacities in support of democracy, the rule of law and respect for human rights and fundamental freedoms; (b) promoting social development, which must go hand in hand with economic development, and environmental protection. The Contracting Parties shall give particular priority to respect for fundamental social rights (...)".

[26] OJEU of 30.10.2008, L 289/3 et seq. English version available at

[27] For an examination of the agreement's impact on human rights in general, see Schmieg, *SWP* 24, p. 3 et seq.

Paragraph 2 contains a commitment to the 2006 ECOSOC Declaration on Full Employment and Decent Work. Paragraph 3 highlights the positive effect that core labour standards and the principle of decent work can have on economic efficiency, innovation and productivity, and emphasises the value of greater linkage between social policy and trade policy. According to paragraph 4, labour standards should not be used for protectionist purposes. The Parties also agree on the positive effects that 'fair trade' can have. Article 192 of the Agreement expressly confirms the right of the Contracting Parties, as well as of individual States, to decide for themselves on the adoption of labour and social law provisions, provided that these are aimed at a high level of protection and are compatible with international agreements. Both Parties also undertake not to gain commercial advantages by reducing the level of protection of labour legislation or by failing to apply it (Article 193). Both Parties wish to examine the extent to which the principles of Article 191 are being respected. To this end, they may seek the assistance of the ILO, as expressly provided for in Article 194(3). In the event of disagreement or dispute, each party may consult the other. If the consultation procedure does not lead to a satisfactory result within three months, each party may request the establishment of a committee composed of three experts, which shall prepare a report within three months. This report shall be forwarded to the consultative committee (composed of equal numbers of representatives of both parties). Article 202 of the agreement provides for a dispute settlement procedure which, according to Article 203(1), covers all matters relating to its interpretation and application, including labour and social policy rules. If consultation and (voluntary) mediation do not lead to an agreement, an arbitration procedure will be initiated. If one of the parties fails to comply with the arbitration award, the other party may take any measures it deems appropriate, in accordance with Article 213. However, such measures must affect the objectives of the agreement as little as possible; the temporary withdrawal of the trade advantages derived from the agreement is excluded from the outset.

b) Agreements with Colombia and Peru

Unlike the CARIFORUM Agreement, the Trade Agreement between the EU and Colombia and Peru[28] contains a specific chapter on "Trade and Sustainable Development", which includes labour and environmental standards. Here too, there is a commitment to the ILO's core labour standards, which are listed in detail in Article 269(3) of the agreement. At the same time, paragraph 1 of this provision emphasises the desire to develop international trade in a way that leads to productive employment and decent work for all. In addition, there are some new aspects that are not included in the CARIFORUM Agreement[29].

- According to Article 276, migrant workers must be treated equally in terms of their working conditions and must not be subject to any discrimination. However, this is formulated as an objective and therefore, unlike the EU association agreements, not as a directly applicable right[30]. The fact that the importance of promoting equal treatment is recognised does not mean that it must be practised directly under the agreement. - In

[28] OJEU of 21.12.2012, No. L 354/3.

[29] Summary in Zimmer, in: Scherrer/Hänlein (eds.), *Sozialkapitel in Handelsabkommen*, op. cit., p. 146 et seq.

[30] 'The Parties recognise the importance of promoting equal treatment in terms of working conditions, with a view to eliminating any discrimination in this area towards any worker, including migrant workers legally employed in their territories.'

accordance with Article 271(3), examples of good practice in the field of "corporate social responsibility" shall be promoted.

- Labour and environmental protection standards shall not be reduced to satisfy the interests of trade and investors (Article 277(1)). Nor may the application of existing standards be made more flexible in such a way that it affects trade and investment between the Contracting Parties. However, each State shall be free to decide on the resources it allocates to each purpose, provided that this does not jeopardise the objectives of the agreement. This decisively relativises the above statement[31].

- The Contracting Parties shall inform each other, in accordance with Article 269(4), of their situation and progress made in ratifying ILO conventions.

In the event of differences in the interpretation and application of the Agreement, the general dispute settlement mechanism provided for in Article 285(5) shall not apply. This is regulated in Articles 298 et seq. and gives rise to an arbitration procedure and the withdrawal of trade advantages if the arbitration award is not respected. The chapter on sustainability has its own rules in this regard[32], which give rise to mutual consultations and the creation of a group of experts. No binding decision by an arbitral tribunal or other body is envisaged, so there is also no possibility of imposing sanctions. In accordance with Article 282, a dialogue with civil society organisations on the implementation of the agreement will be held once a year.

c) The agreement with South Korea

On 1 July 2011, the Free Trade Agreement between the EU and the Republic of Korea[33] entered into force. It is similar in many respects to the agreement with Colombia and Peru. Similarly, it contains a chapter on sustainability that addresses the issues of dependent labour and environmental protection. In slightly modified terms, Article 13.4 also commits to respecting the ILO's core labour standards, but, like the CARIFORUM Agreement, adds a reference to the 2006 ECOSOC decision on full employment and decent work. Article 13.2 expressly emphasises that labour and environmental measures shall not be used for protectionist purposes and that 'comparative cost advantages' shall not be called into question. Nor do the parties intend to harmonise their labour and environmental standards. Article 13.9 emphasises the principle of transparency that must be respected in all measures and the participation of non-state actors. Each party will establish a national consultative group and ensure the participation of civil society (Article 13.13). In the event of disagreement on the interpretation and application of the chapter on sustainability, consultations will be held between the parties.

If no agreement is reached, a committee of experts shall examine the dispute. This exhausts the possibilities for "dispute settlement". Article 13.16 expressly excludes broader procedures, such as the intervention of an arbitration tribunal and the imposition

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[31] Zimmer, op. cit., p. 147.
[32] Zimmer, op. cit., p. 147.
[33] Summary in Zimmer, op. cit., p. 147 et seq. OJEU of 14.5.2011, L 127/6 et seq. Summary in an official publication of the European Commission with a foreword by De Gucht, available at http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148307.pdf. The brochure does not mention the chapter on sustainability.

of sanctions. The Framework Agreement between the EU and the Republic of Korea[34], which complements the Free Trade Agreement, is primarily relevant to the protection of human rights and the rule of law[35], but Article 22 also addresses employment-related issues. In terms of content, it does not go beyond the sustainability chapter of the free trade agreement[36].

3. Assessment

The developments described above show that the 'social clause' has evolved in many respects from a mere consultation obligation[37]: ILO conventions, in particular core labour standards, have taken on greater importance, and compliance with them is not only examined by experts but can also be addressed, to a certain extent, by civil society organisations. The reason given for this development is that the social correction of the global market has become an "indisputable norm" which, in a sense, is at the peak of its development, following the life cycle of a legal norm: however, there is a danger that its dilution will lead to its decline[38]. This would also explain why the expansion of social clauses has taken place at a different time than in previous years, when most EU Member States were governed by conservative parties, which were rather reserved in their response to socio-political demands. On the other hand, it is cautiously pointed out that the importance of the provisions of the CARIFORUM Agreement and the treaties with Colombia/Peru and South Korea cannot be assessed, as no complaints based on the "social clauses" have yet been lodged[39]. Some contributions to the debate give the impression that, in principle, legal norms and reality can be equated without any problems, which is all the more surprising when one considers that they come from economists and social scientists, while legal experts specialising in international economic law pay little attention to the social clause[40], even though they consider international trade to be part of universally recognised human rights and make this clear in their publications[41].

Looking at reality, it must be assumed that social corrections are usually a burden on companies, normally directly, because they have to pay a higher minimum wage or negotiate collective agreements, and sometimes indirectly, when state benefits have to be financed from tax revenues. However, burdens provoke resistance, especially when companies have to compete. This is clearly seen in the example of the resistance of many developing countries to a social clause within the WTO framework: they do not see themselves as being able to force their companies to comply even with the ILO's core labour standards, because this would deprive them of the comparative advantage they gain from excessive exploitation, which manifests itself in child and forced labour and the prohibition of trade unions. Social corrections to world trade are not achieved

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[34] https://eeas.europa.eu/korea_south/docs/framework_agreement_final_en.pdf.

[35] See section 5 I in this regard.

[36] Article 22 states: "Employment and social affairs 1.

[37] See also Van den Putte/Orbie, *The International Journal of Comparative Labour Law and Industrial Relations* 41 (2015), 263, 268: 'broadening and deepening'.

[38] Van der Putte/Orbie, op. cit., p. 263, 278: 'unquestionable norm'. On the rise and fall of legal norms, see there.

[39] García, p. 9/10.

[40] It is not mentioned, for instance, in the textbooks of Tietje, Herdegen y Krajewski.

[41] Herdegen, op. cit., § 7, n. 14 ff.; Tietje, in: Tietje (ed.), *Internationales Wirtschaftsrecht*, § 1 fn. 69 ff.

through rational discourse, in which there are slow or less slow learning processes and in which, ultimately, the best argument prevails. Rather, ‘pressure’ is needed, which can come from workers’ associations, but also from states or international organisations that wish to secure greater legitimacy in the eyes of their population or the international community. Therefore, “pressure” can also come from legal norms. However, this only happens if non-compliance results in sanctions. Mere programmatic statements, however nice they may sound, do not change anything on their own. What could lead companies to make substantial concessions to employees that could have a negative impact on the next balance sheet? They may also be interested in maintaining a good public image, but they use other means to do so, such as a code of social responsibility[42].

The parties involved must examine the issues and cooperate; this is (apparently) expected to lead to social progress. In addition, the ILO's “core labour standards” and other provisions are highly general, so that violations can almost always be presented as “dubious” and “controversial”. While it is true that ILO supervisory bodies have developed numerous specific requirements regarding freedom of association, collective autonomy and the right to strike, among others, these are not considered legally binding. A trade and investment agreement could make them binding by referring to ILO conventions, ‘including the principles developed by the supervisory bodies,’ but so far this has never even been considered. In these circumstances, it is not surprising that to date no complaints have been filed for non-compliance with the social clauses of the most recent EU agreements. Why should a civil society organisation take on the effort of a procedure if, at best, the outcome is the opinion of a group of experts that it is ‘concerned’ or, in serious cases, ‘deeply concerned’ about a particular development?

Despite their non-binding nature, social clauses cast the content of a trade and investment agreement in a more favourable light. Their mere existence has a legitimising effect. This also explains why they have increased under conservative leadership in the EU: it is not the speculative image of the rise and fall of legal standards that is decisive, but simply the fact that the increasing globalisation of markets creates a greater need for legitimisation[43]. Why would conservative governments block this, if no business management really has anything to fear from such rules? It is worth asking whether this assessment also applies to the social clauses that the United States agrees in its trade and investment agreements with various countries.

III. US practice: similarities and differences

1. Model agreement

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[42] Critical on this point is Däubler, ‘Corporate Social Responsibility: A Way to Make Deregulation More Acceptable?’, in: Blanpain/Hendrickx (ed.), Labour Law between Change and Tradition. Liber Amicorum Antoine Jacobs (Bulletin of Comparative Labour Relations, vol. 78), Kluwer Law International, 2011, p. 49 et seq.

[43] In the same vein, García, op. cit., p. 24: ‘EU trade policy is largely driven by pressures to achieve market expansion, accompanied by a discourse of legitimisation.’ However, Van den Putte/Orbie take the opposite view in The International Journal of Comparative Labour Law and Industrial Relations 31, issue 3 (2015), p. 263 et seq.

The model bilateral investment protection agreement between the United States and other states, in force since 2012[44], does not contain provisions that differ substantially from those applied in the EU. Article 13 states the following:

> 'Investment and labour
> 1. The Parties reaffirm their respective obligations as members of the International Labour Organisation (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up.
> 2. The Parties recognise that it is not appropriate to promote investment by weakening or reducing the protections provided for in national labour legislation. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour laws where such waiver or derogation would be inconsistent with the labour rights referred to in subparagraphs (a) to (e) of paragraph 3, or by failing to effectively apply its labour laws through a continuous or recurring act or omission, as an incentive for the establishment, acquisition, expansion or retention of an investment in its territory.
> 3. For the purposes of this article, 'labour laws' means the laws or regulations of each Party, or provisions thereof, that are directly related to the following:
> (a) freedom of association;
> (b) effective recognition of the right to collective bargaining;
> (c) the elimination of all forms of forced or compulsory labour;
> (d) the effective abolition of child labour and the prohibition of the worst forms of child labour;
> (e) the elimination of discrimination in respect of employment and occupation; and
> (f) acceptable working conditions with regard to minimum wages, working hours and occupational safety and health.
> 4. A Party may request in writing the other Party to hold consultations on any matter arising under this Article. The other Party shall respond to the request for consultations within thirty days of receipt of such request. The Parties shall then consult and endeavour to reach a mutually satisfactory solution.
> 5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation in relation to any matter arising under this Article.

Paragraph 3(a) to (e) clearly reproduces the essential content of the ILO's core labour standards, which are, however, only mentioned indirectly in paragraph 1. Even more striking is the absence of a commitment to ratify the fundamental ILO conventions on which it is based, since most of them have not been ratified by the United States itself[45]: of the 189 conventions, only 14 had been ratified by 2012; of the eight conventions on fundamental labour standards, only two have been ratified to date, namely Convention No. 105 on the abolition of forced labour and Convention No. 182 on the elimination of the worst forms of child labour. Section 3(f) of the model agreement contains a specification of the concept of 'decent work'. However, the list in section 3 only refers to the matters referred to in section 2: existing national standards in this regard cannot be waived in any way in order to encourage investment. It is assumed that national standards exist in this regard. A fundamental difference from EU practice is that, as in other parts of the treaty, failure to comply with these provisions may lead to arbitration proceedings. If the arbitration award is subsequently not complied with, the financial penalties provided for this purpose may be imposed. 2. On the practice of US bilateral agreements. In practice, a social clause has only been waived in the agreement with Israel[46].

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[44] In https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (25.9.2016).
[45] Data from Weissbrodt/Mason, *Minnesota Law Review* 98 (2014), p. 1842 et seq.
[46] Ebert, Labour Standards, note 11

Otherwise, a distinction is made between 'three generations' of treaties which, as in the EU, are characterised by an increasing emphasis on social aspects[47].

In the agreement with Jordan[48], Article 6 establishes the obligation to give effect in practice to the respective national legislation on fundamental labour standards and "decent work", although the competent authorities are granted a wide margin of discretion. Otherwise, it only states that both parties 'shall strive'; if the efforts are unsuccessful, nothing happens. The agreement with Oman[49], for example, belongs to the second generation. It contains specific provisions on access to courts and extends the consultation process prior to the arbitration decision to include other bodies in addition to governments. On the other hand, arbitration proceedings are only initiated if there is a breach of obligations arising from core labour standards (as described in the model agreement) and the principles of 'decent work'. The agreement between the United States and Colombia is considered to be third generation[50]. It also includes the obligation to harmonise national legislation with core labour standards (Art. 17.2, paragraph 1) and not to use the deterioration of legislation or its application as an incentive for investment (Art. 17.2, paragraph 2). According to Article 17.3, there is an obligation to enforce one's own legislation insofar as it relates to core labour standards and also has an impact on trade and investment. To this end, the available resources must be used reasonably and in good faith. Article 17.4 guarantees access to the courts and a fair trial. Article 17.5 provides for the establishment of a joint 'Labour Affairs Council' which will, among other things, be responsible for the implementation of the agreement. At each meeting, there must be an opportunity for discussions with interested citizens. In addition, a contact point will be set up in the ministries of labour of both contracting parties. Article 17.6 also provides for "capacity building" measures, i.e. the creation of institutions that can achieve better implementation of the relevant labour legislation. The general provisions of the dispute settlement procedure also apply to these rules, but according to Article 17.7, the first step must always be consultation with the other party. The procedure itself is regulated in Article 21. If the arbitration award is not complied with, compensation for damages will be paid. If this is not done, trade sanctions will be imposed, i.e. the advantages (e.g. in terms of customs duties) linked to the agreement will be withdrawn.

3. The parallel agreement to NAFTA

The North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico could only be approved by the US Congress because an additional agreement addressing social issues was signed at the same time[51]. This was the North American Labour Agreement, abbreviated to NAALC[52], which came into force on 1 January 1994. This is the result of two compromises: on the one hand, the newly elected President Bill Clinton had to reach an agreement with his supporters in the trade unions

[47] Ebert, Labour Standards, note 11
[48] https://ustr.gov/sites/default/files/Jordan%20FTA.pdf (25.9.2016).
[49] https://ustr.gov/sites/default/files/uploads/agreements/ fta/oman/asset_upload_file901_8812.pdf (25.9.2016).
[50] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file993_10146.pdf (25.9.2016).
[51] On the history of its origin, see Dombois, 'Sozialklauseln in US-Freihandelsabkommen – ein wirksames Mittel internationaler Arbeitsregulierung?', *Industrielle Beziehungen* 13 (2006), pp. 218, 242.
[52] Available at http://www.naalc.org/naalc/naalc -full-text.htm (25.9.2016); brief explanation by the Department of Labour at https://www.dol.gov/ilab/trade/agreements/naalcgd.htm#NAALC (25.9.2016).

and the environmental movement in order to be able to impose "free trade" with neighbouring countries. On the other hand, Mexico and Canada were not interested in severe economic sanctions, as they feared US supremacy, so the potential for enforcement was less than initially anticipated. Both in terms of the content of the guarantees and the procedure, the NAALC has some peculiarities.

In terms of content, it obliges the three signatory states – the US, Canada and Mexico – to guarantee high labour standards and to strive to improve them. In addition, they must ensure the practical enforcement of their national labour legislation and give individuals the opportunity to assert their legally protected interests in a fair and transparent procedure. However, this obligation does not cover all labour legislation, which in the case of Mexico would lead to very unexpected results[53]. Rather, the treaty contains a list of subjects ranging from freedom of association, the right to collective bargaining and the right to strike, to the guarantee of the legal minimum wage, equal pay for men and women, accident prevention and the protection of migrant workers. The eleven topics listed are divided into three groups, each with different possibilities for application.

At the same time, the agreement provides for the creation of various institutions. In each of the three countries, there is a NAO, a National Administration Office, which communicates with the NAOs of the other states, receives complaints and acts as a 'point of contact' with the relevant government and the Conference of Labour Ministers. Each country may provide it with an advisory committee composed of 12 persons: four representing the "labour community", four from the "business community", two from academia and two from the general public. At the international level, there is the "Labour Cooperation Commission", which has a council composed of the three Ministers of Labour and a permanent secretariat. If someone wishes to file a complaint for non-compliance with registered labour law provisions, they can contact the NAO of another Member State. Therefore, irregularities in Mexico can only be reported to the NAO of the United States or the NAO of Canada. Conversely, the United States can only be 'reported' in Mexico or Canada. Filing a complaint leads to a lengthy procedure. The NAO carefully examines the complaint and determines the relevant facts. In principle, it is accepted for review when relevant labour law issues are raised and when the examination of the content supports the objectives of the agreement. Since these include comprehensive cooperation between the three States, this may, in principle, lead to the dismissal of a complaint, even if it is likely to be well-founded on its merits. When deciding whether to accept or reject a complaint, the NAO may also take into account "other factors" without specifying them. If the complaint is accepted, an attempt is made to reach a mutually agreed solution through cooperation with the NAO of the country in which the events in question took place. If this is not possible, a report on the matter is published. Consultations are then held at ministerial level. If the consultations do not lead to an agreement, in certain areas, in particular occupational health and safety and equal pay for men and women (but not trade union rights), an 'Expert Evaluation Committee' (abbreviated to EEC) may be set up, which must be composed of independent persons. However, this measure is only taken if the matter relates to interstate trade. In addition, both States involved must have laws on the matter in dispute; if only one of them has a law regulating the matter, it is not possible

[53] This is established, for example, in Article 123 of the Mexican Constitution of 1917, still in force (full text in Néstor de Buen, *Labour Law*, 13th ed. 2000, p. 348 et seq.) in sections 12 and 13 that larger companies are obliged to provide accommodation for their employees, as well as infrastructure, including schools, hospitals and recreational parks. This has nothing to do with the current reality.

to set up an evaluation committee. These restrictive conditions have contributed to the fact that, to date, no use has been made of the possibility of setting up such a committee. If only one of them has regulated the issue by law, it is not possible to set up an evaluation commission. These restrictive conditions have contributed to the fact that, to date, no use has been made of the possibility of setting up such a commission. If this were to change, the commission would have to draw up a report on the conflict in question and submit it to the Council of Ministers. This would lead to further consultations. However, these are only envisaged for a single group of sub-areas of labour law, covering the protection of children and young people, minimum wages and minimum working conditions, and accident prevention. The relevant rules must be infringed not only on a one-off basis, but persistently ('persistent pattern of failure'). If the issue remains controversial, either party may request an extraordinary meeting of the Council of Ministers, which may also call on advisers and mediators. If this also fails to produce a result, two of the three ministers may refer the matter to an arbitration tribunal composed of five persons selected from a list of 45 independent experts. The tribunal may adopt an action plan to remedy the situation. If this is not implemented, the arbitration tribunal meets again and adopts a binding action plan. If this is not complied with, a kind of penalty payment of up to 0.007% of the value of the goods traded between the two States concerned may be imposed[54]. The money is paid into a fund and the Council of Ministers decides how it is to be used to improve law enforcement in the State concerned. Only if this penalty payment is not paid can trade sanctions be imposed. However, this does not apply to Canada, where the sum in question can only be recovered through enforcement. By early 2005, i.e. after about ten years, only about 30 complaints had been received. Of these, 18 were directed against Mexico, 10 against the United States and 2 against Canada[55]. All cases were resolved by mutual agreement, at the latest at the (first) ministerial consultation, because the governments were not interested in clouding their relations[56]. The imposition of sanctions was quite far off. Meanwhile, the situation has not changed; the number of complaints has decreased considerably[57], although there is no reason to assume that labour standards are being respected more than before in the three participating countries. It is also worth noting that the most frequent complaints about issues relating to the free establishment and activity of trade unions cannot be submitted to a binding dispute resolution procedure, but only lead to consultations. In general, the procedure is subject to so many conditions and is so lengthy that it is not surprising that no one even attempts to overcome all these obstacles.

4. The agreement with Cambodia

The textile agreement between the United States and Cambodia, which entered into force on 1 January 1999 and was valid for a total of six years[58], deserves special attention. It directly linked improvements in interstate trade (specifically, increased textile export quotas to the US) to compliance with certain labour standards in Cambodian companies[59]. In this way, employers in the textile sector themselves had a

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[54] Ebert, Labour Standards, p. 6.
[55] Data according to Dombois, op. cit., Industrielle Beziehungen 13 (2006), p. 218, 244.
[56] Dombois, op. cit., Industrielle Beziehungen 13 (2006), p. 218, 245 et seq.
[57] Lukas/Steinkellner, in: Scherrer/Hänlein (eds.), 41 Social Chapter in Trade Agreements, pp. 157, 160 speak of 'symptoms of fatigue'.
[58] Textile Agreement between the United States and Cambodia.
[59] See Ebert, *Labour Standards*, p. 8.

vested interest in compliance with protective standards[60]. Effective compliance with these standards was monitored directly by the ILO[61], which is also a measure that goes beyond the usual framework. Improved working conditions and economic benefits were directly linked, which gave a significant boost to growth[62]. The available documents do not clarify why this model was not continued or extended to other countries.

IV. Interim assessment

The examination of the contractual practice of the EU and the US has revealed some legal differences, two of which deserve special attention. While the EU focuses on the ILO's core labour standards and their practical application, the agreements concluded by the US, especially the NAALC, focus on the application of the relevant national labour legislation. Secondly, the EU relies solely on consultations and the formation of certain convictions which, at some point, lead to an improvement in the situation, while the US, although also interested in a voluntary agreement, almost always provides, at the end of an unsuccessful cooperation process, for a binding decision, the non-compliance with which must result in sanctions. Both points should be discussed.

1. ILO standards or national legislation?

The reference to ILO standards has the advantage of leading to uniform standards: there should be no child labour or forced labour anywhere, trade unions striving to conclude collective agreements can be formed everywhere, and discrimination, for example on grounds of gender or trade union activities, is prohibited everywhere. These 'fundamental labour standards' can be applied regardless of a country's level of socio-economic development, but they also allow low wages and the comparative advantage that this brings to be maintained. The same applies to the principle of decent work: this means a minimum wage in line with national possibilities and particularities, as well as a limitation of working hours that takes into account people's performance capacity and health.

On the other hand, the application of ILO standards has the disadvantage that, in the event of a dispute, they can lead to the most disparate consequences. There is no authority, such as a court, that provides a binding interpretation. It is true that compliance with ILO conventions is monitored by the Committee of Experts and, with regard to freedom of association, collective autonomy and the right to strike, by the Committee on Freedom of Association; in this sense, a concrete interpretation and application of the various conventions is carried out. However, according to the prevailing opinion, this 'case law' of the committees does not constitute an authentic interpretation[63]. In German case law, there is a view that the findings of the ILO committees must be taken into account in the interpretation of national law in such a

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[60] Kolben, Trade, 'Monitoring and the ILO: Working to Improve Conditions in Cambodia's Garment Factories', *Yale Human Rights & Development Law Journal* Vol. 7 (2004), pp. 79 et seq.
[61] On the obstacles that often prevent compliance with labour legislation (e.g. unofficial payments to labour inspectors), see Kolben, op. cit. vol. 7 (2004), p. 85 et seq. 129
[62] This is stated by the US Government in its declaration of 1 July 2002: https://ustr.gov/archive/Document_Library/Press_Release/2002/.
[63] On this point and on alternative approaches, see Heuschmid, SR 2014, 1, 2.

way that they can only be deviated from for well-founded reasons[64], but this cannot be regarded as generally recognised. Rather, in many cases, ILO conventions are not invoked at all or only to the extent that they confirm a result obtained under national law. The wording of the social clauses does not attempt to change this situation either, as is clear from the fact that nowhere is the view taken that the interpretative findings of the supervisory committees should be taken into account. If, for example, a state maintains that there is no trade union right of access to the workplace and this is effectively denied by almost all companies, it is difficult to assume a violation of freedom of association, i.e. of ILO Convention No. 87, which could even lead to sanctions. After all, it cannot be ruled out that Convention No. 87 does not grant the right of access to the workplace because it does not expressly mention it in its text. All these difficulties become even more apparent when reference is made not to ILO conventions but to 'fundamental labour standards' as such, which are, in a sense, on a higher level of abstraction. In this case, it is even more difficult to draw concrete conclusions. Moreover, States tend to be very generous in their mutual relations. This may be because decision-makers do not know whether they might need the support of the other party in completely different contexts in the future. This basic attitude prevents a specific interpretation from being adopted in doubtful cases and, on this basis, arbitration proceedings from being initiated. If, as in the case of the prohibition of forced labour or child labour, questions of interpretation take a back seat, another obstacle arises: how can it be effectively proven that this is a case of forced or child labour? The people affected are too weak to defend themselves; in serious cases, they would tend to deny their own experiences in an investigation because they fear reprisals (not without reason).

As a result of all these circumstances, only serious and obvious cases are reported, while 'normal' cases of rights violations go unpunished. If, on the other hand, the US model, based on national law, is taken as a reference, the starting point is different. Poorer countries may have more modest labour legislation, which would maintain the 'legal gap'.

However, this is not always the case. If, for example, we compare the level of protection offered by Mexican and Uruguayan labour legislation with that of the United States, we see that the two poorer countries offer a higher level of protection. National law has the advantage over international conventions in that it is enforced through the courts and other bodies, so that there is a "solution" for many situations. Although in practice certain countries rarely take them seriously, this does not change their existence: an international contractual obligation to effectively implement one's own labour legislation and to respect it in practice does not fail in any case due to the vagueness and ambiguity of the 44 rules referred to.

However, this does not mean that the other obstacles mentioned above disappear: even in this situation, it is difficult for one state to take action against another; in this case too, there are problems of proof, since illegal activities do not usually take place in

[64] ArbG Oldenburg of 21 August 1987 – 2 Ca 284/87 – BB 1988, 565. 132 For further details, see Däubler, 'Die Implementation von ILO-Übereinkommen – Erfahrungen und Überlegungen in Deutschland' (The implementation of ILO conventions: experiences and considerations in Germany), in: *Arbeitsgemeinschaft Arbeitsrecht im Deutschen Anwaltverein*, *Festschrift zum 25-jähriges Bestehen*, Bonn 2006, p. 1183 et seq.

public and are even less tangible for another state than for the one in whose territory they are committed.

2. Sanctions?

Violations of obligations arising from a social clause (in the broad sense) can be determined, according to the US model, in a procedure leading to a binding decision. If this is not taken into account, sanctions consisting of a fine or the withdrawal of trade advantages may be imposed.

It is logical to assume that this second level of pressure exerts an influence in the sense of reaching an agreement in the prior consultation procedure. However, this presupposes that one of the parties seriously considers the possibility of initiating such a sanctioning procedure and, in principle, seeing it through to the end. However, this cannot be taken for granted within the framework of the NAALC, as otherwise one or other procedure would have been initiated in more than 20 years. Furthermore, experience shows that the 'pressure' would have led to consultations eliminating the odd social injustice. However, there is no evidence of this.

Potential sanctions are so much in the background that conflict resolution according to the EU and US models are converging: in both cases, modest success is reported, but no change is achieved. The root causes of this practice are analysed further in section 6. First, the available and used means will be examined, in addition to the social clause: the granting of tariff advantages under the Generalised System of Preferences (GSP) and the commitment to certain human rights.

§ 2. Generalised System of Preferences (GSP) – advantages and disadvantages in customs duty rates

I. The basic principle

Developing countries receive tariff advantages for their export products from industrialised countries. This is referred to as a "generalised system of preferences", abbreviated to GSP, a general system of tariff preferences[65]. This system exists particularly in the EU and the US, but there are also similar regulations in other developed countries, such as Japan. The legal basis for this preferential treatment is Article XXV:2 of the GATT 1994, which allows exceptions to most-favoured-nation treatment[66].

Since a decision adopted in 1979[67], this preferential treatment has been granted to a total of 176 States; with effect from 1 January 2014, their number has been reduced to 90[68]. Since 1995, the granting of tariff advantages has also been subject to compliance with certain minimum standards in the field of labour law. While the EU initially only prohibited forced labour, since the last reform of the GSP in 2012 (in force since 1 January 2014), beneficiary States are required not to commit 'serious and systematic'

[65] Summary in Ölz, ZIAS 2002, 319 et seq., which remains illuminating despite the changes that have taken place in the legal situation in the meantime.
[66] Herdegen, op. cit., § 10, no. 37 et seq.
[67] Reproduced in Herdegen, § 10, no. 38.
[68] García, p. 8.

violations of the ILO's core labour standards[69]. If this is the case, the advantages granted may be withdrawn and they will once again be subject to the general tariff regime. The European Commission decides on the withdrawal. In addition to the general GSP system, there are other, more extensive benefits in the EU, for which the term GSP+ has been coined. The requirement is that the country in question has ratified the eight fundamental ILO labour standards, undertakes to implement them effectively and submits, among other things, to a periodic review[70]. The aim is to encourage ratification and compliance with the ILO's core standards. The economic advantages granted should enable the country to boost its economic development and thus create better conditions for the protection of employees in the future.

II. The practice of the EU Commission

According to widespread opinion, frequent and serious violations of the ILO's fundamental labour standards occur in many, if not most, of the EU's beneficiary countries[71]. However, this does not in any way lead to regular procedures for the withdrawal of preferences; instead, selective use is made of the rights granted[72]. Only in extreme cases have the existing legal possibilities been activated; sanctions were only imposed on Myanmar from 1997 and on Belarus from 2007, although the measures against Myanmar were lifted in 2013. In the first case, the reason was the widespread practice of forced labour, while in the second it was the failure to respect freedom of association[73]. Sri Lanka had its GSP+ status temporarily withdrawn due to serious human rights violations committed in the conflict with the Tamil Tigers. The three cases of application suggest that another unwritten element should be added to violations of fundamental labour standards: the states in question must not be particularly important from an economic point of view, must be relatively isolated internationally and, at the same time, must not be fully open to international capital flows. Jeffrey Vogt has detailed that in many other cases where violations were evident, no sanctions were imposed. This even applies to the granting and maintenance of GSP+[74]. For example, the European Commissioner responsible, Karel de Gucht, rejected any measures against Uzbekistan and 'trusted' that further talks would be held, even though no one doubted that forced child labour was practised on a large scale in Uzbekistan. Furthermore, Georgia retained its GSP+ status even though all labour inspection had been abolished and elected trade union representatives had lost all legal protection. No sanctions were imposed on Guatemala and Colombia either, even though the repression of trade union activities is very intense in those countries and numerous trade unionists have been murdered[75]. And the question of whether US legislation is compatible with the ILO's core labour standards is not even raised. In trade agreement negotiations, the only issue is whether the other contracting party complies with ILO requirements[76], even though

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[69] Vogt, The International Journal of Comparative Labour Law and Industrial Relations, 31, no. 3 (2015), p. 285 et seq.
[70] Vogt, op. cit., pp. 285, 289.
[71] For all, Vogt, op. cit., pp. 285, 296.
[72] Ebert, Labour Standards, p. 29; Orbie/Tortell, European Foreign Affairs Review 14 (2009), pp. 663 et seq.
[73] García, p. 7.
[74] Vogt, op. cit., pp. 285, 296 et seq.
[75] On Colombia, see in particular Zimmer, in: Scherrer/Hänlein (eds.), Sozialkapitel in Handelsabkommen, p. 141. Further examples in García, p. 7.
[76] Ebert, Labour Standards, p. 36.

US authors have pointed out numerous contradictions between ILO principles and US legislation[77]. In the present context, it should be noted that the actual policy of the European Commission does not seem to depend on whether it has sanctions at its disposal, as in the area of GSP, or whether these do not exist, as in the case of social clauses in trade agreements. In both cases, it is limited to an exchange of views; since the "offender" runs no risk, the rules are largely ineffective. Even when they are applied exceptionally, as in the case of Myanmar, their actual effect is minimal, as demonstrated, among other things, by the fact that Myanmar, despite the withdrawal of tariff advantages in the period up to 2013, has multiplied its trade with the EU[78].

III. The practice of the United States

The US system is largely similar to the European one, but lacks a system of special incentives similar to GSP+. The US regulations were established by the Trade Act of 1974 and currently cover 122 developing countries, which can import some 3,500 different products into the US tariff-free. Least developed countries can do so with another 1,500 products. In total, trade benefiting from this scheme reached a volume of almost US$17.7 billion in 2015[79].

Those wishing to benefit from the GSP programme must meet a series of requirements that can sometimes be somewhat surprising[80]. For example, the country in question must not be dominated by "international communism" or belong to a group of states that deprive international trade of essential products (which probably refers to oil producers). Nor can the country have refused to comply with an arbitration award in favour of a US citizen or company; investor protection receives considerable support here. In the present context, a provision with the following wording is directly relevant:

'GSP beneficiaries must have adopted or be adopting measures to ensure internationally recognised labour rights, including: 1) the right of association, 2) the right to organise and bargain collectively, 3) the prohibition of any form of forced or compulsory labour, 4) a minimum age for the employment of children and the prohibition of the worst forms of child labour, and 5) acceptable working conditions with regard to minimum wages, working hours and occupational safety and health."

This refers, without expressly citing them, to the ILO's fundamental labour standards and the ILO's concept of "decent work". However, it is sufficient for the country concerned to take measures to guarantee these fundamental rights, without specifying to what extent they must be effective and comprehensive. In this regard, there is considerable discretion, whereby rather symbolic efforts may suffice to grant or maintain GSP benefits to a country. Interested parties, including trade unions, may approach the Department for International Trade and express their view that a particular country no longer meets the requirements for GSP participation. A public hearing is then held to clarify whether the allegations are well-founded. The last time this

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[77] See, in particular, Weissbrodt/Mason, Minnesota Law Review, vol. 98 (2014), pp. 1842–1878.

[78] Zhou/Cuyvers, Journal of World Trade, vol. 45, no. 1 (2011), p. 63 et seq.; García, p. 7.

[79] Data according to https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/september/united-states-reinstates-trade (2.10.2016).

[80] On this subject and the following, see https://ustr.gov/sites/default/files/GSP-Guidebook-September-16- 2016.pdf (2.10.2016).

happened was in January 2016 in relation to Thailand, Uzbekistan, Niger, Fiji, Georgia and Iraq[81].

The possibility of withdrawing tariff advantages is used more in the United States than in Europe. For example, Bangladesh was excluded from the advantages in 2013 and Swaziland in 2014, while, in the opinion of the authorities, a review concerning the Philippines did not reveal the need to introduce changes[82]. Burma/Myanmar was excluded from the programme in 1989 for violations of workers' rights and applied for reinstatement in 2013; this was only granted, with effect from 13 November 2016, after a thorough investigation[83]. The United States was much more hesitant than the EU in this regard[84]. However, trade developed unusually positively during this period, rising from a low of US$38,000 in 2012 to US$142 million in 2015[85].

US practice also indicates that the sanction of withdrawal of tariff advantages is only imposed in clear-cut cases and, moreover, only affects states that are politically isolated or less important to the United States from an economic point of view. There is no evidence that the situation of employed workers in the countries concerned has improved significantly as a result of the GSP system.

§ 3. Human rights clauses

I. Legal basis

Article 21 of the TEU contains important principles for the EU's external relations which, as far as can be seen, have not yet entered the public consciousness[86]. Paragraph 1 of this provision states:

> 'In its international action, the Union shall be guided by the principles which have inspired its own existence, development and enlargement, and whose promotion worldwide it has committed itself to: 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 Charter and international law."

The European Commission has taken this aspect into account in a resolution that has been approved by the European Parliament[87]. In paragraph 2 of its resolution, the

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[81] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/ustr-uses-tradepreference (2 October 2016).
[82] Information according to https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/ustr-uses-trade-preference (2.10.2016).
[83] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/september/united-statesreinstates-trade (2 October 2016).
[84] See section II in this regard.
[85] Again, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/september/united-statesreinstates-trade (2 October 2016).
[86] Similar statements at a more general level in Article 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, global sustainable development, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as the strict observance and development of international law, including the principles of the United Nations Charter."
[87] COM(1995)0216 – C4-0197/95, available at http://eur-lex.europa.eu/legal-ontent/DE/TXT/?uri=CELEX%3A51996IP0212 (3.10.2016). 50 ‘access the labour market’.

European Parliament stresses the importance of 'ensuring respect for human rights in the workplace'[88]. This was initially done in the trade, cooperation and association agreements themselves, but since 2009 it can also be done in a separate agreement that does not directly refer to issues of free trade and investor protection[89]. However, these clauses have not been included in all treaties, particularly those that refer only to specific products or sectors[90]. Sometimes there is also a provisional entry into force that does not refer to the human rights clause[91]. Today, there is no longer any doubt that human rights related to dependent work are included.

II. Examples of human rights clauses

The wording of the clauses is not uniform. Reference is made to different codifications, such as the ECHR or the 1948 Universal Declaration of Human Rights, so it is possible that some rights are not taken into account[92]. Sometimes there is also an explicit commitment to the social market economy, which raises the question of compatibility with the guarantee of self-determination of peoples in Article 1(1) of the International Covenant on Economic, Social and Cultural Rights, according to which peoples have the right to freely determine their economic, social and cultural development[93].

1. Cotonou Agreement

The protection of human rights has been the subject of particularly detailed regulation in the text of the Partnership Agreement with the ACP States[94], Article 9 of which states the following:

'Essential elements and fundamental element

(1) The objective of cooperation is sustainable development, with human beings as the main actors and beneficiaries, which presupposes respect for and promotion of all human rights.

Respect for all human rights and fundamental freedoms, including fundamental social rights, democracy based on the rule of law, and transparent and accountable governance are an integral part of sustainable development.

(2) The Contracting Parties refer to their international commitments on respect for human rights. They reaffirm their commitment to human dignity and human rights, respect for which is a legitimate right of individuals and peoples. Human rights are universal, indivisible and interrelated. The Parties undertake to promote and protect all

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[88] OJEC of 28.10.1996 – C 320/261.
[89] Bartels, p. 10.
[90] Hachez, p. 12 et seq.
[91] Hachez, p. 14.
[92] Hachez, p. 14 et seq.
[93] Hachez, p. 15.
[94] Official title: Partnership Agreement between the African, Caribbean and Pacific States, on the one hand, and the European Community and its Member States, on the other, signed in Cotonou on 23 June 2000 – OJEU of 15 December 2000 – No. L 317/3-353. Commonly referred to as the Cotonou Agreement.

fundamental freedoms and human rights, both economic, social and cultural, and civil and political. In this context, the Parties reaffirm the equality of men and women.

The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are closely linked and mutually reinforcing. Democratic principles are universally recognised principles on which the organisation of the State is based in order to guarantee the legitimacy of State power, the legality of State action, which is reflected in its constitutional, legal and administrative system, and the existence of mechanisms for participation. On the basis of universally recognised principles, each country develops its own democratic culture.

The structure of the State and the powers of the various branches of government are based on the principle of the rule of law, which requires, in particular, an effective legal protection system accessible to all, independent courts guaranteeing equality before the law, and an executive branch fully subject to the law.

Respect for human rights, democratic principles and the rule of law, on which the ACP-EU partnership is based and by which the contracting parties are guided in their internal and external policies, are essential elements of this Agreement.

(3) In a political and institutional environment that respects human rights, democratic principles and the rule of law, good governance consists of the transparent and accountable management of human, natural, economic and financial resources and their use for balanced and sustainable development. It involves clear decision-making procedures by the authorities, transparent and accountable institutions, the rule of law in the management and distribution of resources, and the capacity to develop and implement measures, in particular to prevent and combat corruption.

Good governance, on which the ACP-EU partnership is based and by which the parties are guided in their internal and external policies, is a fundamental element of this Agreement. The Contracting Parties agree that only in serious cases of corruption, including acts of bribery leading to serious cases of corruption, shall this element be considered to have been infringed within the meaning of Article 97.

Of particular note is the last paragraph of section 2, according to which the above-mentioned principles are ‘essential elements of this Agreement’.

Paragraph 4 also provides approaches for an implementation policy, stating that "the partnership shall actively support the promotion of human rights, democratisation, the consolidation of the rule of law and good governance. These areas are important topics for political dialogue. Within the framework of this dialogue, the Contracting Parties shall attach particular importance to current changes and the continuity of progress made.

This regular assessment shall take into account the economic, social, cultural and historical context of each country.

Particular attention shall also be paid to these areas in support of development strategies. Within the framework of the strategies agreed between the State concerned

and the Community, the latter shall provide support for political, institutional and legal reforms, as well as for the training of public and private actors and civil society."

Annex VII further specifies this provision. If we disregard the diplomatic language, a "hard core" emerges in the sense that projects contributing to respect for human rights, democratisation and the rule of law will be particularly promoted.

2. Agreement with South Korea

In the framework agreement with the Republic of Korea[95], a commitment to democratic principles and human rights ('strong attachment') is already found in the preamble. Under the heading "Basis for cooperation", this is repeated and specified in Article 1(1): 'The Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, as well as the rule of law. Respect for democratic principles and human rights and fundamental freedoms, as set out in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the domestic and international policies of both Parties and constitutes an essential element of this Agreement." However, it is difficult to draw specific conclusions, for example, regarding the right to strike, which is particularly controversial in Korea, as this would require, at a minimum, that this provision be binding at the national level.

3. Agreement with Georgia

The provisions of the Agreement with Georgia[96] are shorter and less specific, and mention political dialogue and reform as the first priority:

'2.1. Political dialogue and cooperation on reforms within the framework of this Association Agenda shall aim to strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, including the rights of persons belonging to minorities, as enshrined in the fundamental conventions of the United Nations and the Council of Europe and in the related protocols, and to contribute to the consolidation of internal political reforms, in particular through approximation to the EU acquis communautaire'.

The aim is therefore to strengthen respect for democratic principles, human rights and fundamental freedoms; the proximity to "good intentions" cannot be overlooked, but perhaps in the specific circumstances it has not been possible to go further.

III. Legal consequences in the event of non-compliance

In the agreements concluded (and not only in those planned, as in the case of Georgia), respect for human rights is a fundamental condition for cooperation and the granting of advantages. If this is not taken into account, the EU may take "appropriate measures" to restore a situation in line with human rights.

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[95] https://eeas.europa.eu/sites/eeas/files/framework_agreement_final_en.pdf.
[96] Signed in 2014 and entered into force in 2016.

1. Right of appeal for those affected?

Does this provision give a person affected by a human rights violation the right to demand that measures be taken and to enforce them in court? The Court of Justice of the European Union (CJEU) dismissed as inadmissible a claim brought by a Lebanese citizen invoking the relevant clause of the EU-Lebanon Association Agreement[97]. The CJEU expressly confirmed this[98]. Both decisions were published without reasoning, so it is not clear what human rights violation was alleged. The question therefore also remains open as to whether the EU's obligation to act derives directly from the TEU, as the applicant relied solely on the association agreement[99]. With regard to events taking place outside the territory of the EU, the courts find it difficult to rule on claims brought by individuals affected by human rights violations. Thus, the European Court of Human Rights (ECHR) had to rule on the question of whether Serbian citizens affected by NATO bombing during the 1999 war could invoke the fundamental rights recognised in the ECHR. The claim was rejected on the grounds that Article 1 of the Convention requires the person concerned to be subject to its jurisdiction (i.e. the jurisdiction of a member state of the Council of Europe), which was not the case[100]. On the contrary, everyday common sense would be much more inclined to think that it is difficult to imagine a more serious form of "being subject" than being bombed.

2. Adoption of appropriate measures

Numerous agreements contain a provision that, in the event of serious human rights violations, "appropriate measures" may be taken, a more flexible provision than the "Baltic clause" used previously, which provided for immediate suspension[101]. Even without such a provision, an appropriate reaction would be possible. The EU can criticise human rights violations and urge its partner to remedy them. If it deems it appropriate, it can also suspend certain contractual obligations, for example by temporarily withdrawing trade advantages, i.e. until a situation in line with human rights is restored. This would be a partial suspension under Article 60(1) of the Vienna Convention on the Law of Treaties[102]. A total suspension and termination of the treaty would also render the special protection of EU investments ineffective, which has raised some concerns in legal literature[103]. However, in an emergency, this can be avoided by limiting the effect of the suspension. The practice is characterised by the fact that human rights clauses are only applied in extreme cases, such as coups d'état and serious human rights violations. They are seen as a political instrument, not a real guarantee of human rights[104]. It is also very important whether the human rights violator is an economically important or rather marginal state; so far, the human rights clause has only been used against ACP states such as Guinea-Bissau, Mauritania, Liberia and

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[97] CFI, 6.9.2011, T 292/09, juris (Mugraby case)
[98] CJEU, 12.7.2012, C-581/11, juris (Mugraby case).
[99] Bartels, p. 18.
[100] ECHR, 12 December 2001 – 52207/99 – NJW 2003, 413 (Bankovic and Others case)
[101] For further details, see Hachez, p. 10.
[102] Vienna Convention on the Law of Treaties of 23 May 1969 (BGBl 1985 II, p. 927), also reproduced in Däubler/Kittner/Lörcher, Internationales Arbeits- und Sozialrecht, No. 030.
[103] See, in particular, Berner, M*enschenrechtsklauseln in Freihandels- und Investitionsschutzabkommen* (Human rights clauses in free trade and investment protection agreements), EuZW 2016, 533.
[104] Bartels, p. 11.

Zimbabwe[105]. Often, even in those cases, only consultations were held, with no sanctions imposed. To the extent that they were imposed, they did not affect trade advantages, but were limited to the cancellation of meetings and the suspension of technical cooperation[106]. Even these modest consequences were only applied in cases of coups d'état, fraudulent elections and serious human rights violations. Everyday and routine human rights violations are accepted without opposition[107]. No agreement provides for the creation of a special body that can investigate human rights violations. The only possibility is for participating governments to engage in consultations. Civil society organisations are limited to addressing a ministry with the relevant remit, if possible with the support of public pressure. The possibilities are much more limited than under the NAALC[108]. In essence, this is declarative diplomacy[109].

§ 4. SOCIAL CORRECTIONS AT THE INTERNATIONAL OR NATIONAL LEVEL?

I. Social clauses, GSP and human rights guarantees: useless embellishments?

The results of studies conducted to date are discouraging: neither the generalised social clause, nor the possibility of withdrawing tariff advantages through the GSP system, nor human rights clauses can guarantee effective social protection. Contrary to popular belief, it does not matter whether the treaty in question provides for sanctions or not. While the social clauses agreed by the EU do not provide for sanctions of any kind, but are based solely on improving knowledge through consultation and technical cooperation, the EU has, in the form of the GSP system, an instrument with which it could exert economic pressure in the event of serious violations of core labour standards. This would also be possible in the case of human rights clauses. However, except in a few extreme cases, these possibilities are not used. Even when it would be possible to act differently, the choice is made not to do so.

It is doubtful whether this is ultimately due to the fact that EU Member States take different positions and are therefore unable to reach a compromise[110]. US law differs from its European counterpart in that it also provides for sanctions in the case of social clauses. However, the agreement parallel to NAFTA[111] is not a very convincing example, since, although it is intended to apply to a small part of labour law protection standards, the procedure is such that, according to human judgement, such a situation never arises. However, the situation is different in bilateral trade and investment agreements, as well as in the GSP system that also exists in the United States[112]. Nevertheless, experience shows that the provisions in question are not taken seriously there either. In these circumstances, one wonders why trade and investment protection agreements do not dispense with such provisions altogether. If, for example, a coup

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[105] Hachez, p. 17 et seq.
[106] Hachez, p. 19.
[107] Hachez, p. 19: 'Conditionality is therefore not normally triggered when systematic human rights violations occur in a country, unless the situation deteriorates seriously and suddenly.' Bartels, p. 11, shares this view.
[108] See § 3 III 3 above.
[109] Hachez, p. 21, with reference to Horn/Mavridis/Sapir.
[110] See Van den Putte/Orbie, The International Journal of Comparative Labour Law and Industrial Relations, vol. 31, no. 3 (2015), pp. 263, 273 et seq. for social clauses.
[111] See section 3 III 3 above.
[112] See sections 3 III 2 and 4 III above.

d'état occurs in another country and part of the population is deprived of their liberty or killed, any aid could already be suspended under the general principles of international law and the disappearance of the basis of the agreement could be invoked (*rebus sic stantibus* clause). Why, then, is there an express provision that, under normal circumstances, is not intended to apply in cases of violations of fundamental labour and human rights standards? Why have these provisions become even more widespread in recent years? The vast majority of agreements are concluded between industrialised and developing countries. They generally do not refer to conditions in industrialised countries (which could also be subject to criticism), but exclusively to the situation in developing countries. The latter undertake to respect certain minimum standards or, depending on the wording of the agreement, to improve them or at least to endeavour to improve them. Under normal circumstances, no political body is concerned with whether these obligations are actually fulfilled. However, the developed country has the option at any time to change its behaviour and demand effective compliance. This could happen if the developing country in question behaved 'inappropriately', for example by cooperating with North Korea or showing sympathy for Al Qaeda. As soon as this became apparent, the contracting party could point out the breach of fundamental labour standards and propose the imposition of sanctions. In some cases, even a much more harmless "deviation" from a consensus shared by the EU and the United States would trigger such a mechanism. Therefore, the social clause and the other two instruments have, according to the thesis defended here, a function of power; they are means of controlling behaviour that are used on very rare occasions. To this is added another aspect. Respect for fundamental labour standards or comparable standards, as well as for human rights, is a concern shared by virtually the entire population, both in Europe and in the United States. Enacting these positive values and (apparently) basing policy on them generates, as mentioned above in section 3.II.3, a high degree of acceptance. The population therefore views the foreign policy of the EU and the Member States favourably, and policy-makers enjoy support. The fact that the reality in the "partner countries" is far removed from the standards laid down in the treaties is incomprehensible to the average citizen, as there is little literature or reports on the Internet about the situation of workers in developing countries and because, as a rule, personal experience is frustrated by geographical distance. Furthermore, tourists visiting these countries tend to visit monuments, landscapes and cultural traditions, but are generally unaware of the current labour situation. The social clause and the other two instruments therefore have an "ideological" function: they refer to a relatively idyllic world that does not actually exist. Abandoning them would cause irritation. The practical ineffectiveness of social clauses and the other two instruments is underlined by the fact that they do not appear in books dealing with foreign trade law[113]. Why should authors concern themselves with provisions that have no practical significance for companies, which are their most important target audience?

II. Does the situation change when the social clause is applied to developed countries?

Experience to date relates to situations in which developing countries are required to respect core labour standards, comparable standards and human rights. However, in the current debates on CETA and TTIP, the main issue is that workers in developed countries, faced with the strengthening of the market principle (which is increasingly

[113] See references in the previous section § 3 III.

extending to public goods) and investor protection, are demanding social protection. Can a 'sustainability chapter', whose part on dependent work is based on the social clauses outlined here, have such an effect? The answer is probably no. On the one hand, there is already a treaty, the NAALC, which concerns two developed countries, Canada and the United States. Despite an attractive legal basis, which included not only "core labour standards" but also much of labour law, its practical effects have been very modest[114]. Neither in Canada nor in the United States has the NAALC been shown to prevent the deterioration of protection standards or to achieve improvement. This is despite the fact that a significant proportion of complaints were directed against the United States, which could have led to changes. On the other hand, the free trade and investment protection agreements concluded to date are part of an asymmetrical power relationship: the industrialised country is usually the stronger party and could therefore, if it so wished, use its power to enforce the social provisions laid down in the agreements. In practice, however, this only happens in extreme cases. In relations between industrialised countries, as a rule, no such power relationship would exist. Given the relative equality between the parties, respect for the independence of the partner state and the maintenance of good relations would be even more important than in previous agreements. It would be even less likely that "pressure" would be exerted in favour of practical implementation. Finally, it should be borne in mind that the social clause and the other two instruments are ultimately based on one country granting the other trade advantages, tariff preferences or other advantages that can be denied or withdrawn in the event of non-compliance with social standards. This 'link between trade and labour' does not fit in a situation where it is not a question of granting advantages, but of ensuring that certain consequences of market structure and investor protection are subject to social corrections. In other words, the guarantee of core labour standards and the ratification of ILO conventions are of little use if an investor can claim before a commercial court (CETA) or an arbitration tribunal that its legitimate expectations have been frustrated by a huge increase in the statutory minimum wage. The only difference would be in the theoretical case where they claimed that they had relied on the continued prohibition of free trade unions: this reliance would not be worthy of protection in the light of ILO principles, but such a case is unthinkable within the EU. As a provisional conclusion, it should be noted that there is no indication that social clauses and related instruments, such as the GSP and human rights guarantees, can limit the risks to EU workers arising from existing and planned free trade and investment protection agreements[115]. The question therefore arises as to whether there are other possibilities at international and national level that could help to prevent social deterioration and the blocking of improvements.

III. Social corrections at supranational level: the EU as a model?

Apart from social clauses and similar phenomena, international law offers little experience on how to regulate the social repercussions of market opening and investor protection. However, this is not the case in the EU integration area, which has developed its own supranational corrections. Reference should be made to the literature on this subject[116]. In our opinion, EU labour law is limited in this respect, as it mainly

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[114] Cf. supra § 3 III 3.

[115] On risks, see § 1 II above.

[116] See, for example, Franzen/Gallner/Oetker (eds.), *Kommentar zum europäischen Arbeitsrecht*, Munich 2016; Preis/Sagan (eds.), *Europäisches Arbeitsrecht. Grundlagen – Richtlinien – Folgen für das deutsche Recht* (European labour law. Fundamentals, Directives and Consequences for German Law), Cologne,

contains rules that can be applied and enforced without taking into account the level of socio-economic development of each Member State.

1. Procedural rules

EU labour law contains numerous procedural and consultation rules, even in areas where national law lays down substantive rules. This applies, for example, to the - Directive on collective redundancies[117], which only regulates the procedure in the event of collective redundancies, but does not rule on the grounds for dismissal;

- the Documentation Directive[118], which only obliges employers to provide information on essential working conditions, but does not comment on the admissibility of specific clauses;

- Framework Directive on the protection of safety and health at work[119], which, unlike traditional German protection in the field of safety and health at work, does not lay down content requirements, such as limit values, but rather procedural rules[120];

- European Works Council Directive[cxxi][121], which regulates the establishment of a European Works Council and its information and consultation rights, but does not contain any provisions on participation or co-determination rights;

- Directive on informing and consulting employees[cxcii][122], which, beyond its title, grants information and consultation rights to representatives of employees' interests in the company.

2. Principles of equality

In addition, EU labour law is characterised by numerous rules establishing equal treatment, although it is clearly open to interpretation what level of pay or other level of protection is the benchmark for equal treatment. Of particular importance are the - Anti-discrimination directives, including the Racial Discrimination Directive[123], the

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2015; Schlachter/Heinig (eds.), *Europäisches Arbeits- und Sozialrecht* (European Labour and Social Law), Baden-Baden, 2016.

[117] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225/16).

[118] 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 (OJ L 288/32).

[119] Framework Directive on the protection of safety and health at work.

[120] Bücker/Feldhoff/Kohte, *Vom Arbeitsschutz zur Arbeitsumwelt*. European challenges for German labour law, Neuwied, among others, 1994.

[121] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 122/28).

[122] 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 (OJ L 80/29).

[123] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180/22).

Framework Directive on equal treatment[124] and the Directive on equal treatment[125], as well as Council 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 (OJ L 183/1).

- Directives establishing equal treatment between atypical workers on permanent and full-time contracts. These include the Part-Time Work Directive[126], the Fixed-Term Workers Directive [127]and the Temporary Agency Workers Directive[128], which, however, allows for certain exceptions in collective agreements. The Directive on the transfer of undertakings[129] can also be included here, as, in principle, a change of employer should not result in any loss of rights; workers with a new employer receive, in principle, the same treatment as workers whose employer remains the same. In addition, the Posting of Workers Directive[130] aims to ensure that workers posted within the country are, in principle, treated in the same way as national workers, although this objective has not been fully achieved nor is it intended to be fully achieved.

3. Material guarantees as exceptions

In addition, there are guarantees of content, albeit in a rather modest scope. These include, for example, the four weeks' holiday entitlement provided for in Article 7 of the Working Time Directive[131], which also limits the maximum weekly working time to 48 hours in Article 6 and provides for a rest period of 11 hours within a 24-hour period in Article 3. The Insolvency Directive[132] can also be classified here due to the granting of insolvency compensation. The Fixed-Term Employment Contracts Directive[133] contains a ‘soft’ restriction on the possibilities for concluding fixed-term contracts, and the Temporary Agency Work Directive[134] also contains individual protection provisions in favour of temporary agency workers.

However, in general, this is insignificant compared to the provisions on procedures and equal treatment. Furthermore, according to Article 153(5) TFEU, remuneration for work (in particular the minimum wage), freedom of association and trade union action are

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[124] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303/16).
[125] Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204/23).
[126] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998, No L 14/9, corrected in No L 128/71).
[127] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ECET, UNICE and CEEP (OJ L 175/43).
[128] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ L 327/9).
[129] Council Directive 2001/23/EC of 12 March 2001 on the application of the laws, regulations and administrative provisions 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 (OJ L 82/16).
[130] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997, No L 18/1).
[131] 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 (OJ L 299/9).
[132] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of workers in the event of the insolvency of their employer (OJ L 283/36).
[133] See footnote 194 above.
[134] See footnote 195 above.

expressly excluded from the scope of the social policy provisions of the TFEU; in this respect, Member States retain full competence.

4. Consideration of workers' interests in other areas of EU law

EU labour law also includes rules designed to prevent EU labour law or national labour law from being undermined, in whole or in part, by other EU provisions. In this regard, it is worth mentioning the case law of the CJEU[135], which does not extend the prohibition of agreements restricting competition provided for in Article 101 TFEU (formerly Article 81 TEC) to collective agreements, as otherwise these would not be able to achieve their social policy objectives. This also applies when the collective agreement has been concluded for self-employed workers, but they are in a situation comparable to that of employed workers[136]. The second case of application is public procurement law. Article 67(2) of the new Public Procurement Directive[137] provides that social and environmental aspects must also be taken into account when awarding a contract. This ensures that higher wage costs resulting from protection standards do not generally lead to exclusion from the award of public contracts.

5. The division of tasks in the field of social policy between the Union and the Member States

In these circumstances, EU labour law is fragmentary in nature. This is not due to disorderly legislation, but mainly to the fact that rules that would place an unequal burden on Member States are excluded. In principle, this applies to most substantive protection rules: a minimum wage of €8.84 per hour could not be applied throughout the Union, as it would be unaffordable for many companies, for example in the Eastern European Member States. The same applies to material protection against dismissal, including notice periods and automatic compensation, which, for example, under Dutch or Italian law, must be paid automatically in the event of termination of employment.

Therefore, even in an area of integration such as the EU, the risks that arise at supranational level cannot be fully addressed at that same level. Instead, fundamental issues must continue to be decided at national level. This applies in particular to wage levels, forms of social security and collective representation of interests. The ‘division of labour’ between the supranational and national levels has developed over decades and has, in principle, proven its effectiveness. In this way, each Member State was able to respond in the way it considered most appropriate to the economic challenges of the internal market. In this regard, it is not only the level of economic development that is important, but also national tradition, which is particularly important in the field of labour law: while in one country conflicts over co-management are resolved through negotiation, in another priority is given to negotiations between trade unions and employers, which may even threaten to strike. This “peaceful coexistence” between supranational and national social policy was seriously disrupted a few years ago by the

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[135] V. 21.9.1999 – C-67/96 – *AuR* 2000, 26 with note by Blanke – Albany.

[136] CJEU of 4.12.2014 – C-413/13 – NZA 2015, 55 – FNV. See in this regard Heuschmid/Hlava, AuR 2015, 193 et seq.

[137] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

case law of the CJEU[138]. In its Viking[139] and Laval[140] judgments, the CJEU held that fundamental economic freedoms, in particular the freedom of establishment and the freedom to provide services, are not only directly applicable in Member States, but also apply in relations between trade unions and employers. Therefore, strikes with specific objectives are only compatible with EU law if they constitute a proportionate restriction of the fundamental freedom concerned in order to safeguard the interests of workers. This was confirmed in the Viking case for the direct defence of jobs, but not in the Laval case, where the activity of a Latvian company on a construction site in Sweden was hampered by a boycott and strike at a subcontractor that refused to enter into a collective agreement in accordance with Swedish law and Swedish conditions. It was important to note that a fundamental freedom such as freedom of establishment is already infringed when its exercise is made 'less attractive' by measures at national level, such as strikes[141]. Thus, it would also be conceivable that, for example, high compensation payments to be paid in the event of a company closure and its subsequent relocation to another Member State could be considered illegal, as "relocation" could effectively be made "unattractive" if such a condition were maintained.

It will not be discussed here whether this case law deserves approval or whether it actually infringes EU law. Rather, it should only be noted that the CJEU's "interference" in the national sphere and the resulting shift in the division of labour have rightly met with considerable resistance: if its case law is taken as a basis and applied consistently (which has not been the case so far), in many cases Member States can no longer resolve social policy issues on their own. Given the lack of EU competence or political will to create EU-wide regulations (e.g. on severance pay), the workers affected may be left unprotected. This must be taken into account when considering the extent to which the risks posed by free trade and investment protection agreements should be addressed at the international or national level.

IV. Trade and investment protection agreements as a new form of supranationality?

Within the EU, 'supranationality' is characterised by the fact that EU bodies can adopt rules that have direct effects for and against individual citizens and that, moreover, take precedence over national rules governing the same issue: the latter do not cease to exist, but cannot be applied as long as the conflicting EU rule remains in force. The primacy of EU law also applies in relation to national constitutional law. Under German constitutional law, an international treaty concluded by the Federal Republic does not have such an effect. Although it may be directly applicable, i.e. it may establish rights and obligations for individual citizens (e.g. the ECHR), in principle, even after its ratification, it only has the status of national law. If it conflicts with the Basic Law, the Federal Constitutional Court may declare it unconstitutional. If the international treaty is not compatible with existing national law, it is a matter of interpretation whether it should prevail as subsequent law. If, after ratification, a law is enacted that contradicts it, the latter takes precedence. In specific cases, an interpretation of the law in

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[138] See in this regard Däubler-Heuschmid, Arbeitskampfrecht, 3rd ed. 2011, § 11, no. 67 et seq.

[139] CJEU, 11 December 2007, C-438/05, AuR 2008, 55; see Kocher, AuR 2008, 13 et seq.

[140] CJEU, 18 December 2007, C-341/05, AuR 2008, 59.

[141] CJEU, 11 December 2007, C-438/05 – AuR 2008, 55, paragraph 72.

accordance with international law may help to remove the contradiction through interpretation, but this is not the case with open contradictions[142].

The FRG's free trade and investment treaties are, in principle, normal international treaties; unlike EU law, they do not take precedence over national law. In practice, however, a similar effect may occur: if a law violates the principle of 'fair and equitable treatment' or the prohibition of indirect expropriation, high claims for damages may arise against the state that enacted the law: if an investor continues to suffer economic damage in the future, the state would be well advised to repeal the law in question as soon as possible. In this context, it is worth recalling the new health legislation in Slovakia[143]. If the Slovak Constitutional Court had not repealed the ban on profit distribution to private health insurance companies, experience would have shown that the Slovak legislature would have amended the law accordingly, as it would be forced, for budgetary reasons, not to expose the State to a claim for damages amounting to several million every year. Therefore, in terms of their effects, investor protection rules take precedence over national law. Other contractual provisions may also take precedence over national and European law. If, for example, the criteria for awarding public contracts are exhaustively laid down in the free trade and investment agreement, both the national state and the EU, within the framework of their respective competences, would have the legal possibility of ignoring them and declaring that their own criteria are decisive. However, this would result in the sanctions provided for in the treaty; depending on the specific configuration, in such a case a considerable sum would have to be paid for breach of obligations, the amount of which would be determined by an arbitral tribunal. Added to this would be possible claims from a candidate who had not been selected. The same applies if a treaty stipulates that certain tasks must always be put out to public tender, thereby ruling out remunicipalisation in principle. If, despite this, it is decided to proceed, a sum of money would have to be paid, at least in relation to the other state. If these consequences are not to be accepted, it is necessary to include provisions in the contract itself that do not affect the national legislator's room for manoeuvre or that provide for social aspects to be taken into account, for example, in award decisions. With regard to the general consequences of an enlarged market, the experience of the EU could be taken as an example: here too, it is not advisable to leave the management of the social consequences of an even more globalised market solely in the hands of "international treaties" or at national or European level. The reasons for a division of labour between the EU and the Member States in the EU are also valid in a new 'internal market' created by an international treaty; here too, different economic capacities and national traditions must be taken into account. These considerations will first be examined below using the CETA agreement as an example and, where appropriate, will be reflected in drafting proposals (see below, § 7). The same will then be done with the draft 'sustainability chapter' presented by the European Commission in the TTIP negotiations with the United States (see below, § 8).

§ 5: THE EXAMPLE OF CETA

[142] For further information on this issue, see Däubler, *AuR* 2008, 409 et seq.; Heuschmid, *Mitentscheidung durch Arbeitnehmer – ein europäisches Grundrecht?* (Co-determination by employees – a European fundamental right?), p. 204 et seq.; Kocher, *AuR* 2008, 13 et seq.; Rebhahn, "Grundfreiheit vor Arbeitskampf – der Fall Viking", *ZESAR* 2008, 109 et seq., with references.

[143] See *supra* § 1.I; the same applies to decisions by other legitimate state institutions, e.g. courts.

I. The legal framework

The ‘Comprehensive Economic and Trade Agreement between Canada, on the one hand, and the European Union and its Member States, on the other’ is currently (6 October 2016) in the draft negotiation phase and is also available in German.212 It will be supplemented by a number of explanatory protocols. The name ‘CETA’ is an abbreviation of the original English title ‘Comprehensive Economic and Trade Agreement’. The text of the agreement itself is around 500 pages long. Together with the annexes and reservations, the total volume amounts to 2,286 pages. Like other treaties concluded by the EU, it would apply, in accordance with Article 55 TEU, in the 24 official languages of the Union, which are equivalent to each other and must be taken into account in its interpretation. This creates a considerable degree of legal uncertainty. CETA is an international treaty. Insofar as it relates to Union competences, it will become part of Union law upon its entry into force and will therefore take precedence over secondary Union law and, by virtue of the primacy of Union law, also over all national law[144].

If regulatory competence in certain areas lies with the Member States, CETA has, in this respect, the status of a simple national law in Germany. In the present context, CETA cannot be subject to general criticism[145]. Rather, the comments focus on the corrections necessary to ensure the protection of workers' interests. It is not just a matter of maintaining the status quo, but also of being able to react appropriately to future challenges or to improve the current situation in line with changes in parliamentary majorities. In this regard, Chapter 23, entitled ‘Trade and Labour’, will be examined first. Next, the various sets of CETA rules will be analysed which, based on their current content, could pose a risk to workers' interests in the sense that they cause social regression or block future progress.

II. Limiting risks through Chapter 23 on “Trade and Labour”?

Chapter 23 of the TCA contains, as a social clause in the above sense[146], a number of highly commendable provisions. For example, Article 23.1(2) sets out a commitment to decent work and the ILO's fundamental labour standards, including freedom of association and collective bargaining, the prohibition of discrimination, and the prohibition of child labour and forced labour. According to Article 23.3, ‘each Contracting Party shall ensure that its labour legislation and practice incorporate and guarantee respect for the fundamental principles and rights at work listed below’. These include, first and foremost, the ILO’s fundamental labour standards.

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[144] Available at https://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-vorschlag-fuer-einen-beschluss-ueber-die-unterzeichnung-des -wirtschafts-und-handelsabkommens-zwischen-kanada-undder-eu,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

[145] See, for example, Fischer-Lescano/Horst, *Europa- und verfassungsrechtliche Vorgaben für das Comprehensive Economic and Trade Agreement zwischen der EU und Kanada (CETA)* [European and constitutional requirements for the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA)], Bremen 2014, available at https://www.mehr-demokratie.de/fileadmin/pdf/CETA-Rechtsgutachten.pdf (6.10.2016).

[146] See Article 3 above.

As a socio-political corrective to global market freedoms, as established in the CETA agreement, this is insufficient for two reasons in particular.

On the one hand, ‘freedom of association’ and ‘collective autonomy’ are very broadly formulated guarantees, which are implemented very differently in each country.

Although the ILO supervisory committees have done important work to flesh these out in their reports over the decades, these are not legally binding and are not referred to in the CETA agreement. This means that, in the event of a dispute, it is by no means certain that resorting to strike action to secure a new collective agreement would be covered by the guarantees of collective autonomy. Nor is it possible to know how the burden of proof is distributed, for example in cases of (controversial) discrimination on the grounds of trade union activity, which would be of vital importance for the prospects of success in practical litigation. Unlike in national law, there is no body that can derive from the generally formulated guarantees the specific consequences that are absolutely necessary for practical litigation. Consequently, the corrective function of this guarantee is very modest.

Secondly, the chapter on ‘Trade and Labour’, like the chapter on environmental protection (Art. 24.16), is excluded from the general dispute settlement mechanism in Chapter 29 and from the jurisdiction of the investment tribunals. If the obligations assumed are not fulfilled, only consultations are held. If these are unsuccessful, a commission of experts is set up to assess the dispute. If one of the parties, for whatever reason, ignores the outcome, no sanctions of any kind can be imposed. Therefore, the objections raised above against standard social clauses also apply in this case[147]. If, for example, an investor were to argue that an increase in the statutory minimum wage or the extension of co-determination contradicts its legitimate expectations and that it can therefore claim damages, the commitment to the ILO's core labour standards set out in Chapter 23 would be of no help. The same would apply if public procurement legislation took into account only the most economically advantageous tender, without mentioning social policy aspects such as the employment of unemployed persons in the context of the project to be awarded[148]: how could one assert a claim solely on the basis that Chapter 23 contains (very nice-sounding) commitments to social policy objectives? It is therefore necessary to analyse the specific provisions of CETA, determine the respective risks to workers' interests and, where appropriate, propose corrections. For the sake of clarity, the order of the provisions of CETA will be followed.

III. Provisions on subsidies

The broadly interpreted rules on subsidies, referred to as ‘aid’ in EU law, could lead to the inclusion of payments motivated by labour market and employment policies. This would be conceivable, for example, in the case of integration aid or wage subsidies granted to start-ups.

Subsidies are regulated in Articles 7.1 to 7.9 of the CETA Agreement. The term ‘subsidy’ is defined by reference to the WTO Agreement on Subsidies; Article 7.2 establishes full transparency with regard to the existence of subsidies (but not with

[147] Above, § 6 I.
[148] See the CJEU case of 26 September 2000, C-225/98, NJW 2000, 3629, Nord – Pas de Calais.

regard to the procedure for granting them). If one Party considers that a subsidy or public aid granted by the other Party affects or could affect its interests, it may, in accordance with Article 7.3(1), notify the other Party of its concerns and request consultations. This would be the case, for example, if a particular product were so heavily subsidised in Canada that products from an EU Member State could not compete with it at all in terms of price. However, unlike within the EU, consultation is the only reaction provided for, as Article 7.9 expressly excludes recourse to the general dispute settlement mechanism (which leads, in particular, to binding decisions by arbitration tribunals). Nevertheless, in order to avoid doubts and disputes from the outset, it would be advisable to clarify Article 7.1. This clarification could be, for example: 'State aid shall not be considered a subsidy when its purpose is to promote the recruitment or retention of workers or to guarantee them decent remuneration and working conditions'.

IV. Protection of investors against unfair and inequitable treatment

According to Article 8.10(1), the protection of investors regulated in Chapter 8 includes the right of investors to receive 'fair and equitable treatment'. This includes, as explained[149], in particular the principle that investors' 'legitimate expectations' should not be disappointed. Article 8.10(2) lists negative examples of unfair behaviour, but these are not exhaustive. Extreme cases are mentioned, such as 'denial of justice', a 'fundamental violation of the principles of the rule of law', 'manifest arbitrariness', 'selective discrimination on manifestly unjustified grounds, such as sex, race or religious beliefs' and 'abusive treatment of investors, such as coercion, duress or harassment', which, in the latter case, leaves a wide margin for interpretation. In addition, the CETA Joint Committee 218 may, in accordance with paragraph 3, establish other rules of conduct whose content is not specified in the Treaty. In these circumstances, there remains a risk that changes in labour law, such as innovative collective agreements, the extension of works council co-management or a significant increase in the minimum wage, could violate the 'legitimate expectations' of investors and thus oblige the Federal Republic of Germany to pay damages. In accordance with Article 8.18, it is not the arbitration tribunals that decide on the existence and scope of the obligation to pay compensation, but an international commercial court appointed by the contracting parties. If the freedom of decision of the national and EU legislator in the field of employment is to be preserved, an additional clarification could be added to Article 8.9 ('Investment and Regulatory Measures'), following the 'clarifications' in paragraphs 2 to 4, which could read as follows: 'Provisions relating to labour and social law are covered without exception by paragraph 1, even if they have an impact on the markets for goods and services'. Paragraph 1, to which reference is made, guarantees the regulatory competence of the competent authorities of the contracting parties by establishing the following: 'For the purposes of this Chapter, the Contracting Parties reaffirm their right to adopt regulatory measures to achieve legitimate policy objectives, such as the protection of public health and safety, the protection of the environment or public morals, social and consumer protection, or the promotion and protection of cultural diversity within their territory'[150]. The scope of the 'social protection' referred

[149] Supra, section 1.III.
[150] See section IX in this regard.

to may be unclear in specific cases, so it seems appropriate to clarify it. However, the version of a 'clarifying statement' known to date is not sufficient for this purpose[151].

V. Protection of investors against indirect expropriation

Article 8.12 guarantees protection against expropriation. As usual, it refers both to 'direct' nationalisation or expropriation and to measures having an equivalent effect, referred to as 'indirect' expropriation.

Both are only permissible if they are carried out for public purposes, in accordance with the rule of law, without discrimination and upon payment of prompt, adequate and effective compensation. The concept of expropriation is defined in more detail in Annex 8-A to the Treaty. In particular, it describes indirect expropriation, which is of interest to us here. Thus, paragraph 1(b) of Annex 8-A provides that a measure has the same effect as expropriation when "the investor is deprived of fundamental rights in relation to its investment, in particular the right to use, exploit and dispose of it, without there being a formal transfer of ownership or confiscation". Would this include the previously controversial case in which corporate co-management deprives owners of the right to elect all members of the board of directors according to their own ideas?[152] The text does not allow us to answer this question with certainty. Paragraph 2 of Annex 8-A provides little additional information. It states that the existence of indirect expropriation must be decided on a case-by-case basis, after assessing the facts. To this end, the economic impact of the measure and its duration are taken into account (although a mere decrease in the value of the investment is not sufficient); in addition, the extent to which the measure is contrary to the investor's "reasonable expectations" is taken into account, as well as its "purpose, context and objective". This general authorisation is further restricted in paragraph 3: non-discriminatory measures aimed at "ensuring the protection of legitimate objectives of general interest, such as public health, safety and environmental protection" do not constitute indirect expropriation, but an exception to the exception is then established: The above does not apply in 'exceptional cases where the effects of a measure (...) are so severe, taking into account its purpose, that they appear manifestly excessive. Labour and social legislation does not enjoy privileges; in any case, the protection of labour could be classified as "public health". The last sentence of Article 8.12(1) clarifies that it must be interpreted "in accordance" with Annex 8-A. This may give rise to additional possibilities for interpretation. If, for example, an extension of co-determination through collective agreements or legislation and an extension of co-determination are to be prevented from being considered indirect expropriation, the following should be added to paragraph 1: "Labour and social law measures never constitute expropriation within the meaning of this paragraph. Their admissibility shall be determined in accordance with national law". This does not leave investors unprotected at all, but simply removes the special protection established by CETA, which in specific cases can go much further. Moreover, this exclusion from the property regime is also found in Article 345 TFEU, which expressly states: 'The Treaties shall in no way affect the rules in Member States governing the system of property ownership'. However, the idea expressed in this article is only mentioned in relation to labour and social law. The broader question of

[151] Final draft. Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States. Date: 9 October 2016, page 5; available from the Federal Ministry for Economic Affairs and Energy (BMWi).
[152] On the controversy surrounding the 1976 Co-determination Act, see § 2 II 2 above.

whether Article 345 TFEU is incompatible with an EU international treaty that modifies the property regime in Member States cannot be analysed here for reasons of space.

VI. Cross-border services

In the case of cross-border services, there is a risk that self-employed service providers, but not their employees, will benefit from the conditions customary in the host country. While Article 9(3) grants service providers from the other Contracting Party the same treatment as nationals, this does not apply to their employees: according to the text, they cannot demand the same treatment as national workers. It might therefore be appropriate to add the following: 74 'Workers posted to the territory of the other Contracting Party to provide services shall not be subject to less favourable working conditions than those applicable to comparable national workers'. Since Article 9.3(2) already contains a 'clarification', the proposed wording could be added as paragraph 3 with the words 'By way of clarification:'. Although full equality goes beyond the Posting of Workers Directive[153], CETA, as an international treaty, takes precedence over the Posting of Workers Directive, which is part of secondary Union law. In this area, the provisions of the TISA[154] should be taken into particular account.

VII. Competition law

Competition law rules shall not apply to collective agreements. This is not expressed in most cases in the text of the relevant legal source (TFEU, GWB), but it is expressed in case law. For example, according to the case law of the BAG, shop closing times and facility usage times may be regulated by collective agreement, even if they have an impact on the market for goods and services[155]. The CJEU has approved a Dutch collective agreement that not only regulated a supplementary company pension scheme, but also designated the insurance company that was to take on this task[156]. A 'sectoral exception' of this kind for collective agreements would also be appropriate in the chapter on competition in the CETA Agreement (Art. 17), where collective agreements are not mentioned. It would therefore be possible to add a clarification that could be worded as follows: 'The conclusion of collective agreements between trade unions and employers shall not be affected, even if they have an impact on the market for goods and services'.

This is not of great importance, as CETA only contains very general provisions on competition policy, which, moreover, according to Art. 17.4, are not subject to any dispute settlement procedure. Nevertheless, this would avoid differences of opinion.

VIII. Public procurement

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[153] See footnote 197 above.
[154] See ETUC resolution of 2 October 2016, in note 54.
[155] See in this regard the ETUC resolution of 2 October 2016, see note 54.
[156] BAG of 27 June 1989 - 1 AZR 404/ 88 - AP No. 113 on Art. 9 GG on labour disputes, confirmed by BAG of 10 November 1993 - 4 AZR 316/93 - AP No. 169 on § 1 TVG on collective agreements: construction 224 TJUE of 21 September 1999 – C-67/ 96 – AP No. 1 on Art. 85 of the EC Treaty = AuR 2000, 26 with note by Blanke – Albany; confirmed for persons assimilated to workers by the CJEU of 4.12.2014 – C-413/13 – NZA 2015, 55 – FNV.

The regulation of public procurement in Article 19 of CETA does not include an obligation to put services of general interest out to tender (and thus privatise them). Furthermore, tasks that were previously performed by private entities can be taken over again by public authorities, i.e. they can be remunicipalised, without infringing CETA[157]. However, issues relating to labour and social law are only addressed marginally. Article 19.2(3)(d) excludes employment contracts from the obligation to tender (which, in principle, is self-evident). Article 19.3(2)(d) allows for the favouring of bids submitted by persons with disabilities (e.g. from a workshop for persons with disabilities), by "charitable organisations" or by prisoners. Unlike the new EU legislation, the general selection criteria mentioned in Article 19.9(9) do not include social aspects, but neither do they exclude them, as there are no conclusive rules on this matter. However, according to Article 19.9(7)(c) of the CETA Agreement, the contracting authority must publish all evaluation criteria and their relative importance or, in any case, clearly indicate them in the tender documents. If social aspects are omitted, they cannot be taken into account later. In view of this situation, it would be advisable to clarify that social aspects may also be taken into account. This would eliminate the risk of it being considered a criterion 'unrelated to the award' (and therefore inadmissible). One possible wording could be as follows: 'The evaluation criteria may include social policy measures, such as the employment of unemployed persons and disadvantaged groups of workers. In addition, it must be ensured that the tenderer offers the remuneration and working conditions customary in the locality." The second sentence is essentially an automatic consequence of the principle of equal treatment set out in paragraph VI.

IX. Legislation of the CETA Joint Committee

In accordance with Article 26.1(1) of the CETA Agreement, a CETA Joint Committee shall be established, composed of representatives of Canada and the EU. In accordance with Article 26.1(3), this committee 'shall have competence for all matters relating to trade and investment activities between the Parties and the application and enforcement of this Agreement'. Its decisions are taken by consensus (Article 26.3(3)). They are binding on the EU and Canada and must be implemented by both parties (Article 26.3(2)). Article 21 provides for 'regulatory cooperation' covering a wide range of issues. Its institutional form is embodied in a 'forum', which is also a special committee of the CETA Joint Committee (Art. 21.6(1)). The broad powers of the Joint Committee, which go beyond the implementation and enforcement of the agreement, have raised legitimate constitutional concerns: the powers are defined very broadly, as 'trade and investment', beyond what would be permitted under the principle of exclusive competence within the EU[158]. In addition, decisions relating to the application and implementation of the Agreement can no longer be "revoked" by the parliaments of both parties or amended, as this would require a new decision by the Joint Committee, which could only be adopted unanimously[159]. In this sense, parliaments would be

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[157] According to the statement by the Federal Ministry of Economics, http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Freihandelsabkommen/ceta,did=654766.html (6 October 2016).

[158] Article 5(1), sentence 1, TEU.

[159] For further details, see Fisahn/Ciftci, KJ 2015, 256 et seq. For improvements, see Stoll/Holterhus/Gött, *Die geplante Regulierungszusammenarbeit zwischen der EU und Kanada sowie den USA nach den Entwürfen von CETA und TTIP* (The planned regulatory cooperation between the EU and Canada and the US according to the CETA and TTIP drafts), Vienna 2015, p. 21 et seq. ; Däubler-Gmelin, *Politik & Kultur* 5/16, p. 21 et seq.

divesting themselves of their powers. The ‘autonomy’ of the Joint Committee is an important supranational element that is not designated as such and is difficult to reconcile with the democratic principle enshrined in Article 20(1) of the Basic Law and Article 10 TEU. Given the Joint Committee's broad powers, it cannot be ruled out that it may also adopt rules that directly or indirectly affect labour and social law. This should be avoided by adding a clarification to Article 26(3), third paragraph:

“There is no competence in the field of labour and social legislation”.

However, this would only dispel constitutional doubts about a small part of the Joint Committee's current powers.

X. Overall assessment

Examination of the provisions of the CETA agreement has shown that this treaty entails considerable risks for workers' rights, which cannot be offset in any way by the chapter on “Trade and Labour”. The individual risks need to be addressed and either the agreement needs to be supplemented with clarifications (e.g. on public procurement) or a kind of sectoral exception needs to be established, as proposed here in the area of investor protection and competition law. The ‘sectoral exception’ leads, as in the EU, to the preservation of national competences, while other issues must be resolved at the ‘supranational’ level, i.e. by amending the agreement. This does not require explicit amendments to the text; in almost all cases, clarifications are sufficient. These could be summarised in an additional annex to the agreement.

§ 6: THE EXAMPLE OF TTIP

I. The starting point

The Transatlantic Trade and Investment Partnership (TTIP) differs in fundamental respects from CETA, the content of which is nevertheless often described as a ‘model for the TTIP’: the US partner has more weight and the planned free trade area would be much larger. At the same time, the negotiations are more difficult, which is why many observers currently assume that they will fail[160]. No draft agreement has yet been presented. The positions formulated by both sides are only partially accessible to the public. The EU's negotiating position is examined in more detail below. It includes a chapter on sustainability under the heading “Trade and sustainable development”, which contains guiding principles in Section I (Articles 1 to 3), “Labour aspects” (of particular interest in this context) in section II (Articles 4 to 9), in section III, “Environmental aspects” (Articles 10 to 16), and in section IV (Articles 17 to 21), “Cross-cutting issues”. Here too, the question arises as to whether these provisions can be expected to prevent social regression and keep the door open to social improvements.

II. The proposed provisions

Section I, under the heading “Background”, in Article 1(3), contains a statement that both parties emphasise that consideration of labour and environmental issues related to

[160] This was stated, for example, by Federal Minister for Economic Affairs Gabriel, according to the FAZ of 30 August 2016, available at http://www.faz.net/aktuell/wirtschaft/ttip-und-freihandel/gabriel-amerikaner-haben-ttip-aktiv-beendet14412568.html (6 October 2016).

trade and investment "is beneficial as part of a comprehensive approach to trade and sustainable development". Article 2 lists the objectives of the chapter on sustainability, which include 'maintaining the Parties' environmental and labour protection objectives in a more liberalised, open and transparent trade and investment environment'. Article 3(1) confirms the right of each Party to determine for itself the level of labour and environmental protection within the framework of existing international treaties. According to Article 3(2), each Party shall ensure that its domestic measures 'provide and promote a high level of labour and environmental protection' and shall endeavour to further improve the underlying level of protection.

The 'labour aspects' regulated in Section II specify this to a certain extent. According to Article 4(1), both parties recognise that 'mutual supportiveness between trade policy and labour policy should be enhanced'. They therefore agree, as indicated below, to promote the development of their trade and investment relations in a manner that supports the implementation of the decent work agenda. In this regard, reference is made to the 2008 ILO Declaration on Social Justice and Fair Globalisation, which is followed by four strategic objectives: employment promotion, social protection, social dialogue, and fundamental principles and rights at work. Article 4(2) returns to the usual line by committing to apply the ILO's fundamental labour standards; both parties also commit to "make continuous efforts" to ratify the ILO's fundamental conventions.

According to Article 4(3), each Contracting Party shall protect, in accordance with the ILO's 2008 Decent Work Agenda, "health and safety at work", with preventive approaches playing an important role. Working conditions, including working hours, must be decent and wages must cover 'basic expenses'. Both parties recognise, under Article 4(6), that 'an adequate labour inspection system is necessary for the effective enforcement of their labour legislation'. Less obvious is Article 4(7): the violation of fundamental workers' rights may not be invoked as a "legitimate competitive advantage or used in any other way".

Likewise, trade rules must not be used "to discriminate in an arbitrary or unjustified manner" or for protectionist purposes. Article 5 refers to freedom of association, referred to as 'freedom of association' in ILO terminology. It begins by stating (without much substance) that ILO Conventions Nos. 87 and 98, as well as other international guarantees, are 'important'. . According to paragraph 2, the contracting parties shall 'respect' the rights guaranteed in the conventions in question and apply them, which, in addition to the right to form trade unions, includes the right to establish employers' organisations, the right to strike, the recognition of collective bargaining and effective social dialogue and tripartite consultations (probably with the participation of public authorities). To ensure compliance, paragraph 3 establishes a total of eight programmatic principles, including the guarantee of 'adequate protection against discriminatory acts against trade unions in the employment of workers' and the preservation of the right 'to negotiate, conclude and enforce collective agreements and to take collective action, in accordance with national law and practice'.

Article 6 refers to the prohibition of forced labour, Article 7 to the effective abolition of child labour. Article 8 deals with equal treatment and non-discrimination in employment and occupation, the implementation of which, in the light of EU directives and US anti-discrimination legislation, poses fewer difficulties.

Article 9 takes up the idea already mentioned in Article 1(3) of developing a comprehensive approach to labour and trade policy. In this regard, Article 9 states, by way of introduction: 'The Contracting Parties recognise the importance of cooperation on the trade-related aspects of employment policies in achieving the objectives of this Agreement. In this context, they shall consult on trade-related labour issues of mutual interest and cooperate as appropriate at the bilateral, regional and global levels, paying particular attention to developing countries and, in particular, least developed countries (LDCs).' Numerous programmes for the exchange of information and views and for cooperation are then listed, including cooperation 'in promoting decent work in global supply chains'.

In Section IV, Article 17 essentially prohibits social and environmental dumping, but uses rather cautious wording. According to Article 17(1), it is 'recognised' that 'the weakening or reduction of the level of protection afforded by national environmental and labour legislation' is not an 'appropriate' means of encouraging or influencing trade or investment in any way. Paragraph 2 is somewhat clearer: no Party shall derogate from its environmental and labour legislation, or waive its application, or offer such derogation or waiver for the purpose of encouraging or influencing trade or investment in any way. Finally, paragraph 3 states that no Contracting Party shall 'undermine, through continuous or recurring measures or through inaction, its environmental or labour legislation for the purpose of encouraging or influencing trade and investment in any way'. Article 18 refers to transparency and public participation, while Article 19 addresses the issue of how sustainability impacts should be assessed. Article 20 revisits the idea of corporate social responsibility.

III. Assessment

1. Innovative value

The chapter on sustainability envisaged for the TTIP goes far beyond the content of traditional social clauses[161]. This refers, first of all, to the objects mentioned, which include, according to Article 4(1), the promotion of employment and fundamental rights in the workplace. Furthermore, social clauses almost never contain an explicit commitment to the right to strike. Secondly, the direct link between trade policy and labour policy in Article 1(3) and Article 4(1) is new, but requires further examination. Thirdly, specific provisions are laid down on specific issues; thus, the violation of workers' rights must not lead to competitive advantages (Article 3(7)) and standards must not be lowered, including through negligent enforcement, in order to gain commercial advantages. Overall, the EU's position reads like a general statement of good principles of labour law, which deserves clear support from workers. In Italy, one could speak of a new "Statuto del lavoro" (Labour Statute), and in Spain, of a new "Estatuto de los trabajadores" (Workers' Statute).

2. Relationship with the risks of the TTIP?

Considering the risks for workers, for example, investor protection[162], or purely market-oriented criteria in the awarding of public contracts, there are no direct references in the

[161] See § 3 above.
[162] See § 1 III and IV above.

chapter on sustainability. If an investor were to claim damages because co-management in the company or society had been significantly improved and he was unable to tell, the chapter on sustainability would be of little help to the Federal Republic as the defendant. The fundamental provisions are not relevant; no one would argue that, without an extension of co-determination, the principles of decent work are not being respected. Article 5(3) provides for the promotion of social dialogue between capital and labour, as well as effective national measures to inform and consult workers, but it is understandable that an investor would not infer from this that full parity could also be introduced on the supervisory board or that works council co-determination would be extended to all changes in the company.

Nor would the "overall concept" for trade and labour referred to in Article 1(3) and Article 4(1) be of any help. This is a conceptual project whose contours cannot be deduced from the part of the draft agreement that has been presented. It is highly unlikely that a state court or an arbitral tribunal would infer from the statement of commitment to an 'overall concept' that an investor should expect far-reaching changes in labour law in favour of workers. If it is stated that the development of trade and investment relations must be 'conducive' to the implementation of the decent work agenda, in case of doubt it would be interpreted that the investor must accept moderate improvements. Anything more than small steps could disappoint their 'legitimate expectations' and give rise to a claim for damages. In this sense, the chapter on sustainability changes practically nothing in terms of actual risks. Nor does it address the question of whether a labour or social law can constitute indirect expropriation and under what conditions[163]. Furthermore, the provisions of the chapter on sustainability are likely to be insufficient to apply social policy criteria in public procurement law if these are not taken into account in the text of the contract. It could perhaps be justified that, taking into account Article 4(3)(b) of the draft, only candidates who guarantee their workers decent working conditions and a living wage would be considered, but this is by no means certain if the award criteria do not contain any reference to this provision. Moreover, this would only be a minimum, far removed from the principle of "equal pay for equal work in the same place". The chapter on sustainability could take on greater importance in the framework of the 'Joint Committee' legislation, which, assuming it is legally admissible, would also exist within the framework of the TTIP. When deciding on the implementation and transposition of the agreement[164], the principles set out in Articles 4 to 9 should also be taken into account. However, expectations should not be too high in this regard, as the provisions often use abstract concepts that can be interpreted and applied in very different ways. What does 'promotion of employment' mean within the meaning of Article 4(1)(a)? Does it also cover legislation that expects positive effects on employment resulting from the reduction of protection standards? When is a labour inspection system 'adequate' within the meaning of Article 4(6)? To what extent can collective agreements have an impact on the market for goods and services?[165]. This does not necessarily follow from the fundamental commitment to collective bargaining in Article 5(3)(d). The result is clear: despite many positive statements, the draft chapter on sustainability is not adequate to counteract the risks associated with TTIP. These remain virtually unchanged.

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[163] See above, section 7 V

[164] On jurisdiction in the area of CETA, see above, section 7.IX.

[165] On the issue, see above, § 7 VII.

3. No competitive advantage due to illegal working conditions

One of the few concrete provisions is the prohibition on obtaining a 'legitimate competitive advantage' from the violation of workers' rights (Art. 4(7)). Translated into German law, this means that a competitive advantage obtained in this way is illegal; its use would violate the German Unfair Competition Act (UWG). This has already been considered, at least in the case of serious human rights violations, in previous rulings by the German Federal Supreme Court, which, however, did not consider this to be unfair competition in a specific case involving the importation into Germany of asbestos manufactured in South Korea without significant labour protection at correspondingly lower prices[166]. In the literature, on the other hand, the position has been taken that the threshold for unfair competition is reached much earlier[167], but so far not all market behaviour based on the illegal exploitation of labour gives rise to a presumption of unfair competition. It is not possible to predict with certainty whether this would change under Article 4(7), but it is at least a possible alternative.

4. Prohibition of social regression

Article 17(1) prohibits the Contracting Parties from reducing the level of protection provided for in labour legislation in order to encourage trade and investment. 'Industrial free zones' or 'world factories', as they are known in developing countries, would not be permitted within the scope of the TTIP. The repeal of legal provisions is expressly equated with a waiver of their application. Nor is it permissible to circumvent labour law through inaction in order to create an incentive for trade and investment (Article 17(3)). It remains to be determined to what extent this also includes the autonomous reduction of rights established in collective agreements or employment contracts. Since the negotiating parties are not contracting parties, only an omission on the part of the state can be considered a possible breach of an obligation in such a case. It cannot be predicted with certainty whether, and under what specific conditions, the state is obliged to intervene in such a case. In addition, the objective of creating an incentive for trade and investment must be pursued, which will rarely be demonstrable.

§ 7. SUMMARY

1. TTIP and CETA have made trade and investment protection agreements the subject of public debate. These agreements entail risks, particularly for workers' interests and environmental protection, which need to be addressed.

2. The risks relate in particular to investor protection. Concrete examples show that legislators would no longer be in a position to take the measures they deem appropriate. Rather, they run the risk of incurring high liability for damages on the part of the state towards investors if their 'legitimate expectations' are frustrated. Furthermore, labour law provisions, such as the extension of co-determination, could be classified as indirect

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[166] BGH of 9 May 1980 – I ZR 76/78 – NJW 1980, 2018 with critical commentary by Knieper/Fromm

[167] In addition to Knieper/Fromm, see in particular Däubler, 'Sozialstandards im internationalen Wirtschaftsrecht', in: v. Westphalen/Sandrock (eds.), *Lebendiges Recht – Von den Sumerern bis zur Gegenwart*, FS Trinkner, Heidelberg 1995, p. 475, 486 et seq. ; similarly Kocher, 'Unternehmerische Selbstverpflichtungen im Wettbewerb. Die Transformation von soft law in hard law durch das Wettbewerbsrecht', *GRUR* 2005, 647 – 652.

expropriation, which would result in the total value of the company having to be compensated.

3. There are also risks insofar as social policy criteria can no longer be taken into account in public procurement decisions. Furthermore, there is a danger that collective agreements could, to competition law to a certain extent or that subsidies motivated by labour market policy will be classified as illegal subsidies. If a "joint committee" of the parties to the trade and investment protection agreement is given the power to legislate independently, it will also be able to adopt binding rules affecting dependent work. 85

4. There are numerous social clauses that aim to counteract the risks described above, with different formulations, in numerous agreements between the EU and the United States. The central element is the commitment to "core labour standards" and "decent work", as developed by the ILO. While European practice refers directly to ILO conventions, the treaties concluded by the US are based on national labour legislation, insofar as it regulates the fundamental areas mentioned. Another difference is that the EU has not provided for sanctions, while the US provides for trade consequences or cash payments as a last resort in the event of non-compliance with the agreements.

5. In addition to social clauses, there are tariff preferences for developing countries that are linked to respect for fundamental principles of labour law, such as core labour standards and the principle of decent work. If these conditions are not met, unilateral withdrawal of the advantages is possible.

6. An increasing number of trade and investment protection agreements include a commitment to human rights, which is considered an essential element for the existence and implementation of the agreement. In the event of serious human rights violations, the agreement may be suspended in whole or in part or terminated.

7. Social clauses are only used in absolutely exceptional cases. The same applies to the unilateral withdrawal of tariff preferences and suspension for human rights violations. The provisions described serve only to ensure acceptance of the foreign trade policy of developed countries and can be used as a means of pressure if necessary, when a developing country deviates politically or economically from the general consensus.

8. There is no evidence that the social corrections outlined here are more effective when applied not in relation to developing countries, but in agreements with other industrialised countries.

9. When creating a new large market, the experience gained in the EU in the field of social corrections can be followed to a certain extent. It has been shown that, at the supranational level, only those rules that can be applied regardless of the socio-economic development level of each country are possible. These include, For example, rules on the procedure to be followed by employers and workers, as well as principles of equal treatment that do not determine the "benchmark". With regard to the employer's contribution, at the current stage of integration, only national rules can be considered, as only these can take into account different economic conditions.

10. CETA carries the same risks as other trade and investment protection agreements. The chapter on "Trade and Labour" only contains general provisions on labour law, but

does not address the specific risks posed by investor protection and other provisions of the agreement. More specific rules are therefore needed.

11. CETA must make it clear that labour and social law standards that comply with national constitutional law cannot give rise to claims for compensation by investors for frustrated expectations or indirect expropriation.

12. Social policy aspects (such as the employment of unemployed persons) may also be taken into account in public procurement law.

13. Subsidies motivated by labour market policies do not constitute aid. Following the case law of the CJEU, collective agreements are also not subject to competition law when they have an impact on the market for goods and services.

14. Legislation adopted by the so-called EU-Canada Joint Committee should not refer to labour and social law issues. In this regard, as in the case of investor protection, there should be a sectoral exception.

15. The EU's draft chapter on sustainability for the TTIP also does not refer to actual risks, but merely makes general statements on labour law that add nothing new.