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Research  
Paper

International Law  
Programme

May 2021

# Advancing human rights through trade

## Why stronger human rights monitoring is needed and how to make it work

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# Summary

- Changing domestic political pressures and priorities, the economic and geopolitical implications of the COVID-19 pandemic, and the struggle for a shared vision of how to ‘build back better’ from the current crisis, have reignited the debate about trade and human rights.
- It is possible to identify two main groups of human rights-related concerns about the way that trade and investment agreements are designed and implemented. The first group of concerns arises largely from the effects that a new trade agreement might have on the economies of the trading partners, for instance as a result of exposing local businesses to greater competition, or the effects on the availability or prices of food, medicines or other essential items or services. The second group of concerns stem from the ever-widening scope of trade and investment agreements, now increasingly focussing on ‘behind the border’ issues such as regulatory standards (which may create non-tariff barriers to trade) and investor protection. This, according to some commentators, is contributing to shrinkage in regulatory space to address human rights issues as they emerge.
- On the other hand, these developments may also create openings for trading partners to find new ways of supporting human rights objectives, through cooperative action that incentivizes and rewards concrete efforts to promote and realize rights.
- Policymakers have sought to enhance the responsiveness of trade agreements to human rights-related concerns in various ways, including by seeking commitments from trading partners to effectively implement internationally recognized human rights and labour standards, and to guard against a possible ‘race to the bottom’ (in relation to labour and environmental standards in particular), and by putting in place arrangements for further cooperation with a view to maintaining and improving regulatory and policy approaches.
- However, without robust human rights monitoring systems, trading partners have little chance of being able to tell for sure whether human rights commitments made in the context of trade agreements have been met, whether human rights benefits of trade relationships are being maintained and fairly shared, whether the trade agreement is contributing to improving or worsening human rights situations, or whether steps taken to mitigate risks are working as they should.

- Although many trade agreements either provide for or envisage human rights monitoring in some shape or form, the monitoring systems that have emerged so far are not especially coherent or systematic. However, resolving these problems is not at all straightforward, and there are many methodological, structural, political and resource-related challenges to contend with. This paper considers the prospects for improvement, based on experiences with human rights monitoring (or ‘monitoring-like’ activities) thus far.

# 01

# Introduction

**While human rights impact assessment of trade agreements is becoming more established as a policy tool, the role that ongoing monitoring could play has received much less attention.**

## **1.1 Trade and human rights: an intensifying debate**

The human rights impacts of trade and investment agreements – and the measures needed to address them – continue to be hotly debated. There seems little doubt that trade liberalization has many potential human rights benefits; for instance, through the economic gains and increased job opportunities that come from greater and fairer access to export markets, and through reduced consumer prices and greater availability of basic goods and services.<sup>1</sup>

On the other hand, civil society organizations (and those engaged in human rights, environmental and anti-poverty campaigning in particular) have long expressed concerns that the negotiation and implementation of trade agreements have privileged economic considerations and corporate interests over human rights and environmental protections.<sup>2</sup> These concerns have intensified of late, with the desire of major trading powers to broaden their relationships beyond addressing tariffs and quotas to increasingly cover non-tariff barriers to trade, regulatory cooperation, trade in services and investor protection. These ‘new generation’ trade agreements therefore have potential repercussions for the regulation of many aspects of day-to-day life, and to a much greater degree than their less ambitious predecessors. In particular, some commentators have drawn attention to the possibility that the extended coverage of these more recent

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<sup>1</sup> World Bank (2020), *Trading for Development in the Age of Global Value Chains*, World Bank Development Report 2020, <https://www.worldbank.org/en/publication/wdr2020>; Zerk, J. (2019), *Human Rights Impact Assessment of Trade Agreements*, Research Paper, London: Royal Institute of International Affairs, p. 6, <https://www.chathamhouse.org/2019/02/human-rights-impact-assessment-trade-agreements>.

<sup>2</sup> Horten, D. (1995), *When Corporations Rule the World*, West Hartford, CT: Kumarian Press, Inc. and San Francisco, CA: Berrett-Koehler Publishers, Inc.; Dine, J. (2005), *Companies, International Trade and Human Rights*, Cambridge: Cambridge University Press.

trade agreements ‘increases the risk that these agreements will interfere with the regulatory space’<sup>3</sup> of trading parties to respond to domestic human rights and environmental challenges.<sup>4</sup> This, along with the intense public debate taking place at present about the advantages and disadvantages of different types of trading arrangements for a range of social, environmental, health and welfare related issues,<sup>5</sup> is fuelling demands for more transparency from governments as regards the way that trade policy is formulated and developed.

At the same time, the COVID-19 crisis, and its economic fallout, has begun to shape discussion about the human rights implications of trade policy in other ways. As well as raising public awareness and concern about the consequences of inequality and poverty at a local level, it has highlighted the inequalities and power imbalances that exist between countries themselves. Heightened awareness of the interconnectedness of economies and the importance of well-functioning food supply chains has also helped to draw attention to the poor working conditions of many of the people who work in them. The roll-out of desperately needed vaccines has provoked reflection on the lack of access to medicines in many countries, and the common interest in ensuring that these problems are resolved. As governments around the world confront the enormity of rebuilding their economies in the wake of the crisis, calls from UN agencies and international organizations to ‘build back better’ have been accompanied by demands from a range of actors, both state and non-state, for a renewed focus on strategies to achieve greater alignment between trade policies and sustainable development goals.<sup>6</sup>

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<sup>3</sup> Ebert, F. (2017), ‘The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?’, *International Journal of Comparative Labour Law and Industrial Relations*, 33(2): pp. 295–329, p. 300, <https://kluwerlawonline.com/journalarticle/International+Journal+of+Comparative+Labour+Law+and+Industrial+Relations/33.2/IJCL2017013>.

<sup>4</sup> Dommen, C. (2020), *Blueprint for a human rights impact assessment of the planned comprehensive free trade agreement between EFTA and MERCOSUR*, Alliance Sud, p. 6, <https://www.alliancesud.ch/fr/file/58105/download?token=Jasyd4B->. Dommen’s analysis of the EFTA–Mercosur trade agreement shows the range of trade agreement provisions with potential relevance for the realization of the Sustainable Development Goals and human rights in practice, including provisions on trade in goods and services, intellectual property, competition, investment and government procurement.

<sup>5</sup> For example, in the UK context, see Vasilopoulou, S., Keith, D. and Talving, L. (2019), *Emerging divisions in trade after Brexit*, DEMOS, University of York and University of Tartu, <https://demos.co.uk/wp-content/uploads/2019/10/Emerging-divisions-on-trade.pdf>. This research, based on a public opinion survey of more than 2,000 respondents, indicates the concerns of the public around the impact of post-Brexit trade agreements on workers’ rights, erosion of health and safety regulation and potential economic benefits. See also social, environmental, health and welfare issues being debated in the context of post-Brexit trade negotiations: Trade Justice Movement (2020), ‘Teachers’ union joins civil society groups in demanding social and environmental protection in EU-UK trade deal’, 2 March 2020, <https://www.tjm.org.uk/blog/2020/teachers-union-joins-civil-society-groups-in-demanding-social-and-environmental-protection-in-eu-uk-trade-deal>; Foster, P., Evans, J. and Brunson, J. (2020), ‘Food groups call for special rules in Brexit trade deal’, *Financial Times*, 16 June 2020, <https://www.ft.com/content/e42cebfc-79d5-42a6-be77-6250881ced21>; Laville, S. (2020), ‘Farmers urge UK government to protect food standards in post-Brexit trade bill’, *The Guardian*, 21 May 2020, <https://www.theguardian.com/environment/2020/may/21/farmers-urge-government-protect-food-standards-trade-bill>; Harrabin, R. (2020), ‘MPs urge UK ban on chlorinated chicken and hormone-fed beef’, BBC, 13 May 2020, <https://www.bbc.co.uk/news/science-environment-52638628>; Buranyi, S. (2020), ‘A trade deal with Trump’s America would shed Britain’s climate ambitions’, *The Guardian*, 7 February 2020, <https://www.theguardian.com/commentisfree/2020/feb/07/trade-deal-trump-america-uk-climate-ambitions-2050>.

<sup>6</sup> Charveriat, C. and Deere Birkbeck, C. (2020), *Greening Trade for a global, green and just recovery: Ten ways governments can ensure trade policy is an integral part of building back better*, May 2020, Institute

The growing prevalence and prominence of provisions in trade agreements relating to sustainable development, human rights and good governance suggest that governments have been receptive to arguments about the need for trade policy to both advance and safeguard core values.<sup>7</sup> Mutual commitments in trading agreements affirming respect for human rights, which are intended to provide for the possibility of trading consequences in the event of serious breaches, are now a standard feature of EU agreements. Over time, parties have made space in their trading agreements for special chapters on particular issues of concern, such as ‘trade and labour’ or ‘trade and the environment’ and, more recently ‘trade and gender’.<sup>8</sup> As is discussed in more detail in Chapter 2 below, these chapters provide for the establishment of consultative bodies that enable concerns about human rights related issues (primarily labour and environmental issues at present) to be aired and discussed.

However, human rights advocates and commentators have argued that these kinds of provisions may not sufficiently address all of the potential human rights consequences of the agreements in question.<sup>9</sup> To better address these risks, and to strengthen approaches in future, UN agencies, civil society organizations and some trade policymaking bodies and experts have been recommending that prospective trading partners perform detailed and systematic human rights impact assessments before the relevant trading agreements are signed.<sup>10</sup> Thus far, these calls have been answered most decisively by the European Commission, which since 2012 has extended its sustainability impact assessment processes to include human rights issues arising from trade agreements.<sup>11</sup>

While various challenges associated with *ex ante* human rights impact assessment of trade agreements have been well studied and discussed,<sup>12</sup> the

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for European Environmental Policy and Hoffmann Centre for Sustainable Resource Economy, <https://ieep.eu/news/greening-trade-for-a-global-green-and-just-recovery>.

<sup>7</sup> Borchert, I., Conconi, P., Di Ubaldo, M. and Herchelegiu, C. (2020), *The Pursuit of Non-Trade Policy Objectives in EU Trade Policy*, EUI Working Papers, RSCAC, 2020/26 Global Governance Programme-391 [Global Economics], <https://cadmus.eui.eu/handle/1814/66882>.

<sup>8</sup> For example, see ‘trade and sustainable development’ chapter of the EU–Korea Free Trade Agreement (2011) Ch. 13, and most subsequent FTAs between the EU and its trading partners; ‘trade and labour’ and ‘trade and environment’ chapters of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) Ch. 19 and 20, the United States–Mexico–Canada Agreement (2020) Ch. 23 and Ch. 24; and ‘trade and gender’ chapters of the Canada–Israel Free Trade Agreement (2019), the Argentina–Chile Free Trade Agreement (2019) Ch 15 and Canada–Chile Free Trade Agreement (2019) Ch N bis.

<sup>9</sup> Bartels, L. (2013), ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’, *Legal Issues of Economic Integration*, 40(4): pp. 297–313, <http://dx.doi.org/10.2139/ssrn.2140033>; Ioannides, I. (2017), ‘The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement: Ex-Post Impact Assessment’, European Parliament, pp. 46 and 50, [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS\\_STU\(2017\)558764\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf);

Human Rights Watch (2019), ‘Joint NGO Letter on EU-Vietnam Free Trade Agreement’, 4 November 2019, <https://www.hrw.org/news/2019/11/04/joint-ngo-letter-eu-vietnam-free-trade-agreement>.

<sup>10</sup> Since 2003, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has on several occasions recommended the use of human rights impact assessment techniques ‘to gauge the extent to which trade liberalization can promote and protect human rights’. See OHCHR (2003), *Human rights, trade and investment: Report of the High Commissioner for Human Rights*, UN Doc. E/CN.4/Sub.2/2003/9, para. 63. See also Economic and Social Council (2017), *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Doc. E/C.12/GC/24, para. 13, p. 32.

<sup>11</sup> Zerk (2019), *Human Rights Impact Assessments of Trade Agreements*.

<sup>12</sup> *Ibid.*; Walker, S. (2009), *The Future of Human Rights Impact Assessments of Trade Agreements*, Brussels: Intersentia, [https://www.narcis.nl/publication/RecordID/oai%3AAdspace.library.uu.nl%](https://www.narcis.nl/publication/RecordID/oai%3AAdspace.library.uu.nl%3A)

structural, political and practical issues surrounding effective *ex post* monitoring of human rights issues connected with trade agreements (i.e. once the trade agreement has entered into force) have received less attention. The aim of this research paper is to build on previous Chatham House research into *ex ante* human rights impact assessment<sup>13</sup> with a more detailed exploration of the various contexts in which *ex post* human rights monitoring is done, the methodologies used, and the extent to which there may be scope for improvement. As discussed below (in chapters 2 and 3), human rights monitoring of trade agreements can take a range of different forms, depending on the available mechanisms and resources and prevailing policy objectives. These insights are then applied to the more future-oriented question of whether there is scope for improvement of human rights monitoring of trade agreements, noting the distinctive issues and challenges that arise depending on whether the monitoring activities are carried out unilaterally, or pursuant to the trade agreement itself, or through complementary processes, or as part of some broader joint programme of action (Chapter 4). The paper concludes with some final observations as to ways that policymakers could potentially work towards greater fairness in the manner in which human rights impacts of trade agreements are scrutinized and monitored, and greater coherence between the various processes that are aimed at ensuring that human rights-related risks are properly identified and tracked over time (Chapter 5).

## 1.2 What do we mean by human rights monitoring of trade agreements?

Human rights monitoring is used in a range of contexts to keep track of the various effects – both positive and negative – that different kinds of activities or economic interventions may be having on people’s enjoyment of their human rights. It may be used, for example, by an international organization to monitor the human rights impacts of a development programme, by a regulatory body to track the performance of a regulatory initiative against a series of human rights-related goals, or by a business enterprise for the purposes of ensuring that human rights risks associated with an investment are being properly addressed and mitigated.

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3A1874%2F36620/uquery/the%20future%20of%20human%20rights%20impact%20assessments/id/1/Language/EN; Dommen (2019), *Blueprint for a human rights impact assessment of the planned comprehensive free trade agreement between EFTA and MERCOSUR*; Walker, S. (2018), ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU–Tunisia Free Trade Agreement’, *Journal of Human Rights Practice*, 10(1) pp. 103–124, <https://doi.org/10.1093/jhuman/huy007>; Velluti, S. (2016), ‘The Promotion and Integration of Human Rights in EU External Trade Relations’, *Utrecht Journal of International and European Law*, 32(83): pp. 41–68, <http://doi.org/10.5334/ujiel.342>; Harrison, J. (2019), ‘The Labour Rights Agenda in Free trade Agreements’, in Schill, S. and Ruiz Fabri, H. (eds) (2019), *The Journal of World Investment & Trade*, 20(5): pp. 705–725, <https://doi.org/10.1163/22119000-12340153>; Bürgi Bonanomi, E. (2015), *Improving the methodology for measuring social and human rights impacts of trade agreements*, Österreichische Forschungsstiftung für Internationale Entwicklung, [https://www.oefse.at/fileadmin/content/Downloads/tradeconference/Bu%CC%88rgi\\_EU\\_trade\\_agreements\\_impacts\\_on\\_human\\_rights\\_methodology.pdf](https://www.oefse.at/fileadmin/content/Downloads/tradeconference/Bu%CC%88rgi_EU_trade_agreements_impacts_on_human_rights_methodology.pdf); United Nations Economic Commission for Africa (UNECA) and Friedrich Ebert Stiftung (FES) (2017), *The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective*, p. 41, [https://www.uneca.org/sites/default/files/PublicationFiles/2017\\_07\\_cfta\\_hria\\_publication\\_eng.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/2017_07_cfta_hria_publication_eng.pdf).

<sup>13</sup> Zerk (2019), *Human Rights Impact Assessments of Trade Agreements*.

In its broadest sense, human rights monitoring can be defined as the active collection, verification and analysis of information relating to human rights situations and problems. While methodologies will vary depending on the context and need, information-gathering and analysis are the two core components. The information-gathering part of the work may involve desk-based research, interviews, field work, online surveys, academic research, and stakeholder meetings and discussions. The analytical part of the work may draw from a variety of techniques, including economic modelling, causal chain analysis, analysis of quantitative and qualitative indicators, case studies and expert input and interpretation. Whatever information gathering and evaluation methods are used, human rights monitoring is fundamentally concerned with observation; of events, of incidents, of progress in advancing human rights and addressing human rights challenges, and of the effectiveness of steps to address different forms of human rights related risks.

When carried out by states, human rights monitoring may be carried out to ensure compliance with the relevant state's international legal obligations, to ensure that that minimum standards or commitments are observed or that the goal of progressive realization of human rights (an obligation that refers to economic, social and cultural rights in particular) is being met, or a combination of these. Thus, in this context, each state needs to adjust the focus of its monitoring exercises to reflect the nature of human rights-related risks that have been identified, in light of the prevailing economic, social, cultural and other factors, as well as any human rights commitments made in trading agreements and elsewhere.

This research paper is concerned with the various forms of human rights monitoring that take place between trading partners in the context of a trading relationship.<sup>14</sup> While the primary focus of this paper is on monitoring activities that are either led by, or instigated by, state bodies (e.g. ministries, regulatory bodies, advisory committees etc.), this is not to overlook the vital role played by a range of non-state actors – and civil society organizations and trade unions in particular – in promoting understanding of the human rights consequences of trade agreements and their implementation. As will be discussed further in this paper, the active involvement of these different stakeholder groups is an essential factor in a human rights monitoring system's performance and impact. Effective monitoring systems will therefore seek to facilitate a two-way dialogue

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<sup>14</sup>As will be discussed further below, trade agreements treat human rights issues in different ways, with labour rights often receiving particular attention in the agreement terms because of the implications of a 'race to the bottom' between the parties for the maintenance of a 'level playing field' for competition. In some cases, the purpose of the monitoring may be to ensure that parties are respecting the fundamental values on which an agreement is based (i.e. as signalled in clauses confirming respect for human rights as an 'essential element' of the agreement) but in some cases the focus of the monitoring may be the effects of non-compliance with human rights-related commitments on the trading relationship itself rather than on enjoyment of human rights as such. This paper takes a broad view of human rights and human rights monitoring, as potentially covering all internationally recognized human rights. While the types of monitoring chosen, and the issues focussed on, will be driven by the objectives and concerns of the parties involved, and while the most advanced forms of monitoring may have prioritized certain sub-sets of human rights (and especially labour rights), there are lessons that can potentially be drawn for human rights monitoring of trade agreements more broadly, as is discussed in the chapters below.

between the relevant authorities and stakeholders; enhancing transparency and creating opportunities for direct feedback by members of the public about the social, environmental or human rights impacts of the agreement in question and progress towards realizing the human rights-related goals that may be significant in the context of that trading relationship.<sup>15</sup>

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### Box 1. A brief note on the terminology used in this research paper

In this paper the term **trade agreement** refers to any negotiated agreement (technically a trade treaty) between two or more trading parties. Trade agreements vary in coverage from the more 'traditional' type that is addressed primarily towards border restrictions (such as tariffs and quotas) to the more recent 'comprehensive' arrangements, which, to an increasing extent, contain provisions relating to investor protection, trade in services and 'behind the border' issues such as competition policy, regulatory cooperation, intellectual property and public procurement.

Trade agreements can be **bilateral** (i.e. operational as between two state parties) or **regional or plurilateral** (i.e. involving more than two parties, frequently a group of states located in the same region). The Comprehensive and Progressive Trans-Pacific Trading Partnership (CPTPP) is a good example of a plurilateral, regional trade agreement. These types of bilateral, regional or plurilateral trade agreements are also referred to in this research paper as **free-trade agreements (FTAs)**.

The term **investment treaties**, on the other hand, refers to treaties predominantly about investment matters, most commonly bilateral investment treaties (BITs).

**Trading arrangements** (as opposed to trade agreements) potentially includes a range of unilateral trade-related measures, and in this context refers particularly to arrangements established under the **Generalised Scheme of Preferences (GSP)**, see Chapter 3 below).

The term **trading partners** refers to the states party to either a trade agreement or a trading arrangement. A **trading relationship** refers to the agreement or arrangement between these partners.

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<sup>15</sup> On the relevance of human rights monitoring of trade agreements to procedural standards of public participation and transparency under international human rights law, see Dommen (2019), *Blueprint for a human rights impact assessment of the planned comprehensive free trade agreement between EFTA and MERCOSUR*.

### 1.3 What are the main reasons for undertaking human rights monitoring of trade agreements?

There are several reasons why a trading partner might want to undertake, facilitate or participate in human rights monitoring of trade agreements and trade arrangements.

#### **Checking compliance with human rights-related preconditions or treaty commitments acknowledged by the parties to be of ‘essential’ importance to the agreement**

As with any agreement, trade agreements confer benefits to parties in return for observing certain conditions. Trading partners have a clear interest in ensuring that the conditions on which benefits have been granted (which may include human rights-related commitments) are observed. EU practice is to include an ‘essential elements’ clause in all trade agreements (either by way of an explicit set of provisions or by linkage to an applicable political framework agreement in which such terms appear) in which the parties make clear their respect for democracy, human rights and the rule of law, and acknowledge that such values constitute an ‘essential element’ of the agreement.<sup>16</sup> Framing human rights commitments in this way creates at least the theoretical possibility for a party to fully or partially suspend an agreement (i.e. unilaterally) in the event of a serious breach.<sup>17</sup>

#### **Checking compliance with commitments made with respect to specific human rights, particularly under specialized chapters**

In addition to embedding respect for human rights as part of the underlying values on which the agreement is based (see above), trade agreements will often include chapters setting out more detailed arrangements aimed at avoiding a race to the bottom in relation to certain social and environmental issues that will not only diminish enjoyment of human rights but undermine fair competition within the context of the trading relationship itself. This is often expressed in terms of the need to protect a level playing field. While breaches of human rights-related commitments made in these specialized chapters (e.g. on ‘trade and labour’ or ‘trade and the environment’) may not be enforced in the same way as breaches of other terms (the consequences of which in terms of monitoring are discussed more fully in chapters 2 and 4 below),<sup>18</sup> early detection of breaches (or situations that may lead to breaches) may help facilitate more proactive (and hence more creative and effective) responses, whether through relevant consultative or dispute

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<sup>16</sup> For a history of the ‘essential elements clause’ in EU practice, a discussion of the different formulations that can be used, and their legal implications, see Hachez, N. (2015), ‘*Essential Elements’ Clauses in EU Trade Agreements: Making Trade work in a way that Helps Human Rights?*, Leuven Centre for Global Governance Studies, Working Paper No. 158, April 2015, [https://ghum.kuleuven.be/ggs/publications/working\\_papers/2015/158hachez](https://ghum.kuleuven.be/ggs/publications/working_papers/2015/158hachez); Zamfir, I. (2019), *Human Rights in EU Trade Agreements: the human rights clause and its application*, European Parliament Briefing Paper, July 2019, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS\\_BRI\(2019\)637975\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf).

<sup>17</sup> See Article 60 of the 1969 Vienna Convention on the Law of Treaties that governs the termination of treaties (in whole or in part) on grounds of a ‘material breach’. Article 60(3) defines ‘material breach’ to include ‘the violation of a provision essential to the accomplishment of the object or purpose of the treaty’ (emphasis added).

<sup>18</sup> See section 2.1 and section 4.2.1 below.

resolution procedures provided for in the agreement itself, or through some other diplomatic means.

### **Checking compliance with human rights-related eligibility criteria for enhanced access to markets**

In the case of trade arrangements that condition economic benefits on compliance with certain human rights standards, as is the case under some GSP programmes (discussed for the purposes of comparison in Chapter 3 below), the administering state party has an interest in ensuring that human rights-related eligibility criteria are complied with so that the human rights-related objectives of the scheme are met.

### **Checking compliance with agreements or undertakings as regards corrective action after a breach of human rights-related commitments has been found**

In cases where the outcome of a dispute resolution process, or a consultative process, established to resolve human rights-related concerns or disagreements between the parties (see section 2.1 below) is a set of recommendations (e.g. from a specially constituted ‘panel of experts’), trading partners may wish to put in place a monitoring system to ensure that recommendations or undertakings are properly implemented in the agreed time frame.

### **Risk management**

Previous Chatham House research has highlighted the importance of *ex ante* human rights impact assessment as a necessary part of strategies for identifying and addressing two distinct (though related) categories of risk: namely the risks that implementation of a trade agreement could lead to either human rights violations, or downward pressure on levels of enjoyment of human rights, or both.<sup>19</sup> However, for economic interventions and investments running many years into the future, *ex ante* human rights impact assessments are of most value, not as a ‘one off’ exercise, but as the starting point of a much longer programme of ongoing monitoring and *ex post* review and assessment.<sup>20</sup> This is particularly the case for trade agreements, the human rights impacts of which can be extremely difficult to predict in advance and may take time to emerge,<sup>21</sup> ‘suggesting the need for robust monitoring and mitigation frameworks designed with longevity in mind’.<sup>22</sup>

<sup>19</sup> Zerk (2019), *Human Rights Impact Assessments of Trade Agreements*, p. 2, and pp. 30–34.

<sup>20</sup> Ibid. As Caroline Dommen puts it, ‘[t]he only way to know whether strategies, programmes and legislative measures constitute progress towards – and not retrogression from – full enjoyment of human rights, is through monitoring and assessment’. Dommen (2019), *Blueprint for a human rights impact assessment of the planned comprehensive free trade agreement between EFTA and MERCOSUR*, p. 46.

<sup>21</sup> Zerk (2019), *Human Rights Impact Assessments of Trade Agreements*, esp. pp. 14–20.

<sup>22</sup> Zerk, J. (2019), ‘Democratize Trade Policymaking to Better Protect Human Rights’, Chatham House Expert Comment, 12 June 2019, <https://www.chathamhouse.org/2019/06/democratize-trade-policymaking-better-protect-human-rights>.

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## Box 2. How do human rights monitoring processes contribute to better risk management?

Robust human rights monitoring:

- provides assurance that the relevant human rights risks have been correctly identified and prioritized;
- allows decision-makers to determine whether the actions decided and/or agreed upon by way of mitigation are being properly implemented and are having the desired effect;
- provides early warning of any possibility that human rights issues may escalate into human rights violations; and
- ensures that any deterioration in levels of enjoyment of human rights are swiftly detected so that appropriate and timely mitigation action can be taken.

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### A platform for dialogue and engagement between trading partners

Aside from the need to monitor compliance with human rights-related conditions or commitments (see above), including commitments made in relation to the maintenance of conditions for fair competition (or a level playing field), trading parties also recognize the role that monitoring mechanisms can play in the furtherance of a constructive dialogue around human rights issues and challenges arising from or connected to trade. As will be seen from the discussion in the next chapter, monitoring mechanisms established under the ‘trade and sustainable development’ chapters of EU trade agreements appear to have been designed and developed with this goal in mind.<sup>23</sup>

### A platform for dialogue and engagement with stakeholders

Similarly, and as shall be discussed further in Chapter 2 below, human rights monitoring mechanisms can also provide a valuable means through which affected stakeholders can raise concerns with policymakers about the way that a trade agreement has been implemented, the effectiveness or otherwise of different kinds of flanking measures, or the impacts of external threats or developments (of which the COVID-19 crisis is a good example) in

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<sup>23</sup> The term ‘trade and sustainable development chapters’, when used in this research paper, is intended to have the same meaning as that used in the European Commission literature on trade policy, namely as a collective term encompassing those ‘specialized’ chapters in EU trade agreements that relate to social justice, respect for human rights, high labour standards, and high environmental standards. These chapters may be variously titled ‘trade and the environment’, ‘trade and labour’ and, sometimes, ‘trade and sustainable development’. However, although there are similarities in manner in which these chapters are structured and in their interactions with other provisions in the agreement, and although there may be some crossover between the chapters in the way that different monitoring and consultative mechanisms established under these ‘specialized’ chapters may function, there are clearly important differences between these chapters too, in terms of their aims and objectives and the international legal standards that underpin them.

terms of the nature, extent or distribution of different types of human rights risks. Alongside enhancements in the *ex ante* assessment and scrutiny of human rights-related risks connected to trade, these types of mechanisms, to the extent that they are accessible by members of the public (including those specialist human rights organizations and trade unions with responsibility for representing affected people and communities), have a potentially vital role to play in the ‘democratization’ of trade policy.<sup>24</sup> ‘Strengthening civil society processes and empowering organisations of civil society that have little or no recognition by their own governments’ has been cited as one of the key achievements of the consultative arrangements established for the purposes of monitoring implementation of the ‘trade and sustainable development chapters’ of EU FTAs, and which are discussed in more detail in Chapter 2 below.<sup>25</sup>

### **A source of information for future trade policy development**

As is noted in Chapter 4 of this paper, attributing improvements or deteriorations in levels of enjoyment of human rights to an individual trade agreement, let alone specific provisions within a trade agreement, is rarely straightforward, and sometimes controversial. For various reasons, it can be very difficult to establish a convincing causal relationship between a trade intervention and the social, environmental and human rights consequences that might later be observed.<sup>26</sup> However, robust human rights monitoring over time might enable parties to build up the data needed for evidence-based decisions about the levels of liberalization and the types of safeguards and flexibilities most likely to deliver the desired human rights outcomes and to preserve parties with sufficient regulatory space to allow them to adequately protect, respect and fulfil the human rights of their citizens through changing circumstances and needs, which can then be fed back into future trade-related discussions and negotiations.

<sup>24</sup> Zerk (2019), ‘Democratize Trade Policymaking to Better Protect Human Rights’.

<sup>25</sup> See European Union (2019), ‘Opinion of the European Economic and Social Committee on the role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements (exploratory opinion requested by the European Parliament) [2019] OJ C 159/04’, p. 32, Article 3.6, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2019.159.01.0028.01.ENG&toc=OJ:C:2019:159:FULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.159.01.0028.01.ENG&toc=OJ:C:2019:159:FULL).

<sup>26</sup> See Zerk (2019), *Human Rights Impact Assessments of Trade Agreements*, esp. pp. 18–20.

# 02 Opportunities for human rights monitoring

**Human rights monitoring is not a new aspect of trade policy. Trade agreements already create a range of opportunities for different forms of human rights monitoring – even if those activities are not explicitly framed in those terms.**

Following on from the observations in the previous chapter about the range of potential motivations for human rights monitoring of trade agreements, it will come as no surprise that there are many possible institutional options and organizational models through which this can be done. Depending on the political and legal context, as well as the objectives of the trading partner (or partners) in question, human rights monitoring may be carried out unilaterally or jointly; through institutions and mechanisms established in the trade agreement itself, or separately. Monitoring processes may be contemplated in the terms of the agreement, or required as a matter of domestic law or policy, or perhaps both. They may be highly structured, or flexible. They may be periodic, or ongoing. They may be closely tied to the work of joint bodies established in the trade agreement, or they may be subject to other agendas (e.g. domestic policy agendas). They may draw from economic and other forms of analysis, theme-based studies, special investigations, or multi-stakeholder dialogue. They may be directed by state agencies, or key processes may be ‘contracted out’ to independent bodies or consultants.

The survey of current and recent state practice in this chapter (which draws primarily from the EU) illustrates the range of possibilities, and the contexts

in which they are most likely to be found and used. As a way of managing the complexity, however, this chapter will focus on monitoring schemes and arrangements that have some official status, either by virtue of having been established pursuant to the terms of a trade agreement, or because they are commissioned by state agencies in connection with the implementation of a specific trade agreement, or for the purposes of implementation and development of trade policy more broadly.

## 2.1 Consultative mechanisms established under the terms of trade agreements

Many trade agreements now establish consultative bodies and mechanisms that, to some degree, could be said to be engaged in, or somehow relevant to, human rights monitoring. These mechanisms are typically created pursuant to labour, environment and sustainable development chapters of trade agreements (or alternatively under side agreements and MOUs between trading partners covering labour or environmental issues)<sup>27</sup> and create forums and points of contact whereby stakeholders can (at least theoretically) feed in their concerns about how the implementation of the relevant agreement may be affecting worker rights, job opportunities, or environmental conditions within their respective jurisdictions. An interesting new innovation, used in two FTAs entered into by Canada (both of which came into force in 2019), has been to include a chapter on ‘trade and gender’. These chapters, which model the approaches taken in the ‘trade and sustainable development’ chapters of the FTAs mentioned above, acknowledge the importance of applying a gender perspective to trade issues, commit the parties to effective implementation of relevant international law instruments, and provide a platform for a series of ‘cooperation activities’ to promote gender equality in a range of areas.<sup>28</sup>

Consultative arrangements established under the terms of FTAs typically comprise a joint committee or council (made up of official representatives of the state party) together with a mechanism for gathering views and information from organizations within the relevant jurisdictions and facilitating dialogue on implementation issues.<sup>29</sup> The need to facilitate direct

<sup>27</sup> For example, the US (with India, China and Vietnam), Canada (with Brazil, Argentina and China), South Korea (with Vietnam, Mongolia, Gabon, South Africa and the Philippines) and New Zealand (with China) have made use of MoUs on labour cooperation with trading partners, which provide for a coordinator to oversee implementation of labour standards. Canada (with Costa Rica, Peru, Colombia, Jordan, Panama and Honduras) and New Zealand (with Malaysia, Hong Kong, Thailand and the Philippines) also make use of ‘side’ Agreements on Labour Cooperation, which set up a joint labour committee or ‘ministerial council’ to review the operation and outcomes of the agreements and require parties to establish national contact points.

<sup>28</sup> See Government of Canada (2019), ‘Canada-Israel Free Trade Agreement, Chapter 13’, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/13.aspx?lang=eng>; Government of Canada (2019), ‘Canada-Chile Free Trade Agreement Appendix II Chapter N’, [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017\\_Amend\\_Modif-App2-Chap-N.aspx?lang=eng&\\_ga=2.181180847.947352946.1620395310-1694803831.1620395310](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng&_ga=2.181180847.947352946.1620395310-1694803831.1620395310); See Hughes, V. (2019), ‘Gender Chapters in Trade Agreements: Nice Rhetoric or Sound Policy’, Centre for International Governance Innovation, <https://www.cigionline.org/articles/gender-chapters-trade-agreements-nice-rhetoric-or-sound-policy>.

<sup>29</sup> For a more detailed comparison of the monitoring structures and systems established in the labour chapters of EU and US trade agreements, and the policy objectives that have helped to shape them, see Harrison (2019), ‘The Labour Rights Agenda in Free Trade Agreements’, esp. at p. 716.

input into monitoring processes by affected stakeholders and their representatives seems well recognized, at least as a matter of principle.<sup>30</sup> The structure devised for EU FTAs, comprising of locally constituted Domestic Advisory Groups (DAGs) that feed information and views into joint mechanisms (e.g. committees) provided for in the trade agreement, is intended to facilitate this input (see Figure 1 below). EU FTAs also provide for an annual joint Civil Society Forum, which can be attended by stakeholders who do not participate in the DAGs, as well as by DAG members.

**Figure 1.** A bird’s eye view of the regular consultative arrangements and bodies established under the trade and sustainable development chapters of EU FTAs (excluding ad hoc dialogue and dispute resolution processes)



Source: Compiled by the authors.

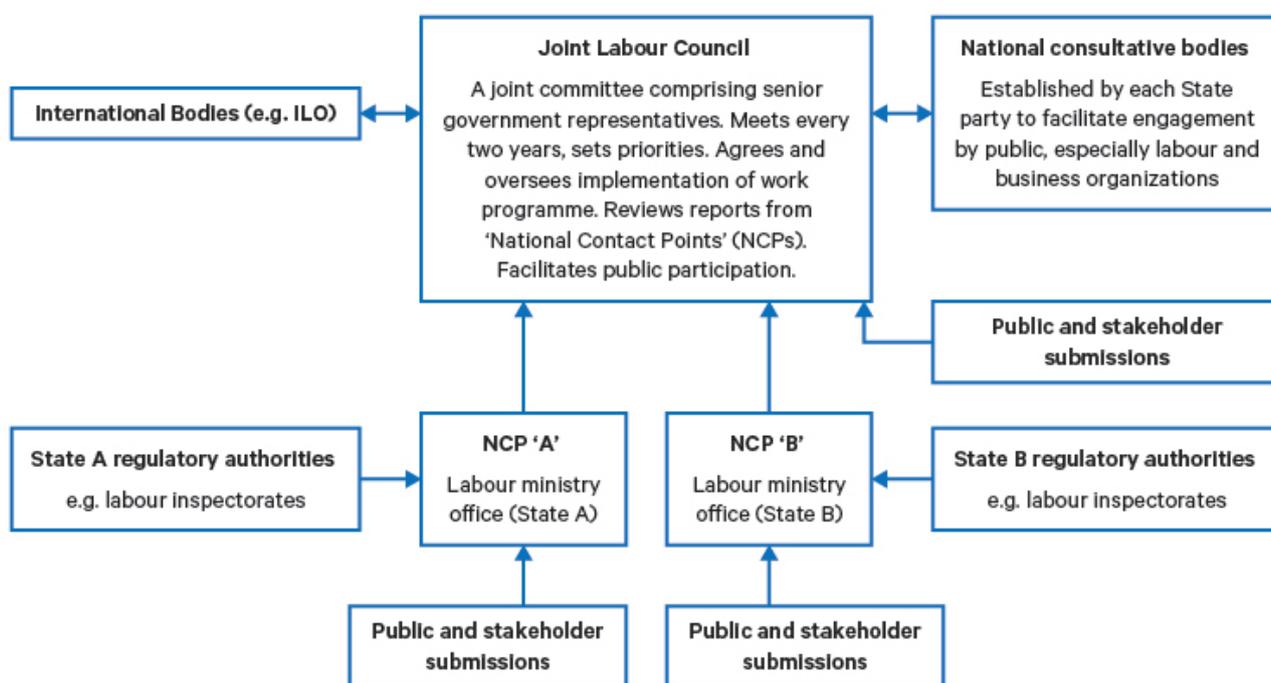
There are, of course, alternative ways of structuring consultative bodies such as these, as practices from elsewhere in the world demonstrate (see, for example, Figure 2 below). It is also important to remember that the monitoring mechanisms eventually arrived at in the final text of the agreement are the product of a negotiation. While each trade actor may have its preferred model, there are many factors, including the agreement’s aim and scope, the parties’ negotiating objectives, the amount of leverage each negotiating party enjoys with respect to the relevant issues, and decisions taken on a range of structural issues (including the arrangements for resolving different kinds of disputes) that will have a bearing on types of consultative arrangements ultimately selected by the parties, and the extent to which, and the routes through which, different stakeholder groups can take part.

A comparison of EU and US practices helps to illustrate the point. Compared to the EU model, consultative arrangements found in US FTAs, which have historically contained a particular emphasis on maintaining fair competition *vis-à-vis* labour rights,<sup>31</sup> create more routes through which

<sup>30</sup> The question of how well these facilitate stakeholders in practice is considered in the next section.  
<sup>31</sup> Harrison (2019), ‘The Labour Rights Agenda in Free trade Agreements’.

members of the public and affected stakeholders can provide input and feedback. A further significant difference between US and EU approaches is the possibility, under US trade agreements, for referral of disputes raised under these specialist chapters for resolution by the agreement’s general dispute resolution mechanisms (as opposed to the EU approach in which disputes under ‘trade and sustainable development’ chapters are intended to be resolved under special dialogue-based processes and which do not generally provide for this kind of further escalation).<sup>32</sup>

**Figure 2.** A bird’s eye view of the regular consultation arrangements established under the CPTPP (excluding ad hoc dialogue and dispute resolution processes)



Source: Compiled by the authors.

The consultative and dispute resolution arrangements under the CPTPP, broadly follow the US model (see Figure 2 above).<sup>33</sup> Other agreements, such

<sup>32</sup> Ibid., pp. 716–717. See, for instance, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), Chapter 19, Article 19.15, para. 12. Note, however, that the recently concluded EU–UK Trade and Cooperation Agreement (TCA), in which the parties set out the arrangements that will govern the post-Brexit trading relationship of the UK and the European Union, departs from ‘standard’ EU practice in a number of ways, including in the special rules on dispute resolution to enforce the non-regression commitments on social and environmental standards, and the possibility of compensatory or retaliatory or ‘rebalancing’ remedies for breach of those commitments. There are also differences between the EU–UK TCA and other EU trade agreements in terms of the structure and scope of activities of consultative bodies relevant to social and environmental issues, with DAGs having the ability to engage with and comment on social and environmental issues raised by other provisions of the agreement, i.e. beyond the prescriptions set out in the specialized ‘trade and sustainable development’ chapters. See Peers, S. (2021), ‘Human Rights and EU/UK Trade and Cooperation Agreement’, University of Essex blog series, 4 January 2021, <http://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>.

<sup>33</sup> US Trade Representative (2019), ‘Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text’, Chapter 23 on Labor, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

as Canada's FTAs with South Korea, Israel and Ukraine, provide for public submissions to be made directly to domestic agencies of state parties about non-compliance with labour chapter provisions, such as commitments to properly enforce laws.<sup>34</sup>

However, as human rights monitoring bodies, these types of consultative arrangements have significant limitations. Their primary purpose is the gathering and exchanging of views on a range of issues connected with the implementation of specific chapters. As such, many of these are perhaps better understood and characterized as an open-ended platform of dialogue (some commentators refer to them as 'implementation' bodies) rather than as vehicles for monitoring human rights-related risks in a structured and systematic way. While this flexibility may have its advantages (not least because, as alluded to above, softer dialogue-based processes are likely to be easier to negotiate than a more rigorous human rights monitoring regime) the vagueness of their respective mandates has been the source of criticism,<sup>35</sup> and has arguably undermined their effectiveness in various ways.<sup>36</sup> The limited and relatively weak options for the resolution of disputes under the trade and sustainable development chapters of the EU FTAs, and the inability of DAGs to trigger investigations of human rights related problems on their own initiative are seen as particular disadvantages of the EU approach from a human rights enforcement point of view.<sup>37</sup> At a practical level, a lack of political support and resources, especially in less developed trading partners, mean that these types of arrangements can often fall short of expectations.<sup>38</sup> That said, there is presently a live discussion going on within EU institutions as regards the various ways that the roles and effectiveness of these consultative bodies could potentially be strengthened.<sup>39</sup> We will return to consider the question

<sup>34</sup> Government of Canada (2015), 'Canada-Korea Free Trade Agreement, Article 18.1', <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/18.aspx?lang=eng>; Government of Canada (2019), 'Canada-Israel Free Trade Agreement, Article 12.1', <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng>; Government of Canada (2017), 'Canada-Ukraine Free Trade Agreement, Article 13.12', <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/13.aspx?lang=eng>.

<sup>35</sup> See Harrison, J., Barbu, M., Campling, L., Ebert, F. C., Martens, D., Marx, A., Orbie, J., Richardson, B. and Smith, A. (2019), 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda', *World Trade Review*, 18(4): pp. 635–657 doi:10.1017/S1474745618000204.

<sup>36</sup> See Chapter 4 below.

<sup>37</sup> Compared to, for example, the US approach under which (as noted above) there is potential for escalation of disputes raised under these specialist chapters for resolution by the agreement's general dispute resolution mechanisms.

<sup>38</sup> The Civil Society Mechanism under the EU-CARIFORUM agreement (an EU 'Economic Partnership Agreement') took six years to fully operationalize, and the delays, limited representation from trade unions and a lack of substantive discussion at the sessions that have taken place have been the source of considerable frustration. Harrison (2019), 'The Labour Rights Agenda in Free trade Agreements'. For a discussion on some of the practical challenges that arise in implementing consultative arrangements such as these, see Chapter 4 below.

<sup>39</sup> European Union (2018), 'Opinion of the European Economic and Social Committee on 'Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)' (own-initiative opinion)', (2018) C 227/04, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2018.227.01.0027.01.ENG&toc=OJ:C:2018:227:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2018.227.01.0027.01.ENG&toc=OJ:C:2018:227:TOC); European Commission (2017), 'Non-paper of the Commission services Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)', 11 July 2017, [https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155686.pdf](https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf); Barbu, M., Campling, L., Ebert, F., Harrison, J., Martens, D., Marx, A., Orbie, J., Richardson, B. and Smith, A. (2017), 'A Response to the Non-paper of the European Commission on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements

of whether these types of consultative bodies could (and should) take up a more concrete and focussed future role in relation to human rights monitoring in Chapter 4 below.

## 2.2 Periodic evaluation exercises under the terms of FTAs

A form of human rights monitoring is arguably mandated under the provisions of trade agreements relating to the periodic evaluation of the implementation of sustainable development chapters and the progress parties have made with respect to specific objectives.

For example, the ‘trade and sustainable development’ chapter of the EU–Canada CETA commits the parties ‘to review, monitor and assess the impact of the implementation of this Agreement on sustainable development in its territory in order to identify any need for action that may arise in connection with this Agreement’.<sup>40</sup> This may include carrying out ‘joint assessments’, which, according to the wording of the treaty, are to be ‘conducted in a manner that is adapted to the practices and conditions of each Party, through the respective participative processes of the Parties, as well as those processes set up under this Agreement.’<sup>41</sup>

Similar provisions appear in other FTAs to which Canada is party. The ‘labour, environment and gender’ chapters of the 2019 Canada–Israel FTA all either envisage or mandate *ex post* evaluation exercises to take place for the purpose of checking the implementation of the specific chapters in question. For instance, the joint Labour Ministerial Council (the joint body established to oversee the implementation of the labour chapter of that agreement), is required to ‘review the operation and effectiveness of [the labour chapter] including the degree to which progress has been made in implementing the objectives of this Chapter, within five years after the date of entry into force of this Agreement and thereafter within any other period directed by the Council’.<sup>42</sup> The joint body responsible for overseeing the implementation of the gender chapter of that agreement has more flexibility, however, required only to ‘consider undertaking a review of the implementation of [the ‘trade and gender’ chapter], with a view to improving its operation and effectiveness, within five years of the entry into force of this Agreement, and periodically thereafter as the Parties decide’.<sup>43</sup> These types of evaluation exercises are periodic rather than ongoing, and a

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(FTAs), <https://www.qmul.ac.uk/geog/media/geog/docs/research/working-beyond-the-border/A-Response-to-the-Nonpaper-26.09.17.pdf>.

<sup>40</sup> European Commission (2016), ‘Comprehensive and Economic Trade Agreement (CETA) chapter by chapter’, Chapter 22, Article 22.3.3., [https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index\\_en.htm](https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm).

<sup>41</sup> Ibid.

<sup>42</sup> Government of Canada (2019), ‘Canada-Israel Free Trade Agreement, Article 12.7.5 (labour)’, see also Article 11.15 (environment), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng>.

<sup>43</sup> Ibid., Article 13.4 (emphasis added).

five-year interval between evaluations, commencing five years after commencement of the agreement, seems to be emerging as the norm.<sup>44</sup>

### 2.3 Bespoke or supplementary arrangements under a side agreement or MoU

Examples exist of cases where trading partners have found it beneficial to augment their agreement terms with a side arrangement relating specifically to monitoring, most commonly of labour issues. The bilateral ‘consistency agreements’ negotiated by the US with several CPTTP partners,<sup>45</sup> prior to its withdrawal from the original Trans-Pacific Partnership (TPP) are worth noting in this context. These bilateral side agreements envisaged a bilateral Senior Officials Committee (SOC) to monitor, assess and facilitate responses on the compliance and implementation of the Consistency Plan (which included adherence to international labour standards).<sup>46</sup>

Further examples of the use of side agreements to strengthen human rights-related consultative arrangements can be found in the Canadian and New Zealand practice of seeking ‘Labour Cooperation’ agreements with trading partners. Under these arrangements, each party is required to nominate national contact points to serve as points of liaison in relation to the side agreement. The side agreement also establishes a joint ‘Labour Committee’,<sup>47</sup> which is mandated to review the operation and outcome of the cooperative agreements, establish working groups on specific issues.<sup>48</sup>

<sup>44</sup> The time frames most commonly envisaged in trade agreement terms are five years after the entry into force of the agreement, and then every five years thereafter, although some flexibility may be provided, to be exercised at the relevant committee’s discretion.

<sup>45</sup> Or Trans-Pacific Partnership (TPP) as the agreement was then known.

<sup>46</sup> These bilateral ‘consistency agreements’ were negotiated by the US with Vietnam, Malaysia and Brunei. The idea was that the Senior Officials Committee would review reports and recommendations from a Technical Assistance Program (to support the implementation of legal and institutional reforms with biannual reporting on progress). These ‘consistency agreements’ would also create a Labour Expert Committee (comprised of one independent expert and a representative from the US and the trading partner to monitor implementation, take public submissions and produce regular reports with recommendations) with provision for bilateral review in the third, fifth and tenth year after entry into force. See *nwLaborPress* (2015), ‘Obama releases text of his Pacific trade deal’, <https://nwlaborpress.org/2015/11/obama-releases-text-pacific-trade-deal/>; Harre, L. (2017), ‘TPPA Labour Chapter – Not a gold standard’, *Trans-Pacific Partnership Agreement New Zealand Expert Paper 8*, New Zealand Law Foundation, <https://tradejusticeunions.org/2017/05/resources/reports/tppa-labour-chapter-not-a-gold-standard/>; United States Trade Representative (2016), *Malaysia–United States Labour Consistency Plan*, 4 February 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labour-Consistency-Plan.pdf>; United States Trade Representative (2016), ‘United States–Viet Nam Plan for the Enhancement of Trade and Labour Relations’, 4 February 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf>; United States Trade Representative (2016), ‘Brunei – United States Labour Consistency Plan’, 4 February 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-BN-Labor-Consistency-Plan.pdf>.

<sup>47</sup> A similar approach is taken with respect to the environmental cooperation agreements, with an environment committee mandated to review operations and outcomes.

<sup>48</sup> Thus far, New Zealand has entered into arrangements of this kind with Malaysia, Hong Kong, Thailand and the Philippines, and Canada with Costa Rica, Peru, Colombia, Jordan, Panama and Honduras. These arrangements are similar to the North American Agreement on Labour Cooperation (NAALC), the side agreement to NAFTA. See New Zealand Department of Foreign Affairs and Trade (n.d.), ‘Free trade agreements’, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/>; Engen, L. (2017), ‘Labour Provisions in Asia Pacific Free Trade Agreements’, *Ninth Tranche of the Development Account Project*, Background Paper No. 1/2017, United Nations Economic and Social Commission for the Asia-Pacific, <https://www.unescap.org/sites/default/files/Background%20Material%20-%20Labour%20provisions%20in%20Asia-Pacific%20PTAs.pdf>.

The agreements also provide for the possibility of civil society consultation by the parties, albeit on a voluntary basis.

Several countries, including New Zealand, the US and Canada have also utilized Memorandums of Understanding (MoU) on labour issues with certain trading partners, such as China, requiring both parties to appoint a coordinator who organizes a joint session every two years to oversee implementation.<sup>49</sup>

As can be seen, there are various ways of formalizing and recording such side arrangements, although a binding side agreement or treaty protocol clearly offers more by way of legal certainty and stability than a non-binding MoU. Each of the above examples are directed towards the establishment of *joint* arrangements and mechanisms relevant to monitoring. However, a rare example of a side agreement that established a *reciprocal* system of human rights monitoring was the 2010 special agreement between Canada and Colombia,<sup>50</sup> ancillary to the Canada–Colombia FTA (CCOFTA).<sup>51</sup> Under this agreement, each state agreed to produce annual reports on the effect of actions taken under the CCOFTA on human rights in both countries. To this end, each party agreed to conduct a human rights impact assessment in relation to the effects of the agreement not only in its own territory but also in the territory of the other party.<sup>52</sup> However, while ambitious and innovative in its design, the practical implementation of these arrangements has since been criticized as a ‘lost opportunity’ on the basis of methodological problems and lack of political commitment to the process.<sup>53</sup>

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<sup>49</sup> New Zealand Ministry of Foreign Affairs and Trade (2008), ‘New Zealand–China MoU on Labour Cooperation’, <https://www.mfat.govt.nz/assets/Trade-agreements/China-NZ-FTA/NZ-China-FTA-Labour-MOU.pdf>; US Department of Labor (2011), ‘United States-India MoU on Labor Cooperation’, <https://www.dol.gov/agencies/ilab/our-work/diplomacy/india>; US Department of Labor (2011), ‘United States-China MoU on Labor Cooperation’, <https://www.dol.gov/agencies/ilab/our-work/diplomacy/china>; US Department of Labor (2000), ‘United States-Vietnam MoU on Continuing Labor Cooperation’, <https://www.dol.gov/agencies/ilab/our-work/diplomacy/vietnam>; Government of Canada (2015), ‘Canada-Brazil Memorandum of Understanding on Labour Cooperation’, <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/mou-brazil.html#cbmou>; Government of Canada (2014), ‘Canada-Argentina Memorandum of Understanding on Labour Cooperation’, <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/mou-argentina.html>; Government of Canada (2007), ‘Canada-China Memorandum of Understanding on Labour Cooperation’, <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/mou-china1.html>. Note, however, that it is increasingly the case that parties are choosing to deal with labour matters (including their monitoring) through specialist chapters in the main trade agreement, rather than through side agreements.

<sup>50</sup> Government of Canada (2010), ‘Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia’, [https://www.treaty-accord.gc.ca/text-texte.aspx?id=105278&\\_ga=2.182088736.649315949.1595424993-984122759.1595424993](https://www.treaty-accord.gc.ca/text-texte.aspx?id=105278&_ga=2.182088736.649315949.1595424993-984122759.1595424993). Links to the annual reports can be found at the Embassy of Canada to Colombia, Annual Reports on Human Rights and Free Trade, [https://www.canadainternational.gc.ca/colombia-colombie/bilateral\\_relations\\_bilaterales/hrft-co\\_2012-dple.aspx?lang=eng](https://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/hrft-co_2012-dple.aspx?lang=eng).

<sup>51</sup> Government of Canada (2008), ‘Canada-Colombia Free Trade Agreement’, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng>.

<sup>52</sup> Article 1.1 of Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia.

<sup>53</sup> Rochlin, J. (2014), ‘A Golden Opportunity Lost: Canada’s Human Rights Impact Assessment and the Free Trade Agreement with Colombia’, *International Journal of Human Rights*, 18(4–5): pp. 545–566, <https://doi.org/10.1080/13642987.2014.917627>.

## 2.4 Miscellaneous cooperative follow-up activities

Human rights monitoring could also potentially come within the scope of a range of follow-up activities, which, if not mandated, may still be recommended or anticipated by trading partners to enhance human rights outcomes and to advance the human rights-related goals that may be associated with the agreement.

An example of this type of provision can be found in the labour chapter of the Canada–South Korea FTA, which provides that ‘parties may initiate cooperative labour activities’.<sup>54</sup> This can include ‘policy issues of common interest and their application’, and ‘such other matters as the Parties may agree’ through information-sharing, joint research projects, collaborative projects or ‘other forms of technical exchanges or cooperation’.<sup>55</sup> The labour chapter of the Canada–Israel FTA contemplates future cooperative activities including ‘a joint plan of action’.<sup>56</sup> Under the ‘trade and gender’ chapter of the same agreement the parties commit to ‘develop programs of cooperative activities based on their mutual interests’ the aim of which will be ‘to improve the capacity and conditions for women, including workers, businesswomen and entrepreneurs, to access and fully benefit from the opportunities created by this Agreement’.<sup>57</sup>

While loose commitments like this may not provide a very strong indication of what the trading partners actually intend (and indeed loose and flexible language may have been favoured precisely because firmer commitments were simply not negotiable) the activities envisaged under these types of ‘enabling’ or ‘framework’ provisions could provide (given the necessary political interest and will) the springboard and inspiration for parties to subsequently develop a more robust set of arrangements for monitoring human rights aspects of a trade agreement’s implementation, which could potentially be formalized, as noted above, by way of a side agreement or MoU.

## 2.5 Unilateral *ex post* evaluations and reviews

The EU’s approach to *ex post* sustainability monitoring of trade agreements deserves special mention here, being arguably the most ambitious system for monitoring the human rights implications of trade agreements developed by a trade actor thus far. It has its roots in the European Commission’s ‘Better Regulation Agenda’, which reaffirms a policy commitment to ‘evaluate in a proportionate way all EU spending and non-spending activities intended to have an impact on society or the economy’.<sup>58</sup> The Commission’s stated aim is for ‘*ex post* evaluations’ of trade agreements

<sup>54</sup> Government of Canada (2015), ‘Canada-Korea Free Trade Agreement, Article 18.11.’

<sup>55</sup> *Ibid.*, Chapter 18, Annex 18-A.3 and 18-A.4.

<sup>56</sup> Government of Canada (2019), ‘Canada-Israel Free Trade Agreement, Article 12.10.’

<sup>57</sup> *Ibid.*, Article 13.3.

<sup>58</sup> European Commission (2015), *Better Regulation Toolbox*, p. 317, [https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox\\_2.pdf](https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf); European Commission (n.d.), ‘Better regulation: why and how’, [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en); European Commission (2015), *Better Regulation Guidelines*, p. 29 (Ch III Guidelines on impact assessment, Section 2.7), <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf>.

to take place after ‘commitments have been phased in and sufficient time has passed to gather a robust body of data and evidence’,<sup>59</sup> the purpose of which is ‘to analyse the observed economic, social, human rights and environmental impacts’.<sup>60</sup>

Two *ex post* evaluations of FTAs have been completed under this strategy thus far<sup>61</sup> – one for the EU–Mexico FTA in 2017,<sup>62</sup> and one for the EU–South Korea FTA in 2018.<sup>63</sup> *Ex post* evaluations currently in progress include those for the CARIFORUM Economic Partnership Agreement (launched July 2018), EU–Columbia/Ecuador/Peru (launched February 2019), six EU–Mediterranean Agreements (launched November 2017), EU–Central America Association Agreement (launched May 2019) and EU’s Deep and Comprehensive Free Trade Area Agreements with Georgia and Moldova (launched February 2020).<sup>64</sup> A comparison of the two completed *ex post* evaluations for FTAs shows some development as far as the execution and presentation of the human rights aspects of the study are concerned, with more detailed treatment of human rights issues, a more detailed screening exercise, greater use of human rights indicators to track movements and trends, a more granular investigation of the impact of the agreement on different sectors, a greater focus on potentially vulnerable groups (e.g. migrant workers) and a dedicated human rights chapter, in the more recent report.

The methodologies used comprise, broadly speaking, a mix of qualitative and quantitative analysis, drawing from economic modelling, statistical analysis, reports by international monitoring bodies, academic research sources and stakeholder engagement exercises (including surveys, meetings, case studies and interviews) to help build up a picture of the economic, social, human rights and environmental situation up to the point at which an FTA is signed and then subsequently the extent to which observed changes may be attributable to the FTA.<sup>65</sup> From this, an assessment is made as to the sectors, activities and groups that have benefited, and also which have been negatively affected, and the possible reasons for this.

<sup>59</sup> European Commission (2016), *Handbook for trade sustainability impact assessment: 2nd Edition*, p. 8, [https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154464.PDF](https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF).

<sup>60</sup> *Ibid.*

<sup>61</sup> Note that a further trade-related *ex post* evaluation, outside the scope of this research paper, was prepared in relation to the Council Regulation (EC) No 953/2003 to avoid trade diversion into the European Union of certain key medicines.

<sup>62</sup> ECORYS (2017), ‘Ex-post evaluation of the implementation of the EU-Mexico Free Trade Agreement’, European Commission, February 2017, [https://trade.ec.europa.eu/doclib/docs/2017/august/tradoc\\_156011.pdf](https://trade.ec.europa.eu/doclib/docs/2017/august/tradoc_156011.pdf).

<sup>63</sup> Civic Consulting and the IFO Institute (2018), ‘Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea’, European Commission, May 2018. [https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc\\_157716.pdf](https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157716.pdf).

<sup>64</sup> For a regularly updated list of consultative processes associated with *ex post* evaluations, see European Commission (n.d.), ‘Published Initiatives’, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives?topic=TRADE>. Note that, at the time of writing, a further *ex post* evaluation process was underway connected with current overhaul of the EU GSP scheme (which will include a new GSP regulation to replace the present regulation that expires 31 December 2023). For a complete list of *ex post* evaluations, completed and in progress, see European Commission DG Trade (n.d.), ‘Ex post evaluations’, [https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/index\\_en.htm](https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/index_en.htm).

<sup>65</sup> Zerk (2019), *Human Rights Impact Assessment of Trade Agreements*, p 12.

The potential challenges and limitations of unilateral *ex post* human rights evaluations of this kind are considered further in Chapter 4. For the time being, however, it is worth observing that, while it is clear that the Commission's *ex ante* sustainability impact assessment processes and its *ex post* evaluation programme have common policy underpinnings, the methodological linkages between these two initiatives are not clear at all. As noted above, treating *ex ante* and *ex post* processes as linked, rather than separate, activities can help to strengthen both, not only in terms of building understanding of causal relationships and impact trajectories, but also by creating opportunities for lessons learned from observing how impacts materialize and are experienced in reality, which can then be applied towards improving impact assessments processes and implementation of FTAs, as well as to inform subsequent negotiations.

The significance of these linkages may become clearer as practice develops and the Commission's programme of *ex post* evaluations of trade agreements becomes more established. However, it may be some years before consultants hired to carry out *ex post* evaluations of the sustainability impacts of EU trade agreements have the opportunity to review the accuracy of predictions made in the human rights sections of *ex ante* sustainability impact assessments (SIAs) in a detailed and systematic way. While most of the EU FTAs currently flagged for *ex post* evaluation had been subjected to an *ex ante* SIA only one of these (the EU's agreements with Georgia and Moldova) had been subjected to an *ex ante* SIA that included an explicit focus on human rights. In the meantime, the rapid development of human rights impact assessment methodologies makes it reasonably likely that future *ex post* evaluation practitioners may have access to techniques and even technologies not available to their *ex ante* counterparts, raising some potential issues with respect to comparability of data and findings.

## 2.6 Monitoring as an outcome of complaints or dispute resolution processes

Finally, it is important not to overlook the possibility that human rights monitoring could potentially be mandated or recommended as an outcome of various dialogue-based processes, or dispute resolution processes, instigated in the event that one (or more) of the parties wishes to raise a potential implementation or compliance issue with another party (or parties). For example, the 'trade and labour' chapter of the CPTPP envisages the possibility of 'action plans' as an outcome of a 'request for dialogue... which may include specific and verifiable steps, such as on labour inspection, investigation or compliance action, and appropriate timeframes' or, as an alternative to an action plan, 'the independent verification of compliance or implementation by individuals or entities, such as the ILO [International Labour Organization], chosen by the dialoguing Parties.'<sup>66</sup>

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<sup>66</sup> The CPTPP, Article 19.11.

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### Box 3. Trade union rights in Colombia

Colombian workers' organizations and the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) filed a submission under the labour chapter of the United States–Colombia Trade Promotion Agreement with the US Department of Labor in May 2016.<sup>67</sup>

The submission alleged that the Colombian government failed to effectively enforce labour laws related to the rights to freedom of association and collective bargaining.<sup>68</sup>

The Department of Labor reviewed the allegations, and on 11 January 2017 issued a public report in response.<sup>69</sup> The report recommended that the US government initiate consultations between the contact points of the two governments under the Labor Chapter of the trade agreement, to engage in dialogue on implementation of the report's recommendations. It also included recommendations that Colombia take steps to improve the labour law inspection system, improve the application and collection of fines for employers linked to labour law violations and strengthen accountability for violence and threats against trade unionists.

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## 2.7 Summary

As can be seen, trade agreements create a range of opportunities for activities that could amount to human rights monitoring (even if those activities are not explicitly framed in those terms), including through specially constituted consultative bodies responsible for liaising and advising on implementation of human rights-related commitments. Separately, some trade actors (and most notably the EU) have established unilateral processes for periodic *ex post* evaluations for the purpose of observing and tracking sustainable development impacts (including human rights impacts) of trade arrangements in partner countries. Some key similarities and differences between the different types of arrangements discussed in this chapter are summarized in Table 1 below.

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<sup>67</sup> See Office of the US Trade Representative (n.d.), 'Colombia Public Submission (2016)' on 'Bilateral and Regional Trade Agreements', <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements>.

<sup>68</sup> Ibid.

<sup>69</sup> US Department of Labor (2017), *Public Report of Review of US Submission 2016-02 (Colombia)*, under the United States–Colombia Trade Promotion Agreement, [https://www.dol.gov/sites/dolgov/files/legacy-files/documents/ilab/PublicReportofReviewofUSSubmission2016-02\\_Final.pdf](https://www.dol.gov/sites/dolgov/files/legacy-files/documents/ilab/PublicReportofReviewofUSSubmission2016-02_Final.pdf).

**Table 1.** Key similarities and differences between different types of human rights monitoring arrangements

Type (or basis) of monitoring activity	Governed by (or carried out under) trade agreement provisions and/or processes? (Y/N)	Joint, reciprocal or unilateral?	Ongoing or periodic?
2.1 Consultative bodies provided for in trade agreement	Yes	Joint	Ongoing
2.2 Periodic evaluation exercises under the terms of FTAs	Yes	Joint or reciprocal (depending on what is agreed)	Periodic
2.3 Bespoke or supplementary arrangements under a side agreement or MoU	Yes	Joint or reciprocal (depending on what is agreed)	Ongoing or periodic (depending on what is agreed)
2.4 Miscellaneous cooperative follow-up activities	Yes	Joint or reciprocal (depending on what is agreed)	Ongoing or periodic (depending on what is agreed)
2.5 Unilateral <i>ex post</i> evaluations and reviews	No	Unilateral	Could be ongoing, but more likely periodic.
2.6 Monitoring as an outcome of dispute resolution processes	Yes	Joint	Ongoing or periodic (depending on what is agreed)

Source: Compiled by the authors.

Despite all this potential, advocates of human rights monitoring of trade agreements are not yet being rewarded with many noticeable changes in state practice. Consultative bodies established in trade agreements have had only patchy and limited success when it comes to advancing human rights issues,<sup>70</sup> opportunities to advance human rights standards and compliance through more robust forms of monitoring are rarely taken up, and there seems little appetite among trade actors at present to make substantial changes to the extent to which and the manner in which human rights-related commitments in trade agreements are framed, structured and enforced. Some key obstacles to moving to more robust forms of human rights monitoring in this context are considered further in Chapter 4 below. However, first it is worth making a slight detour to consider how human rights monitoring takes place in the context of GSP schemes, and whether there are lessons that can usefully be drawn from there.

<sup>70</sup>Gammage. C. (2018), ‘A critique of the extraterritorial obligations of the EU in relation to human rights clauses and social norms in EU free trade agreements’, *Europe and the World: A law review*, 2(1): pp 1–37, p. 14 <https://doi.org/10.14324/111.444.ewlj.2018.01>; Ebert. F, (2016), ‘Labour Provisions in EU Trade Agreements; What Potential for Channelling Labour Standards-Related Capacity Building?’, *International Labour Review*, 155(3): pp. 407–433, p. 413, <https://doi.org/10.1111/j.1564-913X.2015.00036.x>.

# 03

# Human rights monitoring and GSP schemes

**GSP human rights monitoring takes place in a legal and political context that is very different from trading relationships under FTAs – but there are still lessons that can be drawn upon to improve human rights monitoring of future trade agreements.**

## 3.1 Background

The Generalized System of Preferences (GSP) is a trade programme, enabled by the GATT/WTO trading system, designed to promote growth in developing countries by allowing developed countries to offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries.<sup>71</sup> The international legal basis for this system is an ‘enabling clause’,<sup>72</sup> adopted in 1979, which allows derogations to WTO rules on non-discrimination (i.e. most-favoured-nation (MFN) status), meaning that preferential access can be granted to developing countries without the need to afford the same treatment to other trading

<sup>71</sup> For a general history of the development of GSP schemes within the international trading system, see Kennedy, K. C. (2011), ‘The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preference’, *Michigan State International Law Review*, 20(3): pp. 521–668, <https://ssrn.com/abstract=1933756>; UNCTAD (n.d.). ‘GSP – Handbooks’, [https://unctad.org/publications-search?f\[0\]=product%3A498](https://unctad.org/publications-search?f[0]=product%3A498); UNCTAD (2015), *Generalized System of Preferences: Handbook on the scheme of the European Union*, New York and Geneva: United Nations, [https://unctad.org/system/files/official-document/itcdtsbmisc25rev4\\_en.pdf](https://unctad.org/system/files/official-document/itcdtsbmisc25rev4_en.pdf); European Commission (2015), *The EU’s Generalised Scheme of Preferences (GSP)*, August 2015, [https://trade.ec.europa.eu/doclib/docs/2015/august/tradoc\\_153732.pdf](https://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153732.pdf).

<sup>72</sup> Decision on differential and more favourable treatment reciprocity and fuller participation of developing countries of 28 November 1979 (L/4903). See: [https://www.wto.org/English/docs\\_e/legal\\_e/enabling1979\\_e.htm](https://www.wto.org/English/docs_e/legal_e/enabling1979_e.htm).

partners. Thirteen trade actors – Australia, Belarus, Canada, the EU, Iceland, Japan, Kazakhstan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the US – presently use GSP trade schemes. Two of these – the EU and the US – condition eligibility for these trade preferences, to some degree and in different ways, on compliance with human rights standards, and for this reason are the focus of this chapter.

Before delving further into EU and US practices, however, it is necessary to be clear about the various ways in which the context for human rights monitoring for the purposes of GSP schemes is different from the context in which the various monitoring activities described in Chapter 2 take place. Most obviously, the monitoring scheme, and the commitments that are monitored through it, are not negotiated between trading partners. Instead, human rights eligibility criteria are imposed as a condition of joining the scheme and thereby taking advantage of the preferential and non-reciprocal arrangements it creates. Put another way, the dynamic is one of granting or administering trade actor on the one hand, and beneficiary country on the other, rather than of parties to a jointly negotiated agreement. Moreover, the manner in which this policy tool can be used will be subject to domestic legislation and various forms of (often quite detailed) legislative and executive oversight. Finally, the unilateral nature of these programmes provides the granting or administering party with the flexibility to expand or limit the scope of the scheme (i.e. as regards beneficiary countries and/or product coverage), in line with its domestic policy objectives *vis-à-vis* trade and development. It also means that decisions to withdraw preferences are ultimately at the discretion of the granting country within the parameters of enabling legislation (and are not mediated or adjudicated through dispute resolution procedures), although due process considerations (such as obligations to consult with the beneficiary country about human rights related concerns, and opportunities to comment on adverse findings) will tend to be written into relevant legislation and guidance.<sup>73</sup>

### 3.2 Human rights monitoring under EU GSP schemes

The EU's GSP scheme encompasses three layers of preferential arrangements: Everything But Arms (EBA) for least developed countries, allowing them tariff free and quota free access to EU markets for all products except arms and ammunition; Standard GSP (for low and lower-middle income countries); and GSP+ (a special arrangement designed to incentivize the ratification and proper implementation of key international

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<sup>73</sup> It is important to acknowledge, however, that due process safeguards of this kind are rarely sufficient to overcome a number of broader criticisms that can legitimately be made about the way that GSP schemes can operate in practice, such as a lack of even-handedness by administering countries in their approach to monitoring and suspension of benefits depending on the political and economic interests at stake, and the overtones of paternalism and coloniality. The scope and inclination of an administering country to respond to non-compliance by a beneficiary country with human rights-related eligibility criteria, and the practical impact such action might have, will also differ depending on the coverage of the scheme (i.e. in terms of tariff lines), and these can vary significantly from country to country and from scheme to scheme. A further criticism, highlighted below (see esp. Box 7), concerns the possibility (perhaps even likelihood) that a decision to withdraw preferences could actually exacerbate human rights harms in beneficiary countries (and certainly in the short term), for instance where mass lay-offs of factory workers force vulnerable workers into poverty or even more dangerous working situations.

agreements relating to sustainable development, human rights and labour standards, and good governance).

The first GSP scheme of the European Community (EC) ran from 1971 to 1981 and was subsequently renewed for a further two decades.<sup>74</sup> From 2002 to 2005, the EC introduced several important changes to the design of the scheme by including special incentive arrangements for the protection of labour rights and the environment, and introducing the EBA initiative for the least developed countries.<sup>75</sup> These arrangements were revised from 2006 to include GSP+, a set of special incentive arrangements designed to promote sustainable development and good governance, which ran until January 2014. From this point, the current scheme came into play under a 2012 EU Regulation with the three GSP layers – EBA, Standard GSP, and GSP+.<sup>76</sup>

Human rights conditionality is a feature of each of these three arrangements, although, as can be seen from Table 2 below, the nature of this conditionality, and the monitoring arrangements used to verify compliance with human rights-related conditions, differs from scheme to scheme (and particularly as between the monitoring used for GSP+ countries, compared to beneficiaries of standard GSP and EBA schemes).

**Table 2.** An overview of the EU GSP scheme layers (Standard GSP, GSP+ and EBA): human rights conditions and compliance checks<sup>77</sup>

Scheme	Who qualifies?	Benefits	Human rights eligibility criteria	Consequences of non-compliance with human rights conditions ('negative conditionality')
EBA	For least developed countries	Duty-free, quota-free access for all products except arms and ammunition.	Comply with the principles laid down in core human rights and labour rights conventions listed in an annex to the 2012 EU GSP Regulation.	Possibility of 'enhanced engagement' (see note 1 below).  Possibility of launch of withdrawal procedure (see note 2 below).
Standard GSP	Low, and lower-middle-income countries	Partial or full removal of customs duties on two-thirds of tariff lines.	Ratify and implement 27 international conventions related to human rights, labour rights, environmental protection and good governance. (On compliance monitoring arrangements see notes 3 and 4.)	Possibility of 'enhanced engagement' (see note 1 below).  Possibility of launch of withdrawal procedure (see note 2 below).

Source: Compiled by the authors.

Note 1. Failures by a beneficiary country to make sufficient progress with respect to core human rights and labour rights can lead to 'enhanced engagement' processes in which the beneficiary country is asked to provide concrete and sustainable solutions to serious shortcomings (see

<sup>74</sup> UNCTAD (2015), *Generalized System of Preferences: Handbook on the scheme of the European Union*.

<sup>75</sup> Ibid.

<sup>76</sup> EU (2012), 'Official Journal of the European Union, L 303, 31 October 2012', Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012: Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) No 732/2008, [2012] OJ L 303/1: pp. 1–82, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2012:303:TOC>.

<sup>77</sup> Ibid.

below). This special form of engagement, pioneered for the purposes of the GSP+ scheme, has since been applied also to the Standard GSP and EBA schemes.

Note 2. Procedure for withdrawing trade preferences comprises:

- Initial notice by Commission;
- Six-month formal monitoring and evaluation period (during which time beneficiary country can submit its own observations). Third parties may intervene at this point.
- Submission of report of findings to beneficiary country, with period for comment.
- Final decision.

Note 3. Acceptance into GSP+ is also subject to the beneficiary country's agreement to:

- Comply with reporting requirements and treaty monitoring arrangements for the above 27 conventions.
- Cooperate with Commission, including by providing relevant information (see note 4 below).

Note 4. In order to retain the benefits of GSP+ status ('positive conditionality'), GSP+ beneficiary countries are subject to ongoing monitoring comprising:

- review of relevant country reports by ILO and UN treaty bodies.
- a list of issues (formally known as scorecard system) (see further discussion below).
- ongoing dialogue with relevant ministries and officials (see further discussion below), including in the form of country visits.

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#### Box 4. The EU's approach to compliance and performance monitoring under the GSP+ scheme

'The philosophy of the GSP+ is that of an incentive-based mechanism. It fosters the achievement of its goals by offering the "carrot" of preferences, which it provides when the relevant conventions are ratified and effectively implemented. Thereafter, preferences are used as a lever to ensure that implementation (i) does not deteriorate and (ii) improves over time. A regular dialogue with beneficiaries provides the necessary follow-up, which includes temporary withdrawal mechanisms. This approach of progressive improvement is considered the most appropriate given that the changes that need to take place to fully implement the conventions are of a complex, structural nature and involve high economic costs. Thus, they will not happen overnight, and need to be accompanied of support over longer periods.'

European Commission (2015), The EU's Generalised Scheme of Preferences (GSP), p. 3.

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As indicated in the notes to Table 2 above, the system for monitoring the compliance of the beneficiaries of the EU's GSP+ scheme (GSP+ countries) with the terms of membership (which, as noted above, includes ratification and implementation of a series of 'core' human rights treaties), is complex, ongoing and multi-layered. For the verification of the ratification itself (including the implications of any reservations) and for an assessment of the extent to which commitments made under those treaties are being properly and progressively implemented, considerable reliance is placed on the comments and reports of relevant UN treaty bodies and the International Labour Organization (ILO). From these outputs, and drawing also from relevant inputs from civil society and trade unions, the Commission creates a 'list of issues' for each GSP+ country in which priority issues of concern are

highlighted. Some refinements may then be made to this ‘list of issues’ (formerly referred to as a ‘scorecard’, see Box 5 below) in consultation with the relevant GSP+ country, and this document then becomes the framework for a more focussed programme of ongoing dialogue to provide the Commission with a more detailed picture, both of human rights issues and challenges ‘on the ground’, and of the success (or otherwise) of the relevant country at meeting specific human rights-related goals.

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### **Box 5. An overview of the European Commission’s approach to monitoring compliance by GSP+ countries with human rights eligibility criteria**

‘Once a country is granted GSP+ [status], the Commission and the European External Action Service (EEAS) must, therefore, monitor that it abides by its commitments, namely to:

- maintain ratification of the international conventions covered by GSP+;
- ensure their effective implementation;
- comply with reporting requirements;
- accept regular monitoring in accordance with the conventions; and
- cooperate with the Commission and provide all necessary information.

In order to meet its monitoring responsibility, the Commission prepares a List of Issues (“scorecard”) for each GSP+ beneficiary, which serves to measure the GSP+ countries’ compliance with the abovementioned commitments. Beneficiaries receive their individual scorecard upon GSP+ entry or immediately thereafter.

The scorecard is a clearly structured document highlighting salient shortcomings which should be addressed by the beneficiary in order to effectively implement the conventions. The basic elements of the list of issues are the shortcomings identified by the monitoring bodies of the relevant core international conventions and which are set out by the Commission in its assessment of the GSP+ entry applications.

The entry assessment thus constitutes a first ‘snapshot’ of a beneficiary’s situation; scorecards then build on this analysis with a view to further identifying the issues that beneficiaries will be expected to address. Naturally, all lists of issues look different reflecting each beneficiary’s performance under the various conventions.’

European Commission (2019), ‘European Union’s GSP+ scheme’, fact sheet, [https://trade.ec.europa.eu/doclib/docs/2017/january/tradoc\\_155235.pdf](https://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155235.pdf).

The activities that comprise the ‘ongoing dialogue’ part of the monitoring can take a range of different forms, depending on need and the issues at hand, but will typically include meetings, evaluation exercises, self-assessments, and (prior to the COVID-19 pandemic) country visits and a range of in-country stakeholder consultation exercises (potentially involving representatives of international organizations, civil society organizations, trade unions and industry).

The Commission’s reflections on the progress and achievements of GSP beneficiary countries as regards human rights issues, as well as any areas of concern, are communicated to the European Parliament and Council in the form of a biennial report.<sup>78</sup> As well as the economic effects of the various GSP schemes (including GSP+), these reports also set out specific legislative and policy initiatives that have been undertaken within the relevant jurisdictions during the reporting period, as well as comments about issues and trends (including on a regional basis) of particular concern. For instance, the most recent (2020) report singles out for special mention concerns about shrinking civic space, political shifts in favour of increased use of the death penalty, failures to effectively tackle child labour and environmental concerns.<sup>79</sup>

Countries that appear unwilling to address and engage on areas where there are human rights concerns are subjected to ‘enhanced engagement’. The most recent Commission report on GSP+ implementation flags enhanced engagement processes for Bangladesh, Cambodia and Myanmar ‘to press for concrete actions on and sustainable solutions to serious shortcomings in respecting fundamental human and labour rights’.<sup>80</sup> Enhanced engagement may lead to the development of agreed action plans (including targets and timelines) with respect to specific issues.<sup>81</sup> As noted in Table 2 above, a lack of results through these processes may lead to the withdrawal of tariff preferences.<sup>82</sup> In February 2020, the European Commission announced its decision to withdraw some of the tariff preferences granted to Cambodia under the European Union’s EBA trade scheme due to ‘serious and systematic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights’.<sup>83</sup>

The EU GSP+ ‘positive conditionality’ monitoring system is widely recognized and generally admired for its level of ambition, in terms of the

<sup>78</sup> For the most recent report, see European Commission (2020), ‘Joint Report to the European Parliament and the Council: Report on the Generalised Scheme of Preferences covering the period 2018-2019’, 10 February 2020, [https://trade.ec.europa.eu/doclib/docs/2018/january/tradoc\\_156536.pdf](https://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156536.pdf).

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, p. 2.

<sup>81</sup> As has been the case with Bangladesh in relation to improvement of labour rights protection. *Ibid.*, p. 3.

<sup>82</sup> See EU (2012), ‘Regulation (EU) No 978/2012 [2012] OJ L303/1, Article 24’, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0978&from=EN>. Such action has recently been taken with respect to Cambodia, see European Commission (2020), ‘Joint Report to the European Parliament and the Council: Report on the Generalised Scheme of Preferences covering the period 2018-2019’, p. 3. Cambodia’s tariff preferences under the European Union’s EBA trade scheme were partially withdrawn in February 2020 due to the ‘duration, scale and impact of Cambodia’s violations of the rights to political participation and to the freedoms of expression and association’.

<sup>83</sup> See European Commission (2020), ‘Trade/Human Rights: Commission decides to partially withdraw Cambodia’s preferential access to the EU market’, press release, 12 February 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_229](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_229).

proactivity with which human rights issues are identified and followed up, the measured and ‘graduated’ approach to problems of poor or non-compliance, as well as for the wide scope of human rights issues that it seeks to cover. However, concerns have been raised, too, about the lack of transparency around the process used to formulate the list of key issues that are to be monitored through the ‘list of issues’ system, and the benchmarks that are used to determine whether specific goals or targets have been met. From civil society organizations and trade unions in particular comes the criticism that the lack of transparency around process and benchmarking makes it difficult for them to engage effectively.<sup>84</sup>

The renewal of the legislative framework for the EU’s GSP scheme in 2023 provides an opportunity for further consultation and reflection on the strengths and weaknesses of the current monitoring systems, and the extent to which there may be scope for improvement. In a resolution on the implementation of the EU GSP regulation passed on 14 March 2019, the European Parliament makes a number of comments as to ways that monitoring of sustainability development, human rights and governance issues could be improved, including ‘by stepping up cooperation between all actors so as to improve information gathering and in-depth analysis by using all the available information and resources, such as the reports from international monitoring bodies, including the UN, the ILO, the Organisation for Economic Cooperation and Development (OECD), and including direct involvement of civil society and social partners in the process’,<sup>85</sup> stressing that ‘this is necessary in order to ensure the full potential of the GSP+ scheme to improve the situation with regard to workers’ rights, promotion of gender equality and the abolition of child and forced labour through the effective implementation of the 27 conventions’.<sup>86</sup> The Parliament goes on to request the Commission ‘to explore further options for the structured, formal and independent participation of civil society, trade union representatives and the private sector, which could serve as potential avenues to strengthen the monitoring process’.<sup>87</sup>

An interim report published in November 2020 as part of ongoing efforts to assess the impact of the current EU GSP regulation (which will be fed into discussions about possible improvements when the regime is renewed)<sup>88</sup> considers a number of potential options for strengthening current arrangements, including the possibility of a stricter admittance procedure, measures to improve transparency and inclusiveness, more rigorous benchmarking of progress, the possibility of a new ‘intermediary’ body to coordinate expert input from civil society organizations and unions, and a

<sup>84</sup> See GSP Platform (2016), ‘Scrutinising the new GSP+ mechanism after two years: Will it deliver on human and labour rights?’, factsheet, <https://justiceandpeace.nl/wp-content/uploads/2020/01/Factsheet-GSP-after-two-years.pdf>.

<sup>85</sup> European Parliament (2019), ‘Implementation of the Generalised Scheme Preferences (GSP) Regulation (EU) No 978/2012’, European Parliament Resolution, 14 March 2019, para. 9, [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0207\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0207_EN.pdf).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, para. 10.

<sup>88</sup> See BKP Economic Advisors (2020), *Study in support of an impact assessment to prepare the review of GSP Regulation No 978/2012: Inception Report*, European Commission, 18 May 2020, [https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc\\_158710.pdf](https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158710.pdf).

possible new ‘complaints’ mechanism. However, the same report also notes a number of difficult policy trade-offs associated with some options (for instance as between the need for transparency and the need for a relationship of trust and candour between the EU and beneficiary countries under its GSP scheme, especially given the political sensitivities surrounding some of the issues involved), a theme that is taken up further in Chapter 4 below. In the meantime, the very recently unveiled initiative of the newly appointed EU chief trade enforcement officer to create a ‘single entry point’ through which EU companies, trade organizations or non-governmental organizations can submit complaints<sup>89</sup> (including about the extent to which beneficiaries of trade preferences under GSP schemes may not be living up to human rights-related conditions and commitments) will be interesting to watch.

### 3.3 Human rights monitoring under the US GSP scheme

The US GSP programme presently comprises a GSP and three regional programmes designed to help advance specific US foreign policy objectives (and covering additional products not covered by the GSP scheme); the Caribbean Basin Initiative (CBI), the Nepal Trade Preference Program (NTPP) and the African Growth and Opportunity Act (AGOA) programme. A number of different US agencies – including the Office of the US Trade Representative (USTR), the US International Trade Commission and the US departments of commerce, labor, state and treasury – play a part in administering or implementing various aspects of the scheme. An interagency mechanism known as the ‘Trade Policy Staff Committee’ is used to coordinate monitoring efforts.<sup>90</sup> While reporting requirements vary from programme to programme, the legislative arrangements for the GSP scheme require annual reports to Congress about the status of international worker rights in each beneficiary country, including the secretary of labor’s findings as to the extent to which each beneficiary country has implemented commitments relating to the elimination of the worst forms of child labour.<sup>91</sup> To this end, the following reports are prepared on an annual basis:

- An annual report on GSP (USTR), which includes, in addition to outcomes of annual reviews of product eligibility, a review of the country’s observance of international standards as regards worker rights, with particular focus on issues that have been raised through petitions, see further below;<sup>92</sup>
- Country reports on human rights practices (State Department); and
- Findings on the worst forms of child labour (Department of Labor).

<sup>89</sup> European Commission (n.d.), ‘Chief Trade Enforcement Officer’, <https://ec.europa.eu/trade/trade-policy-and-you/contacts/chief-trade-enforcement-officer>.

<sup>90</sup> See US Government Accountability Office (2020), ‘International Trade: Observations on whether women’s rights and economic interests are protected or promoted by U.S. Trade Preference Programs’, 9 December 2020, p. 10, <https://www.gao.gov/products/GAO-21-190>.

<sup>91</sup> *Ibid.*, pp. 8–9 provides a useful summary of the present reporting requirements.

<sup>92</sup> See Congressional Research Service (2021), ‘Generalized System of Preferences (GSP): Overview and Issues for Congress’, updated 7 January 2021, pp. 14–15, <https://fas.org/sgp/crs/misc/RL33663.pdf>.

The US GSP scheme differs from the EU GSP scheme (see section 3.2 above) in a number of important respects. The US GSP scheme is often described as being less ‘progressive’ than its EU counterpart on the basis that it covers a narrower range of human rights, with the advancement and protection of labour rights being the primary focus. Under the US GSP scheme,<sup>93</sup> beneficiary country status is conditional on being able to show (among other things)<sup>94</sup> that the country has taken or is taking steps to protect internationally recognized worker rights (see Box 6 below).<sup>95</sup> A further criterion is that the beneficiary country ‘implements its commitments to eliminate the worst forms of child labour’.<sup>96</sup> Two of the regional schemes (AGOA and NTPP) include an additional eligibility criterion that the president must have made a determination that the beneficiary country does not engage in gross violations of internationally recognized human rights, and there are additional reporting requirements relating to that criterion in particular.

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### Box 6. Internationally recognized worker rights covered by the US GSP scheme

- the right of association;
- the right to organize and bargain collectively;
- no use of any form of forced or compulsory labour;
- a minimum age for the employment of children, and prohibitions on the worst forms of child labour; and
- acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health.

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To maintain their status under the US GSP system, GSP beneficiary countries are required to continue to show progress as regards protection of these ‘core’ labour rights. However, the US GSP monitoring system does not include the same kinds of proactive ‘positive conditionality’ monitoring techniques that are used for the EU’s GSP+ system (see section 3.2 above), US policymakers having favoured a more complaints-based approach for highlighting potential non-compliance to eligibility criteria. While the US trade representative has the power to launch eligibility reviews on its own

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<sup>93</sup> 19 U.S. Code Section 2462(b)(2), <https://www.govinfo.gov/content/pkg/USCODE-2011-title19/pdf/USCODE-2011-title19-chap12-subchapV-sec2462.pdf>.

<sup>94</sup> Ibid., e.g. Not being a ‘communist country’ or ‘dominated or controlled by international communism’, 19 U.S. Code Section 2462 (B)(2)(A)(iii), <https://www.govinfo.gov/content/pkg/USCODE-2011-title19/pdf/USCODE-2011-title19-chap12-subchapV-sec2462.pdf>.

<sup>95</sup> 19 U.S. Code Section 2467, <https://www.govinfo.gov/content/pkg/USCODE-2011-title19/pdf/USCODE-2011-title19-chap12-subchapV-sec2467.pdf>.

<sup>96</sup> Ibid., (G) and (H).

initiative, in practice these reviews tend to be initiated following a petition by interested parties concerned about labour rights compliance in a beneficiary country, such as a civil society organization or a trade union (see Box 3 above).<sup>97</sup>

On the other hand, the arguably greater degree of transparency surrounding the US GSP monitoring system – demonstrated by more frequent reporting, against clear worker rights and child labour criteria, and with the complaints mechanism providing a clear and well-established means of engagement for interested stakeholders – is often cited as an area where the US GSP monitoring system may provide a better model. Moreover, while there is not yet any clear indication that the new US administration may be considering expanding the scope of human rights eligibility criteria, a shift towards a more proactive system of monitoring was signalled by the USTR's October 2017 announcement of a new 'triennial assessment process' to ensure that all beneficiary countries fulfil the eligibility criteria.<sup>98</sup> This process began with Asian countries in the first year, the intention being to roll the review process to other regions in later years.<sup>99</sup> As a result, more recent USTR annual reports to Congress (see above) have begun to include more discussion of the outcomes of self-initiated country practice review processes, in addition to the outcomes of the petition processes mentioned above.<sup>100</sup>

### 3.4 Some reflections on experiences with human rights monitoring in the context of GSP schemes

The non-reciprocal nature of GSP schemes makes it possible to attach trade-related incentives to compliance with a wide range of different human rights.<sup>101</sup> Moreover, the fact that these schemes are unilaterally applied, rather than negotiated between trading partners, can give the granting party (depending on the value of these preferential arrangements to different sectors of beneficiary countries' economies) significant leverage through which it can advance different human rights-related aspects of its external and foreign policy objectives. Attaching specific benefits to specific product lines allows for the possibility of quite targeted use of both positive and negative conditionality, creating opportunities for initiatives directed at addressing human rights problems at a sector level (as well as at a country

<sup>97</sup> 'According to the publicly available information on USTR's website, until recently [i.e. June 2017], the U.S. government had not self-initiated an eligibility review of any country for at least ten years.' See International Corporate Accountability Roundtable (ICAR) (2018), 'Tools of Trade: The Use of U.S. Generalized System of Preferences to Promote Labor Rights for All', February 2018, p. 10, <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5a723ff1ec212d3d586635d9/1517436916673/ICAR+GSP+Report+FINAL.pdf>.

<sup>98</sup> Office of the US Trade Representative (2017), 'USTR Announces New Trade Preference Enforcement Effort', press release, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/ustr-announces-new-trade-preference>.

<sup>99</sup> ICAR (2018), 'Tools of Trade', p. 11.

<sup>100</sup> See Congressional Research Service (2021), 'Generalized System of Preferences (GSP): Overview and Issues for Congress', p. 22, <https://fas.org/sgp/crs/misc/RL33663.pdf>.

<sup>101</sup> See Borchert, I., Conconi, P., Di Ubaldino, M. and Herchelegiu, C. (2020), *The Pursuit of Non-Trade Policy Objectives in EU Trade Policy*, EUI Working Papers, RSCAC, 2020/26 Global Governance Programme-391 [Global Economics], pp. 11–18, and pp. 23–29, <https://cadmus.eui.eu/handle/1814/66882>.

level) and thus making GSP schemes a potentially less ‘blunt instrument’ for advancing human rights objectives than free-trade agreements.<sup>102</sup>

Might there be elements of monitoring methodologies developed for the purposes of GSP schemes that could be applied to other kinds of trading relationships? The question is not just an academic one. In addition to the potential advantages from the perspective of efficiency and opportunities for knowledge sharing, there is also the possibility that greater convergence of approaches might help to smooth the transition as countries pass from GSP schemes to trading under negotiated FTAs. However, some caution is necessary. Firstly, the political and legal context, against which human rights monitoring takes place, is somewhat different for GSP schemes than for FTAs.<sup>103</sup> Secondly, it is important to recognize that there are a range of motivations for human rights monitoring of trade agreements, which will have a bearing on the kinds of arrangements that will be most realistic and effective in any given context.<sup>104</sup> Nevertheless, there are some lessons that can potentially be gleaned from experiences with GSP scheme monitoring that may be relevant to human rights monitoring of other types of trading relationships.

An important lesson that can be taken from human rights monitoring in the GSP context is the way that different methodologies and approaches can be combined in ways that allow them, if done well, to become more than the sum of their parts. For instance, although a review of a country’s ratification records and the comments of international treaty monitoring bodies may provide a reasonable starting point for researching a trading partner’s commitment to different human rights issues, it is recognized implicitly in the way that the EU’s approach to GSP+ monitoring is constructed, that, in order to obtain a realistic view of the quality of implementation of these standards at domestic level (including the human rights conditions in which specific goods traded under the agreement have been produced or manufactured), more of a ‘deep dive’ is needed. For the purposes of in-country work, local ministries, officials and domestic regulatory bodies with human rights-related mandates are potentially vital sources of information. Monitoring practitioners will be on particular lookout for agencies that regularly gather data on issues coming within the purview of human rights monitoring activities, such as on employment trends (including the informal economy), wages and cost of living, health and life expectancy, gender inequality, agricultural production or land use. Local agencies are also likely to be best placed to provide the contextualization needed, for instance, for a proper understanding of sources of inequalities in the way that positive and negative economic effects of trade are distributed (e.g. between regions, or between people of different ethnic background, or between genders).

A further takeaway concerns the potential human rights benefit of more graduated, and potentially more cooperative, responses to resolving human rights compliance problems. These may be tailored to the particular

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<sup>102</sup> *Ibid.*, pp. 18–23.

<sup>103</sup> Zerk (2019), *Human Rights Impact Assessment of Trade Agreements*, p. 12.

<sup>104</sup> See section 1.3 above.

circumstances at hand as an alternative to more prescriptive, possibly confrontational procedures, which may have the effect of worsening human rights outcomes. The European Commission credits the success and impact of its GSP+ scheme, in large part, to this approach.<sup>105</sup> Relatedly, a more consultative and cooperative approach is also potentially helpful in addressing concerns (expressed by governments of developing countries in particular)<sup>106</sup> that human rights standards – whether as part of GSP eligibility criteria or as part of the mutual commitments made between the parties to a trade agreement – might be used to further narrow protectionist or political aims. Although it would be naïve to overlook the presence of potential protectionist and political agendas in the way that human rights criteria or commitments are framed,<sup>107</sup> a more cooperative and consultative approach can provide the relevant trading actors with the space and flexibility needed to properly analyse the options for course of action likely to yield the best outcomes in human rights terms (see the case study in Box 7 below for an example of the conflicting considerations that can arise). As noted above, the unilateral nature of GSP schemes would seem to provide trade actors with greater flexibility to achieve this effect in the GSP context than in the context of a trade agreement, although it must be acknowledged that there are already elements of these approaches in the way that ‘trade and sustainable development’ chapters of EU trade agreements have been constructed.

On the other hand, as will be discussed in more detail in the next chapter, the lack of enforceability of commitments in ‘trade and sustainable development’ chapters of trade agreements, and the limited human rights content of those chapters, are key factors in the present lack of ‘teeth’, influence and direction of the consultative bodies established under those chapters with respect to the monitoring of human rights risks and compliance issues relevant to a trading relationship. As we will see, the tensions that exist between the need for legal certainty versus the need for flexibility, or the need for transparency versus the need to provide an environment to enable politically sensitive and challenging discussions to take place at all, are just two of many dilemmas that trade actors seeking to improve their human rights monitoring systems might be confronted with. The aim of the next chapter is to analyse these dilemmas from a human rights perspective, in order to ascertain the extent to which there might be scope for improvement of human rights monitoring in the trade context.

<sup>105</sup> European Commission (2020), ‘Joint Report to the European Parliament and The Council: Report on the Generalised Scheme of Preferences covering the period 2018-2019’.

<sup>106</sup> Velluti (2016), ‘The Promotion and Integration of Human Rights in EU External Trade Relations’, pp. 53 and 59.

<sup>107</sup> Harrison et al. (2019), ‘Labour Standards Provisions in EU Free Trade Agreements’, p. 655; Gammage (2018), ‘A critique of the extraterritorial obligations of the EU’, p. 9.

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### Box 7. Balancing different human rights needs: the EU's decision to partially withdraw Cambodia's preferential access to the EU market against the background of the COVID-19 pandemic

In February 2020, the European Commission announced its decision to withdraw part of the tariff preferences granted to Cambodia under the European Union's EBA trade scheme due to 'serious and systematic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights'.<sup>108</sup> The Commission further announced that the decision, affecting selected garment and footwear products and all travel goods and sugar, would take effect (unless objected to by the European Parliament or the European Council) on 12 August 2020.

The EU High Representative for Foreign Affairs and Security Policy (and Vice-President of the European Commission) Joseph Borrell explained the decision as being necessary in light of '[t]he duration, scale and impact of Cambodia's violations of the rights to political participation and to the freedoms of expression and association' adding that '[t]he European Union will not stand and watch as democracy is eroded, human rights curtailed, and free debate silenced... For the trade preferences to be reinstated, the Cambodian authorities need to take the necessary measures'.<sup>109</sup> Commissioner for Trade Phil Hogan further commented '[t]he European Union is committed to supporting Cambodia's economic and social development through trade preferences. However, the respect for human rights is non-negotiable for us. We recognise the progress Cambodia has made, but serious concerns remain. Our aim is that the Cambodian authorities end human rights violations, and we will continue working with them in order to achieve that'.<sup>110</sup>

The move has been broadly welcomed by EU-based civil society organizations and international trade unions. ITUC General Secretary Sharon Burrow responded that '[t]he Cambodian government is fully responsible for the withdrawal of benefits, and we regret its lack of commitment to Cambodia's working people. The government and companies doing business in the country must finally listen to the concerns of workers and act to ensure that freedom of association and the right to collective bargaining are fully respected. The trade benefits should only be restored once the government changes its course on democracy and labour rights'.<sup>111</sup> However, Cambodian affiliates of the global union IndustriAll have expressed concerns about the economic damage and unemployment that could result, arguing in a letter to EU Trade Commissioner Cecilia Malmstrom that the

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<sup>108</sup> European Commission (2020), 'Commission decides to partially withdraw Cambodia's preferential access to the EU market'.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> International Trade Union Confederation (2020), 'The European Trade Union Confederation (ETUC) and the International Trade Union Confederation (ITUC) welcomes lifting of EU trade benefits to Cambodia', press release, 12 February 2020, <https://www.ituc-csi.org/EU-stops-EBA-trade-benefits-Cambodia>. See also Fair Wear Foundation, Clean Clothes Campaign, Ethical Trading Initiative et al. (2020), 'International community urges Cambodian government to take action', joint statement, 14 February 2020, <https://www.fairwear.org/stories/statement-international-community-urges-cambodian-government-to-take-action>.

risks of severe economic hardship and unemployment to rural women working in garment factories were particularly great.<sup>112</sup>

Since the decision was taken further representations have been made by EU-based clothing retailers urging the Commission to postpone implementation of the decision in light of the likely economic fallout from the COVID-19 pandemic. In a letter to the European Commission President Ursula von der Leyen, the European Branded Clothing Alliance argues that the COVID-19 pandemic had ‘created challenges unprecedented in our globalised world’ and calls on the European Commission to ‘postpone the withdrawal of the EBA status of Cambodia because of the exceptional circumstances and already severely impacted global industry.’<sup>113</sup>

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<sup>112</sup> Thul, P. C. (2019), ‘Cambodia businesses, unions ask EU not to impose trade sanctions’, Reuters, 21 January 2019, <https://www.reuters.com/article/us-eu-trade-cambodia/cambodia-businesses-unions-ask-eu-not-to-impose-trade-sanctions-idUSKCN1PF1JI>.

<sup>113</sup> European Branded Clothing Alliance (2020), ‘EBCA request for relief measures related to COVID-19 crisis’, 30 March 2020, [https://www.ebca-europe.org/files/userdata/news\\_upload/EBCA%20COVID-19%20Request%20von%20der%20Leyen.pdf](https://www.ebca-europe.org/files/userdata/news_upload/EBCA%20COVID-19%20Request%20von%20der%20Leyen.pdf).

# 04 Could human rights monitoring of trade agreements be improved?

**While the negotiation of robust human rights monitoring arrangements is an important and worthwhile aim, imbalances in power and resources often present intractable political, structural and practical challenges.**

## **4.1 Assessing the status quo**

How do we go about assessing the usefulness, performance and impact of the different types of human rights monitoring systems that may be used in the trade context? One immediate challenge is that, as discussed in Chapter 1 (see section 1.3), human rights monitoring is done for a range of different purposes, meaning that the criteria for assessing success (or lack thereof) may not (and often will not) be the same from mechanism to mechanism or from activity to activity.

A second challenge, necessary to take into account in any discussion about whether a mechanism can be improved or enhanced (or should be replaced

altogether), is understanding the extent to which deficiencies are inherent to a process, or likely to have been caused by (or may be exacerbated by) poor implementation, e.g. due to a lack of political will, or lack of resources.

Unpacking this second challenge is the focus of the second part of this chapter (see section 4.2). However, as a first step to a better understanding of how the success criteria for different types of monitoring activity might vary, it is worth considering, in broad terms, the *potential* relevance and responsiveness of different types of monitoring activity identified in this research paper (see chapters 2 and 3 above) to different types of monitoring needs (see section 1.3 above). This is the purpose of Table 3 below. As can be seen, each type of activity has been ranked for different purposes from 'highly relevant' to 'less (or not) appropriate/relevant'. In several cases, the reasons for the chosen rankings will be self-explanatory. However, where this is not the case, further explanation can be found in section 4.2 below.

As can be seen from Table 3 below, different types of monitoring mechanisms and processes can be more relevant to addressing some needs than others. For instance, periodic evaluations of compliance with human rights eligibility criteria for non-reciprocal trade preferences are necessarily administered on a unilateral basis, although these are likely to draw also from joint processes (e.g. ongoing dialogue). Periodic evaluations, against a clear set of targets benchmarking criteria, whether conducted on a joint, reciprocal or unilateral basis, are more likely to yield the information needed for robust human rights risk management than more consultative and dialogue-based mechanisms (particularly those with fairly open-ended terms of reference), though all have potentially useful contributions to make. On the other hand, if the primary goal is to foster greater engagement (e.g. with a view to advancing human rights more generally), then consultative arrangements (of the type described in section 2.1 above) clearly have a particularly important role to play. In some cases, adopting a combination of approaches may be most effective. For instance, as the EU has found in the contest of administration of its GSP+ scheme, the deeper contextual knowledge obtained from country visits and in-country meetings, as well as the opportunity to hear directly from stakeholder groups and ministerial officials, not only enhances evaluation processes, but can also help to advance human rights agendas in their own right, for instance by providing occasions for further dialogue, capacity-building and empowerment.

**Table 3.** Key attributes of different types of human rights monitoring activities relevant to the trade context, arranged by type of activity and objective

Type of activity	How relevant is this type of activity likely to be for ...					
	Checking trading partners' compliance with human rights commitments?	Checking compliance with agreements or required corrective action?	Checking compliance with human rights-related eligibility criteria?	Risk management?	Providing a platform for dialogue on human rights with trade partners?	Providing a platform for dialogue on human rights issues with stakeholders
Consultative bodies (joint, ministerial level)	●	●	●	●	●	●
Multi-stakeholder consultative bodies	●	●	●	●	●	●
Periodic evaluation exercises (joint)	●	●	●	●	●	●
Periodic evaluation exercises (reciprocal)	●	●	●	●	●	●
Periodic evaluation exercises (unilateral)	●	●	●	●	●	●
Ongoing dialogue with trading partner	●	●	●	●	●	●
Ongoing joint follow up exercises with trading partner	●	●	●	●	●	●
Reviews of reports of UN agencies, ILO etc.	●	●	●	●	●	●
In-country engagement with relevant ministries and officials	●	●	●	●	●	●
In-country engagement with stakeholders	●	●	●	●	●	●

- Highly relevant
- Probably relevant
- Less (or not) appropriate/relevant

Source: Compiled by the authors.

Notes: Type of activity in the first column are drawn from the different types of monitoring activity described in chapters 2 and 3 of this research paper. The objectives are taken from Chapter 1 (see section 1.3).

## 4.2 Structural, practical and political matters

The discussion in the previous section on the potential relevance of different types of monitoring activity to meeting different needs and objectives is obviously subject to the caveat that much depends on practical implementation. Understanding the difference between the inherent limitations of a particular approach and the problems that come from poor implementation is important, not only for a realistic comparison between different available options but also to be able to identify the extent to which

complementary approaches (e.g. in the form of an injection of resources, a declaration of political support, or different forms of capacity-building) are likely to make a difference.

Moreover, in comparing the different options that may be available there will often be, as shall be discussed in more detail later in this chapter, numerous dilemmas and trade-offs that need careful consideration. The remaining sections of this chapter are an attempt to unpack:

- the different ways in which the various potential methods of organizing and undertaking human rights monitoring, identified in Chapter 2 above, may suffer from inherent limitations, as opposed to the limitations that come from poor implementation;
- the key dilemmas and policy trade-offs that may need to be taken into account in designing and implementing these kinds of mechanisms and activities (i.e. that may have a bearing on their effective functioning as human rights monitoring bodies); and
- the various measures and options that could be considered (and indeed are already under consideration in some contexts) to help address the problem of poor implementation in particular.

For the purposes of the discussion below, the various systems and initiatives discussed in Chapter 2 above have been divided into three generic categories: consultative bodies (section 4.2.1), unilateral evaluations (section 4.2.2) and joint evaluations (section 4.2.3). A summary table is provided at the end of each sub-section to highlight the key points made.

#### **4.2.1 Consultative bodies created under trade agreement terms**

As noted in section 2.1 above it is now not uncommon for trade agreements to provide for the establishment of consultative bodies through which different stakeholder groups can raise concerns and share views about social and environmental issues arising from the relevant agreement's implementation. As far as human rights monitoring is concerned, those consultative bodies established under chapters on 'trade and labour', 'trade and the environment' or, in a more recent innovation, 'trade and gender' have a potentially important role to play.<sup>114</sup> However, without a clearly defined role and proper resourcing their practical impact may be limited.

This appears to have been the experience with consultative bodies established under the 'trade and sustainable development' chapters of EU trade agreements,<sup>115</sup> although commentators differ in their analyses of where the main problems lie and what the best solutions might be. As a starting point, there seems to be broad agreement that the present lack of clarity surrounding the role of these consultative bodies *vis-à-vis* the monitoring of human rights issues has been less than helpful.<sup>116</sup> EU FTAs, for instance,

<sup>114</sup> See section 2.1 above.

<sup>115</sup> See footnote 23 above.

<sup>116</sup> Barbu et al. (2017), 'A Response to the Non-paper of the European Commission', p. 7; European Commission (2018), 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements', <https://trade.ec>.

express the roles of consultative bodies (i.e. Domestic Advisory Groups under trade and sustainable development chapters) in very general terms, such as ‘conducting dialogue’,<sup>117</sup> ‘seeking advice’<sup>118</sup> and ‘identifying the need for action’.<sup>119</sup> While this very flexible framing has the advantage of being potentially far easier to negotiate than a series of very prescriptive monitoring regimes, the lack of clear priorities or direction for the various consultative bodies that may be established under the agreement risks creating monitoring mechanisms that are both everything and nothing, with consequences for their credibility among stakeholders as well as between the trading parties themselves. The European Economic and Social Committee has suggested that the functioning of these consultative bodies might potentially be enhanced, at least in part, through some procedural improvements, for instance by tightening up rules around time frames for responses by consultative bodies to submissions, information and complaints.<sup>120</sup>

While reforms of this kind are certainly worth exploring, there may be some more fundamental problems to take account of. Some commentators have drawn attention to the implications of certain structural features of EU trade agreements for the credibility, performance and impact of these consultative bodies; specifically the provisions that are designed to ensure that complaints about non-compliance with commitments made under the specialized ‘trade and sustainable development’ chapters are dealt with under a special set of consultative arrangements, rather than under general dispute resolution processes (and under which a more targeted set of retaliatory or compensatory remedies may be invoked or imposed).<sup>121</sup> This, it is argued, results in a relatively weak accountability framework for social, environmental and human rights issues arising under the agreement. (See the case study in Box 8 below on enforcement of human rights-related commitments under the EU–South Korea trade agreement.)

This is not to suggest that consultative methods of dispute resolution can never be as effective as methods of dispute resolution that carry the threat of sanctions (and indeed there are circumstances, such as where breaches of commitments occur as a result of a lack of resources and capacity, where

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europa.eu/doclib/docs/2018/february/tradoc\_156618.pdf; Martens, D., Orbie, J., Van den Putte, L. and Williams, Y. (2016), ‘Civil society meetings in EU trade agreements; Recommendations and lessons for EPAs’, <https://ecdpm.org/wp-content/uploads/BN93-Civil-Society-Meetings-EPAs-September-2016.pdf>.

<sup>117</sup> European Union (2011), ‘Free Trade Agreement between the European Union and its member states, of one part, and the Republic of Korea, of the other part’, Article 13.13.1, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01)).

<sup>118</sup> Ioannides, I. (2017), ‘The effects of human rights related clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement: Ex-Post Impact Assessment’, European Parliamentary Research Study: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS\\_STU\(2017\)558764\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/558764/EPRS_STU(2017)558764_EN.pdf).

<sup>119</sup> Harrison et al. (2019), ‘Labour Standards Provisions in EU Free Trade Agreements’, p. 645.

<sup>120</sup> Ibid.; See European Union (2018), ‘Opinion of the European Economic and Social Committee on ‘Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)’ (own-initiative opinion)’, (2018) C 227/04. Although note that the EU EESC has voiced support for enhancements to current reporting mechanisms whereby DAGs (through their respective chairs) could report social and environmental concerns arising from the implementation of a trade agreement directly to the relevant joint committees that would then be required to respond to issues and recommendations raised, within a reasonable time frame. See European Union (2019), ‘Opinion of the European Economic and Social Committee on the role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements’, p. 29, Article 1.14, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2019.159.01.0028.01.ENG&toc=OJ:C:2019:159:FULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.159.01.0028.01.ENG&toc=OJ:C:2019:159:FULL).

<sup>121</sup> Although the EU–UK Trade and Cooperation Agreement is an exception, see footnote 29 above.

consultative methods may prove more effective). However, concerns have nevertheless been raised that the reduced enforceability of the commitments made between trading partners in these specialized chapters, coupled with the lack of a clear role for the consultative bodies in ensuring that the applicable standards are met, may be contributing to a devaluing of the human rights-related elements of the agreement, compared to other, market-related commitments.<sup>122</sup> For the consultative bodies themselves, this can have implications, not only for their credibility, but also for the amount of resources and attention they receive and the willingness of interested parties to invest time and effort in engaging with them.<sup>123</sup>

### Box 8. Dispute resolution processes over workers' rights in South Korea under the EU–South Korea FTA

The EU and South Korea have clashed on the issue of workers' rights. The dispute arose from claims by the EU Commission (DG Trade) that South Korea has failed to fulfil some of its core commitments in labour rights under the 2011 EU–South Korea agreement. The 2011 agreement commits South Korea to ratifying and effectively implementing all of the fundamental ILO Conventions as well as establishing effective guarantees under domestic law of the rights to freedom of association and collective bargaining.<sup>124</sup> Although the government had submitted legislation to the National Assembly to ratify these conventions and to enact certain labour reforms, the EU claimed that the National Assembly had not taken formal steps to discuss or vote on these bills.<sup>125</sup> The dispute resolution procedure under the 2011 EU–South Korea agreement was activated after previous efforts – including formal government consultations in January 2019 – failed to provide a satisfactory solution.<sup>126</sup>

A panel of experts to resolve the dispute was appointed in December 2019. The global coronavirus pandemic led to a number of procedural adjustments with the planned in-person hearings due to take place in Geneva replaced by virtual hearings that took place on 8 and 9 October 2020. The panel of experts eventually reported its findings on 24 January 2021. The panel found that South Korea was under an obligation to take continued and sustained efforts toward the ratification of the ILO Conventions arising from the commitments it has given under the trade agreement with the EU and irrespective of whether it was a party to the relevant ILO treaties themselves. The panel concluded that South Korea had not been acting consistently with its trade and sustainable development commitments of the

<sup>122</sup> Harrison et al. (2019), 'Labour Standards Provisions in EU Free Trade Agreements', p. 645; Ebert (2016), 'Labour Provisions in EU Trade Agreements'.

<sup>123</sup> Harrison et al. (2019), 'Labour Standards Provisions in EU Free Trade Agreements'; Barbu et al. (2017), 'A Response to the Non-paper of the European Commission on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)'; Gammage, C. (2019), 'Social Norms in EU Free Trade Agreements: Justiciable or Not?', in Gammage, C. and Novitz, T. (eds) (2019), *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks*, Cheltenham: Edward Elgar.

<sup>124</sup> European Union (2011), 'Free Trade Agreement between the European Union and its member states, of one part, and the Republic of Korea, of the other part', Article 13.4.

<sup>125</sup> European Commission (2019), 'EU-Korea dispute settlement over workers' rights in Korea enters next stage', <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2095>.

<sup>126</sup> European Commission (2019), 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation of free trade agreements 1 January 2018 - 31 December 2018', p. 28.

EU–South Korea FTA and that South Korea needs to adjust its labour laws and practices and to continue swiftly the process of ratifying four fundamental ILO Conventions in order to comply with the agreement.

The Committee on Trade and Sustainable Development established under the EU–South Korea trade agreement is tasked with monitoring the implementation of the recommendations of the panel of experts. While the outcome has been hailed by the European Commission as a vindication of the EU’s ‘cooperation-based approach to trade and sustainable development’,<sup>127</sup> as well as of a declared change in policy in favour of a more assertive approach to enforcing commitments made under ‘trade and sustainable development’ chapters,<sup>128</sup> some commentators have suggested that the amount of leeway provided in the panel of expert’s decision is actually indicative of a lack of leverage on the part of the EU as far as labour standards are concerned.<sup>129</sup>

Aside from the relative weakness of enforcement of commitments given under the ‘trade and sustainable development’ chapters of many EU trade agreements,<sup>130</sup> this separation of labour and sustainable development issues<sup>131</sup> presents these consultative bodies with a further challenge. Not only does this limit their role to the monitoring of specific, quite narrowly defined themes, it also inhibits the introduction of more cross-cutting monitoring initiatives. The consultative bodies established under these agreements that may be best placed to contribute to human rights monitoring processes tend to have limited mandates (relating to issues such as labour, environment, sustainable development and, though only very recently, gender) which, though important in themselves, may not map well onto to the profile of potential human rights-related impacts presented by the agreement. While other types of human rights issues raised by the agreement (e.g. the consequences of intellectual property protections for access to medicines or food, or the consequences of decisions under investor–state dispute resolution mechanisms for a state’s regulatory space to pursue human rights-related objectives) may be picked up by other joint consultative bodies with broader mandates, there is no built-in means of ensuring that the necessary follow up work is done.

<sup>127</sup> European Commission (2021), ‘Panel of experts confirms Republic of Korea is in breach of labour commitments under our trade agreement’, press release, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238>.

<sup>128</sup> European Commission (2018), ‘Commissioner Malmström unveils 15-point plan to make EU trade and sustainable development chapters more effective’, press release, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1803>.

<sup>129</sup> Beattie, A. (2021), ‘China’s scattergun sanctions show the limits of EU engagement’, *Financial Times*, 29 March 2021, <https://www.ft.com/content/f4cca4c4-9759-429f-af65-c8e6c075174b>; Peers, S. (2021), ‘Free trade v freedom of association? The EU/South Korea free trade agreement and the panel report on the EU challenge to South Korean labour law’, *EU Law Analysis* blog, 26 January 2021, <http://eulawanalysis.blogspot.com/2021/01/free-trade-v-freedom-of-association.html>.

<sup>130</sup> As noted above (see footnote 31), the EU–UK Trade and Cooperation Agreement is an exception to this general approach.

<sup>131</sup> See Harrison (2019), ‘The Labour Rights Agenda in Free trade Agreements’, p 721; European Union (2018), ‘Opinion of the European Economic and Social Committee on ‘Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)’ (own-initiative opinion)’, (2018) C 227/04, at 1.8.

Broadening the mandates of specialist consultative bodies established under trade agreements (e.g. those established under labour and environmental chapters of FTAs), so that they are able to more proactively follow up a broader range of human rights risks (including those that may have been identified in ex ante assessment processes), is an option that has been discussed within EU institutions.<sup>132</sup> However, there are some potentially important trade-offs to take account of when deciding the appropriate terms of reference for consultative bodies such as these. Given the capacity and resource implications of establishing monitoring bodies of any kind, (and especially for less developed trading partners)<sup>133</sup> the potential advantages of this course of action, and of creating more and strengthened opportunities for participation in dispute resolution and enforcement activities, needs to be balanced against the risk that these bodies (and the organizations on which they rely) may be spread so thin as to be ineffectual.<sup>134</sup>

Weighing on negotiating parties will be the need to ensure that consultative arrangements provided for in the agreement can stand the test of time. In meeting this objective, parties have some difficult judgments to make about the level of prescription needed to achieve the desired outcomes, while allowing themselves enough flexibility to adapt to changing circumstances. In addition to the potential advantages of greater negotiability, noted above, a certain amount of flexibility of implementation may be necessary to allow parties to tailor their responses to local conditions. A downside, however, is that this can also result in inconsistencies in approach between different trading partners or in non-action,<sup>135</sup> and, because of their dependence on governmental resources and support (see section 4.3 below), can make the effectiveness of the mechanisms vulnerable to changes in government and political priorities.<sup>136</sup>

A further problem arises from the potential proliferation of different monitoring arrangements under different trade agreements. Given the number of trade agreements in effect globally, the development of bespoke monitoring arrangements for each one (and potentially for different human rights-related themes that may be covered in specialized ‘trade and sustainability’ chapters, such as environmental rights, labour rights and rights of non-discrimination etc.) could increase resource demands to an

<sup>132</sup> See European Union (2019), ‘Opinion of the European Economic and Social Committee on the role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements (exploratory opinion requested by the European Parliament) [2019] OJ C 159/04’, pp 3.11–3.13, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2019.159.01.0028.01.ENG&toc=OJ:C:2019:159:FULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.159.01.0028.01.ENG&toc=OJ:C:2019:159:FULL); European Union (2018), ‘Opinion of the European Economic and Social Committee on ‘Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)’ (own-initiative opinion)’, (2018) C 227/04.

<sup>133</sup> See section 4.3 below.

<sup>134</sup> See section 2.1 above and section 4.3 below.

<sup>135</sup> Harrison et al. (2019), ‘Labour Standards Provisions in EU Free Trade Agreements’, p. 645. See also European Union (2018), ‘Opinion of the European Economic and Social Committee on ‘Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)’ (own-initiative opinion)’, (2018) C 227/04, p 4.2., noting the ‘lack of political will in some partner countries to establish their DAGs in a timely way’. See also Smith, A., Harrison, J., Campling, L., Richardson, B. and Barbu, M. (2020), *Free Trade Agreements and Global Labour Governance: The European Union’s Trade-Labour Linkage in a Value Chain World*, Routledge. Chapter 7, concluding that ‘the labour standards provisions in EU FTAs were ineffective in protecting workers’ rights and promoting workers’ voice’.

<sup>136</sup> Zerk (2019), *Human Rights Impact Assessment of Trade Agreements*. See Harrison (2019), ‘The Labour Rights Agenda in Free trade Agreements’, p. 175.

unsustainable level even for wealthier countries, let alone developing trading partners.

In the longer term, the lack of any demonstrable impact of these bodies on social, environmental or human rights conditions (whether due to a lack of a clear set of monitoring priorities or other factors), can lead to cynicism, accusations of manipulation of stakeholders into participation in activities that are essentially ‘window-dressing’, and eventual disengagement. Observers have raised concerns about the implications of ‘the widely diverging evaluations [among stakeholder groups] of the [consultative body] meetings – ranging from ‘talking shops’ to ‘empowering’ marginalized groups’.<sup>137</sup> There is evidence that this process of disillusionment is already underway, at least as far as the implementation of ‘labour’ chapters of EU FTAs is concerned.<sup>138</sup>

**Table 4.** Overview of possible limitations of consultative bodies as human rights monitoring tools and relevant trade-offs

Inherent limitations	Political/structural issues*	Resource-related limitations	Possible dilemmas and trade-offs
Terms of reference will be circumscribed by what is negotiable as between trading partners.	Lack of clear monitoring role Limited monitoring role Weak accountability framework Vulnerable to changes in political priorities	Power and resources imbalances may distort monitoring priorities in favour of the trade partner with greater resources and leverage. Effective stakeholder engagement may require considerable financial and political support.	The need for flexibility (e.g. to respond to changes in circumstances, local issues) versus the need for predictability and consistency in monitoring priorities and practice. Wide ranging terms of reference (i.e. more cross-cutting role) versus more specialized, streamlined, focussed brief.

Source: Compiled by the authors.

Note: This table is concerned with consultative bodies that have been created under the terms of a trade agreement including bodies created under side agreements or other supplementary arrangements (see Chapter 2 above sections 2.1, 2.2, 2.3, 2.4 and 2.6).

Note\*: Issues identified in the table as ‘political and/or structural issues’ may be a consequence of inherent limitations.

Finally, it is important to acknowledge that power and resources asymmetries between trading partners create problems for the effectiveness of joint monitoring activities, with stakeholder groups from wealthier countries able to access greater levels of support from local sources (including government sources), potentially giving them a much greater voice in agenda-setting. Problems of distortion of monitoring priorities as a result of power and resources imbalances can be compounded by a lack of transparency about the relevant processes, particularly concerning time scales for making submissions, and what is seen as a lack of awareness on the part of government agencies and trade bodies of the logistical challenges and complexities (as well as the time needed) to plan and prepare for meetings

<sup>137</sup> Martens et al. (2016), ‘Civil society meetings in EU trade agreements; Recommendations and lessons for EPAS’.

<sup>138</sup> Ibid.; Smith et al. (2020), *Free Trade Agreements and Global Labour Governance*.

and to compile submissions, especially where affected stakeholders are in remote locations or are drawn from hard to reach groups.

#### 4.2.2 Ongoing or periodic evaluations (unilateral)

As noted above, unilateral ongoing or periodic evaluations of human rights compliance of trade partners are used in several different contexts, notably in the administration of GSP schemes by trade actors, which impose human rights ‘conditionality’ on access and continued participation. This research paper has highlighted two areas of EU practice that potentially fall within this broad description, namely:

- the ongoing human rights evaluation process that takes place as part of monitoring for compliance of beneficiary countries with GSP+ eligibility criteria (see section 3.2); and
- the practice of conducting *ex post* evaluations of human rights impacts of existing trade agreements as part of an assessment of their impacts on, and contribution to, sustainable development (see section 2.5 above).

While the unilateral nature of these initiatives obviously gives trade actors significantly more latitude than with other mechanisms and processes discussed in this section (i.e. which take place against the background of negotiated arrangements), there are nevertheless a number of limitations and methodological challenges to be aware of, some of which are inherent to the exercise and some of which are affected (in terms of scale) by the decisions taken.

Many of these, such as the challenges demonstrating causal relationships between a trade intervention and a possible human rights effect, are similar to those encountered in relation to *ex ante* human rights impact assessments,<sup>139</sup> even allowing for the fact that the assessment practitioner for the *ex post* evaluation exercise has the significant advantage of hindsight. A further challenge, again in common with *ex ante* human rights impact assessment, concerns the significant difficulty of ensuring that relevant stakeholders are informed about the process and properly consulted. While the COVID-19 pandemic may have helped to highlight some novel ways that technology can be used to facilitate remote engagement with different stakeholder groups, the ‘digital divide’ in both the Global North and South between those who enjoy access to stable internet coverage and required technology, and those with poor internet access and limited technological equipment, continues to present significant barriers to inclusion and the ability to engage with consultation processes. Even the more traditional reliance on online surveys and consultations for the collection of data and information tend to assume a certain level of literacy among stakeholders and access to digital resources, which can particularly disadvantage groups of people who live remotely, or who do not have ready access to online resources or support from interested civil society

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<sup>139</sup> Zerk (2019), *Human Rights Impact Assessment of Trade Agreements*, pp. 18–20.

organizations.<sup>140</sup> Closely related to this are the obvious resources challenges (and potentially significant associated costs) involved in securing access to the necessary range of specialist expertise.<sup>141</sup>

While the geographical focus of these types of *ex post* evaluation processes will depend on the goals of the exercise (human rights monitoring in the context of administration of GSP schemes will obviously be concerned with human rights issues within the territory of trade partners, for instance, whereas more risk-focussed human rights monitoring under FTAs may be focussed on either domestic or extraterritorial risks, or perhaps both),<sup>142</sup> it is important to recognize that human rights monitoring exercises, which have an *extraterritorial* focus, can compound the challenges identified above, as well as presenting some new ones.

There may, for instance, be political sensitivities as regards access to governmental information or local officials, as well as around the evaluation process itself, which need careful handling. The power imbalances that exist between trading partners can sometimes become a flashpoint for complaints about the politicization of the process for selection of sectors and issues for study, as well as (as noted in the previous section) the concerns that human rights goals are being cited as cover for what are really political or protectionist aims.<sup>143</sup> Without robust ‘issue selection’ criteria that can be transparently and objectively applied, there is a chance that parties will, for their own domestic and foreign policy reasons, veer towards sectors for evaluation that are less politically sensitive (e.g. on the basis that they are less likely to be associated with human rights violations).<sup>144</sup> For trading agreements that have been subjected to *ex ante* human rights assessment, that earlier process may have yielded a set of issues that either ought to be, or could potentially be, prioritized for future monitoring. However, a lack of methodological and institutional link-up between the *ex ante* and *ex post* processes can make this kind of follow-up difficult to achieve in practice. Within the EU context, requiring sustainability impact assessment practitioners to give explicit recommendations not only as regards the issues that will require subsequent monitoring but also the types of data that needs to be collected and retained (and by whom) to enable this to happen could

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<sup>140</sup> For a discussion of these problems in the context of *ex ante* human rights impact assessments in the trade context see Zerk (2019), *Human Rights Impact Assessment of Trade Agreements*.

<sup>141</sup> This is likely to encompass, in addition to crucial expertise in economic modelling, expertise in trade law and human rights law as well as ‘public policy studies or international relations, for an accurate picture of the political and economic constraints that will govern how trade agreements are implemented in practice’. See *ibid.*, p. 20.

<sup>142</sup> That said, it is usual for EU human rights assessment and evaluation processes (both *ex ante* and *ex post*) to focus on extraterritorial human rights issues and risks associated with trade agreements. See Zerk (2019), *Human Rights Impact Assessment of Trade Agreements*, section 3.2.

<sup>143</sup> Smith et al. (2020), *Free Trade Agreements and Global Labour Governance*, esp. p. 132.

<sup>144</sup> Note, for instance, the prioritization within the Canada–Colombia framework of key Colombian exports of cut flowers and textiles for human rights impact assessment, as opposed to the Canadian extractives sector. See Embassy of Canada to Colombia (2015), ‘Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia for the period January 1, 2015 to December 31, 2015’, [https://www.canadainternational.gc.ca/colombia-colombie/bilateral\\_relations\\_bilaterales/rep-hrft-co\\_2015-dple-rapp.aspx?lang=eng](https://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2015-dple-rapp.aspx?lang=eng).

help to strengthen the links between *ex ante* assessments and subsequent human rights monitoring efforts to the potential benefit of both.<sup>145</sup>

However, while this kind of continuity can be advantageous, it is important that monitoring systems also have the flexibility to be able to adapt to new and unexpected challenges, as the COVID-19 crisis amply demonstrates. Providing for meaningful stakeholder input into the ‘issues selection’ process is one way in which concerns about the prioritization of issues for future monitoring can be addressed, and the fairness, inclusivity and responsiveness of the process enhanced. It is established practice, at the ‘issues screening’ stage for EU *ex post* evaluations of trade arrangements and agreements, for example, for there to be a stakeholder consultation process to collect views ‘from the ground’, which is used to complement initial ‘quantitative’ analyses (primarily economic modelling).<sup>146</sup> On the other hand, the lack of transparency surrounding the EU’s human rights monitoring process for the purposes of the GSP+ scheme has been justified in terms of the need to ‘facilitate the dialogue tool and build a relationship of trust with beneficiary countries given the sensitive (often political) nature of the issues involved’.<sup>147</sup>

A potential disadvantage of ‘unilateral’ human rights evaluation processes (i.e. compared to joint and reciprocal processes, see section 4.2.3 below) is that it may be more difficult to secure the buy-in of a trading partner to the outcomes; although, as with the level of cooperation of the trading partner in the process itself (see above), the amount of leverage enjoyed by a trade actor within a relationship may have a bearing on this. In the context of a trading relationship under an FTA, a lack of a trading partner’s acceptance of or participation in a human rights monitoring process may well undermine the chances of agreeing a joint response to any human rights issues that have been identified as needing action (e.g. under a joint action plan, or similar), thus affecting, in turn, the value and effectiveness of the exercise as part of a broader strategy for identifying and managing human rights risks.<sup>148</sup>

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<sup>145</sup> The potential benefits, including enhanced efficiency and the greater potential for assessment and monitoring processes to operate as a cycle of ‘continuous learning’ are discussed in Zerk (2019), *Human Rights Impact Assessments of Trade Agreements*, Chapter 4.

<sup>146</sup> See, for example, BKP Economic Advisors (2020), *Study in support of an impact assessment to prepare the review of GSP Regulation No 978/2012: Inception Report*, p. 10.

<sup>147</sup> *Ibid.*, pp. 36–37.

<sup>148</sup> See section 2.5, ‘...treating *ex ante* and *ex post* processes as linked, rather than separate, activities can help to strengthen both, not only in terms of building understanding of causal relationships and impact trajectories, but also by creating opportunities for lessons learned from observing how impacts materialize and are experienced in reality, which can then be applied towards improving impact assessments processes and implementation of FTAs, as well as to inform subsequent negotiations.’

### Box 9. Stakeholder engagement in human rights monitoring processes: can new conferencing technologies help to foster greater inclusion and coverage?

The 50MAWS Platform ('50 Million African Women Speak') is an illustration of how tech can be used to connect large groups of people. This is a collaborative digital effort by the East African Community, the Common Market for Eastern and Southern Africa, and the Economic Community of West African States to facilitate knowledge sharing and funding opportunities among women workers/entrepreneurs in Africa through an online portal and phone app.<sup>149</sup>

This demonstrates that there is an appetite to create knowledge sharing platforms, and this could potentially be replicated in the human rights monitoring sphere to increase stakeholder engagement, by using a phone app. This would promote connectivity and offer an opportunity to identify problems on the ground more rapidly.

**Table 5.** Overview of possible limitations of ongoing or periodic evaluations (unilateral) as human rights monitoring tools and relevant trade-offs

Inherent limitations	Political/structural issues	Resource-related limitations	Possible dilemmas and trade-offs
<p>Difficulties showing clear causal relationships between trade agreement terms (or their implementation) and human rights effects.</p> <p>Unilateral nature of exercise means that there may be less cooperation and trade partner 'buy-in' than with more joint or reciprocal processes.</p> <p>Difficulties translating unilateral findings and outcomes into a joint programme of action.</p>	<p>Potential political sensitivities surrounding the motivations for the process and issue selection (potentially exacerbated where there are power imbalances in the relationship, e.g. as between larger and smaller economies).</p>	<p>Costs of implementing a robust, credible and comprehensive process.</p> <p>Costs of accessing necessary technical expertise.</p> <p>Impossibility of reaching and engaging meaningfully with all affected stakeholders and groups.</p>	<p>Transparency (for credibility and fairness of processes, and for enhancing stakeholder trust) versus confidentiality (for purposes of building trust between trade partners, and for the purpose of facilitating discussions about issues where there are potential political sensitivities).</p> <p>The need to engage with the widest range of stakeholders versus the need to prioritize (e.g. to enable more focussed, targeted work).</p>

Source: Compiled by the authors.

<sup>149</sup> East African Community (2019), 'EAC-COMESA-ECOWAS launch digital platform to empower women', press release, <https://www.eac.int/press-releases/146-gender,-community-development-civil-society/1633-eac-comesa-ecowas-launch-digital-platform-to-empower-women>.

### 4.2.3 Periodic evaluations (joint and/or reciprocal)

As noted in Chapter 2 above, outside the scope of consultative bodies (addressed in section 4.2.1 above), examples of joint or reciprocal human rights monitoring processes are quite rare in practice, although it is increasingly common for parties to trade agreements to record in their FTAs (albeit usually in fairly loose, aspirational forms of language) their recognition of the desirability of future cooperation on human rights-related issues, sometimes referring explicitly to ‘joint assessments’, or similar types of initiatives (see sections 2.2, 2.3 and 2.4 above). While this is encouraging on some levels, the paucity of examples of mutually agreed joint monitoring regimes for human rights issues connected with trade will inevitably raise doubts about the negotiability of regimes of this nature in the context of an FTA, and tends to suggest at the very least a lack of political will or interest.

There are no underlying difficulties that would seem to rule out the possibility of trading partners developing joint approaches to human rights risk monitoring and management in future. There may be circumstances in which strong domestic political drivers, favourable political conditions and a willingness to work collaboratively all align to encourage trade actors down this route. Borrowing from the ‘enhanced engagement’ mechanism developed for the EU GSP+ context,<sup>150</sup> it might be possible to develop approaches whereby findings from *ex ante* assessment or *ex post* evaluation exercises could be followed up with a joint action plan, setting out concrete actions, responsibilities, targets and timelines towards addressing specific human rights-related problems.

Trade actors may be able to identify a number of potential advantages associated with such an approach; for instance, joint action plans that have been based on the outcomes of a cooperative assessment and evaluation process may have greater political buy-in than proposals emerging from unilateral processes. The greater political buy-in that can come from pursuing joint (rather than unilateral) monitoring initiatives may also enhance the ability of trading partners to identify and exploit potential synergies between the underlying objectives of human rights monitoring of trade agreements and relevant policy objectives being pursued at the domestic level, such as through legal regimes to support and encourage companies to take greater account of human rights issues in the way they conduct their business activities,<sup>151</sup> and also through relevant private and

<sup>150</sup> See Table 2 in section 3.2 Human rights monitoring under EU GSP schemes.

<sup>151</sup> Such regimes appear to be on the rise at present, with a number of jurisdictions recently passing laws designed to encourage or require companies to undertake ‘human rights due diligence’ in various business contexts. See Clifford Chance and Global Business Initiative (2020), *Business and Human Rights: Navigating a Changing Legal Landscape*, briefing paper, May 2020, <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/05/business-and-human-rights-navigating-a-changing-legal-landscape.pdf>. An EU-wide regime for mandatory human rights due diligence for EU-based companies, which will require companies to investigate human rights issues arising within their ‘entire value chains’ is presently under consideration by the European Commission. See Clifford Chance and Global Business Initiative (2021), *Mandatory Human Rights and Environmental Due Diligence: What an EU-level law will mean for business*, briefing paper, <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/01/mhredd-gbi-clifford-chance-january-2021.pdf>.

voluntary schemes aimed at promoting ethical corporate conduct.<sup>152</sup> It also provides a potentially stronger political basis for innovative forms of monitoring and engagement that make use of the expertise of relevant international agencies, such as the ILO (see boxes 10 and 11 below).

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### Box 10. The US–Cambodia Bilateral Textile Trade Agreement

Signed in January 1999, and operational until its expiry with the phase-out of the WTO Multifibre Arrangement in 2004, the US–Cambodia Bilateral Textile Trade Agreement created a series of trade-related incentives (in the form of more generous quotas) for Cambodia to work towards substantial compliance with international labour standards and Cambodian labour law.<sup>153</sup>

Implementing arrangements included an independent, external monitoring programme operated by the ILO, a capacity and technical assistance programme aimed at improving the skills and effectiveness of Cambodian labour inspectors, and technical assistance drafting labour laws. The monitoring system comprised factory level inspections (with the goal that each factory would be inspected six times per year on average), followed up with discussions with employers and workers,<sup>154</sup> with points of contention noted in the final reports. A system of indicators to track progress was devised, closely tracking the main elements of the Cambodian labour code.<sup>155</sup> Under the plan, chief technical officers published synthesis reports every three months, which were made public (including via the ILO website).

The system had some shortcomings from a human rights perspective. Commentators have criticized, in particular, the uncertainties surrounding the meaning of ‘substantial compliance’, the macro approach to compliance that diminished the leverage needed to bring about improvements at the level of individual factories, lack of proper consultation about findings with workers,<sup>156</sup> and weakness of provisions relating to interference with rights of freedom of association and collective bargaining.<sup>157</sup> Nevertheless, in its focus on factory level compliance with legal standards (as opposed to country level human rights compliance) the novel human rights monitoring system forged under this bilateral trading agreement demonstrates how, with creativity, more targeted and

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<sup>152</sup> E.g. codes of conduct developed under multi-stakeholder schemes. See Marx, A., Lein, B., Sharma, Arjun, Suse, A. G., Willemys, I., Ebert, F. and Wouters, J. (2018), *What role can Voluntary Sustainability Standards play in the European Union’s GSP Scheme?*, [https://ghum.kuleuven.be/ggs/publications/research\\_reports/report-vvs-and-gsp.pdf](https://ghum.kuleuven.be/ggs/publications/research_reports/report-vvs-and-gsp.pdf).

<sup>153</sup> Kolben, K. (2004), ‘Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia’s Garment Factories’, *Yale Human Rights and Development Law Journal*, 7(1): pp. 79–107, <https://ssrn.com/abstract=901797>. ‘The Cambodia project represents one of the first and most creative experiments in linking trade privileges to the respect of labor rights in trade agreements’, at p. 81.

<sup>154</sup> Although, this does not appear to have worked quite as intended. Kolben (2004), ‘Trade, Monitoring and the ILO’ notes that ‘the project’s Chief Technical Advisor ... made a decision at the beginning of the project that he would not share the results of the factory monitoring with workers and their representatives because of fears that the workers would use it to justify a strike.’

<sup>155</sup> The effect of this, according to Kolben (2004) ‘Trade, Monitoring and the ILO’ was ‘to give far more attention to standards than to rights because of the breadth of the Code’. The weakened wording with respect to ILO monitoring and reporting of claims of interference with trade union formation has also been criticized.

<sup>156</sup> See Harrison et al. (2019), ‘Labour Standards Provisions in EU Free Trade Agreements’, pp. 635–657.

<sup>157</sup> Kolben (2004), ‘Trade, Monitoring and the ILO’, pp. 103–106.

potentially more effective systems of oversight and reward are possible, which, as well as enabling more granular progress tracking, can have a positive legacy by raising standards not only of individual businesses but also of the domestic agencies responsible for regulating them.

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Despite the potential advantages of joint monitoring approaches, trading partners are not yet showing a great deal of enthusiasm for cooperation and innovation in this area. This may be explained in part by the dynamics of the negotiation process and the leverage that can be exercised at different points; particularly the conundrum that the window during which there is potentially the most interest and leverage in the FTA context (i.e. usually before the trading agreement is signed)<sup>158</sup> is also likely to be the time during which the parties are most sensitive about sharing information relating to human rights issues and problems, and the risks and economic trade-offs they face. Crafting a robust set of arrangements that can stand the test of time, amid changing political interests and governments, can be a significant challenge, as the experiences of Canada and Colombia with their own human rights monitoring regimes demonstrate.<sup>159</sup>

However, some interesting and innovative examples of human rights monitoring activities involving diverse stakeholders<sup>160</sup> can be found in the context of trading relationships with arrangements for technical assistance either integrated or attached. While these vary from case to case, they are typically oriented around a programme of activities designed to meet a specific set of development objectives relevant to an issue arising in the context of the trading relationship (e.g. greater protection of labour rights for vulnerable workers, such as migrant workers) within a specific business sector (e.g. garment, agricultural or manufacturing sectors). Running alongside programmes to boost local regulatory capacity and institutions, and to strengthen the flanking measures identified as needed to address potential adverse human rights impacts (e.g. measures to enhance access to employment opportunities and job security, entrench decent working conditions and strengthen local trade unions), will often be detailed and substantial data collection activities aimed at tracking progress towards programme objectives. Drawing from a range of sources (including regulatory, sector-level and factory-level sources), these activities can also open up a range of opportunities for stakeholder engagement on both the programme itself and the targeted social problems. For programmes aimed at addressing labour issues in particular, the ILO is obviously a key convenor and source of expertise (see Box 11 below), its Better Work programme<sup>161</sup> in some cases providing a ready-made platform and set of

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<sup>158</sup> Vogt, J. (2015), 'The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership', *Journal of International Economic Law*, 18(4): pp. 827–860, <https://doi.org/10.1093/jiel/jgv046>.

<sup>159</sup> See section 2.3 above.

<sup>160</sup> See section 1.3 above.

<sup>161</sup> ILO and IFC, Better Work. See <https://betterwork.org>.

methodologies for facilitating engagement between different types of actors (e.g. domestic ministries, regulatory agencies, international brands and local factories).

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**Box 11. How the ILO supports joint human rights monitoring efforts of trading partners in the context of development cooperation, capacity-building and technical assistance projects connected to trade agreements**

'Member States have requested direct assistance to the ILO concerning policy coherence between national labour market policies and trade, to assess the impact that trade may have on national employment, and to provide advice on how to formulate effective labour provisions and policy responses. Parties to trade agreements have also requested ILO advice in implementing labour standards commitments once a trade agreement has entered into force. This role has been expressly recognized in the labour provisions of many trade agreements in terms of monitoring, dialogue and dispute settlement, where various agreements explicitly include reference "to seek advice from the ILO". The possibility to seek advice from the ILO in the context of trade agreements is also mentioned in the framework of development cooperation...

The ILO is also involved in the actual implementation of labour standards through development cooperation projects referred to in trade agreements. Some projects focus on capacity-building activities of trade partners to foster the implementation of labour standards. These programmes are carried out in the ILO's technical departments and field offices, in collaboration with the country's tripartite constituents and sometimes trade partners.<sup>162</sup>

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<sup>162</sup> ILO (2016), 'Labour-related provisions in trade agreements: Recent trends and relevance to the ILO', briefing paper, 29 September 2016, para. 24 and 26, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_530526.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_530526.pdf).

**Table 6.** Overview of possible limitations of periodic evaluations (joint and/or reciprocal) as human rights monitoring tools and relevant trade-offs

Inherent limitations	Political/structural issues	Resource-related limitations	Possible dilemmas and trade-offs
Possibilities are limited to what is negotiable as between trading partners.	<p>Potential political sensitivities surrounding the motivations for the process and issue selection (potentially exacerbated where there are power imbalances in the relationship, e.g. as between larger and smaller economies).</p> <p>Maintaining the necessary degree of political support, interest and investment during the term of the FTA, amid changing political interests and governments.</p>	<p>Costs of implementing a robust, credible and comprehensive process.</p> <p>Costs of accessing necessary technical expertise.</p> <p>Impossibility of reaching and engaging meaningfully with all affected stakeholders and groups.</p>	<p>Transparency (for credibility and fairness of processes, and for enhancing stakeholder trust) versus confidentiality (for purposes of building trust between trade partners, and for the purpose of facilitating discussions about issues where there are potential political sensitivities).</p> <p>The need to engage with the widest range of stakeholders versus the need to prioritize (e.g. to enable more focussed, targeted work).</p>

Source: Compiled by the authors.

### 4.3 The vital importance of political support and investment

The human rights monitoring activities discussed in this paper can be costly in terms of time and resources. In addition to the costs of the multidisciplinary teams needed to carry out the necessary information-gathering and analytical work, budgets to support the relevant institutions (to permit hosting and attendance of meetings of consultative bodies, for example), are substantial, even before one takes account of the groundwork that may be needed (for instance in terms of stakeholder awareness-raising and communications), to create the conditions for a successful consultative process.<sup>163</sup> Civil society organizations, with specific roles carved out for them under ‘labour and environment’ chapters of agreements but with limited resources to fulfil them, may need extra financial support. Where there are gaps in knowledge and data (a practical problem highlighted by several commentators),<sup>164</sup> further investments may be needed to boost the capacity of relevant domestic regulatory bodies and state agencies (such as official statistical agencies) to gather and analyse the information needed to fill these knowledge gaps, and to participate effectively in these processes as a trusted source of information and advice.

In keeping with the idea that these human rights monitoring exercises are ideally cooperative in nature,<sup>165</sup> investments in capacity-building and

<sup>163</sup> For a discussion of the implications of a lack of a pre-existing community of strong, independent and well-resourced civil society organizations and trade unions for implementation of labour chapters of EU FTAs, see Smith et al. (2020), *Free Trade Agreements and Global Labour Governance*, Chapter 7.

<sup>164</sup> Dommen (2020), *Blueprint for a human rights impact assessment of the planned comprehensive free trade agreement between EFTA and MERCOSUR*, esp. pp. 41–43.

<sup>165</sup> Campling, L., Harrison, J., Richardson, B. and Smith, A. (2015), ‘Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements’, *International Labour Review*, 155(3): pp. 357–382, <https://doi.org/10.1111/j.1564-913X.2015.00037.x>; ILO (2016), *Assessment of Labour*

technical support for counterparts in trading partners may be needed as well. Failure to do so, especially in the context of trading relationships where there are significant imbalances in available capacity and resources, risks undermining the effectiveness of these arrangements in practice. Cooperative action and investment are also needed to address the apparently low levels of stakeholder awareness within the jurisdictions of trading partners of the possibility of contributing views through these kinds of monitoring mechanisms.<sup>166</sup>

For its part, the European Commission has expressed a willingness to invest in improved processes and resources, and with a new ‘implementation handbook’ to promote best practices.<sup>167</sup> In 2018, the European Commission financed a new Partnership Instrument project to provide ‘support to civil society participation in the implementation of EU trade agreements’.<sup>168</sup> The project has been providing some logistical and technical support to DAGs in the EU and in some trading partner countries, and also facilitates joint discussions between trade and sustainable development chapter liaison committees and civil society bodies in the form of annual workshops.<sup>169</sup>

These resources challenges (and ways to address them) should be borne in mind when evaluating proposals to strengthen and expand the role of monitoring bodies, such as broadening their scope, as discussed above, or those that increase their burden with respect to attending meetings or travel. More developed trading partners should identify ways to make financial and technical resources available to partner countries’ consultative mechanisms, including through dedicated funding to support and build the capacity of relevant civil society organizations and trade unions, in order to build a strong foundation for robust and purposeful discussion at joint meetings.<sup>170</sup>

Beyond financial help, monitoring bodies also rely on political support, for their credibility, for the leverage needed to carry out their functions and potentially also for access to sources of information (e.g. from ministries and domestic regulatory bodies). Political support for monitoring bodies may potentially be enhanced by working collaboratively through international organizations. The ILO, for instance, has sought to amplify its role as a

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*Provisions in Trade and Investment Arrangements, Studies on Growth with Equity*, [https://www.ilo.org/global/publications/books/WCMS\\_498944/lang--en/index.htm](https://www.ilo.org/global/publications/books/WCMS_498944/lang--en/index.htm); Oehri, M. (2015), ‘Comparing US and EU labour governance ‘near and far’ – hierarchy vs network?’, *Journal of European Public Policy*, 22(5): pp. 731–749, <https://doi.org/10.1080/13501763.2014.966743>; Postnikov, E. and Bastiaens, I. (2014), ‘Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements’, *Journal of European Public Policy*, 21(6): pp. 923–940, <https://doi.org/10.1080/13501763.2014.910869>.

<sup>166</sup> Martens et al. (2016), ‘Civil society meetings in EU trade agreements; Recommendations and lessons for EPAS’.

<sup>167</sup> See European Union (2018), ‘Opinion of the European Economic and Social Committee on ‘Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)’ (own-initiative opinion)’, (2018) C 227/04.

<sup>168</sup> Directorate-General for Trade of the European Commission (2019), *Report on Implementation of EU Free Trade Agreements: 1 January 2018 – 31 December 2018*, p. 28, <https://op.europa.eu/en/publication-detail/-/publication/1bbb43a4-f540-11e9-8c1f-01aa75ed71a1>.

<sup>169</sup> Ibid.

<sup>170</sup> See Ergon Associates (2012), ‘Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms’, Recommendation 26, <https://ergonassociates.net/wp-content/uploads/2012/02/Final-report-from-a-study1.pdf>.

source of support to governments to monitor the impacts of trade agreements, particularly from an advisory perspective.<sup>171</sup> The extent to which other international agencies, such as the World Health Organization, or treaty bodies with mandates connected with the protection of women's rights or rights of indigenous peoples, could fulfil a similar role in relation to other kinds of trade-related human rights risks, with a view to providing a comparable level of information and support, seems worth exploring.

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<sup>171</sup> Agusti-Panareda, J., Ebert, F. and LeClercq, D. (2014), *Labour provisions in free trade agreements: fostering their consistency with the ILO standards system*, Background Paper – Social Dimensions of Free Trade Agreements, March 2014, International Labour Organisation, [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms\\_237940.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms_237940.pdf).

# 05 Conclusion

**Human rights monitoring has a vital role to play in making trade policy more responsive to human rights needs in future. Although establishing robust monitoring systems can be challenging, there is a growing body of state practice on which to build.**

Without robust human rights monitoring systems, state parties to trade agreements have little chance of being able to tell for sure whether human rights commitments made in the context of trade agreements have been met, whether human rights benefits of trade relationships are being maintained and fairly shared, whether the trade agreement is contributing to improving or worsening human rights situations, or whether steps taken to mitigate risks are working as they should.

However, while there are a range of ways in which human rights monitoring mechanisms, of both generalized or specialized kinds, could conceivably be integrated into the terms of trading relationships – and although the obstacles to devising further bilateral or multilateral regimes and systems in support of robust human rights risk management and analysis would not appear to be insurmountable – opportunities to advance human rights standards and compliance through these methods are rarely taken up. The advances that have been made thus far have tended to be cautious and limited in scope. Although it is possible to point to progressive improvements to human rights monitoring in the context of GSP schemes, there seems little appetite among trade actors to explore ways of applying this learning to the FTA context.

In the context of human rights monitoring of FTAs, there are a particular set of structural problems that create monitoring lacunae for human rights issues that do not fall within the scope of interests of specialist chapters of trade agreements (typically relating to labour, environment or sustainable development). The very flexible terms of reference provided to the bodies that are established under these agreements have contributed to a general and growing feeling among stakeholders that these are ‘window-dressing’

schemes or ‘talking shops’ rather than ones with real policy impact. In some contexts (compliance reviews under GSP programmes for example), administering states have the advantage of considerable leverage. While this has been shown to lead to positive human rights outcomes in some cases, it is important to be mindful of the possibility that this form of monitoring, in this particular context, can take on the colour of a coercive activity from the perspective of the beneficiary state, potentially undermining prospects for collaborative problem solving.

The uncertain relationship between monitoring and enforcement can make productive cooperation and dialogue either more or less likely, depending on the political and economic drivers at work. For the processes that seek to track human rights risks connected with the trade agreements itself (and the effectiveness of measures taken to address them), the sheer number of human rights issues and implications that could be relevant, the range of different stakeholder groups with a potential interest in these issues, and the difficulty of tracking impacts back to specific trade agreements, pose significant methodological challenges. On top of this, there is a risk of an emerging double standard as regards the countries and issues selected for the closest scrutiny (the focus typically being on less developed trading partner or third countries), which both feeds off and also serves to reinforce the misconception that trade agreements pose risks for developing countries and benefits for richer, more powerful countries. The human rights picture is actually far more mixed.

Addressing these problems will not be easy. As this research paper has shown, there are considerable structural, political and resources-related challenges standing in the way of more systematic, coherent, meaningful, fair and effective human rights monitoring in this context. However, there are a number of lessons to be drawn from experiences thus far that can help us to sketch out the contours of more effective monitoring mechanisms for the future. A key lesson we can draw is that human rights monitoring bodies need purpose, direction and support from governments. Setting up bodies with vague, open-ended mandates has not served to empower stakeholders – quite the contrary. Human rights monitoring does not take place in a vacuum, but against a backdrop of standards, commitments and previously identified risks. The more specific the relevant standards and commitments are – and the better understood the relevant risks – the more effective these monitoring activities are likely to be.

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## Acknowledgments

The authors are grateful to Ruma Mandal, head of the International Law Programme at Chatham House, for her assistance in preparing this research paper.

Over the course of the past 18 months the authors have had many occasions to be grateful for the professionalism, unflappability and technical skills of the Chatham House International Law Programme team, particularly Jacqueline Rowe and Chanu Peiris, enabling this project to progress smoothly despite the numerous logistical challenges posed by changes to working arrangements due to the COVID-19 pandemic.

The analysis in this paper benefits from insights drawn from two Chatham House roundtables held (virtually due to the COVID-19 pandemic) in March 2020, as well as from a series of stakeholder interviews. Thanks are due to the participants at the roundtables and to subsequent interviewees, who gave generously of their time and provided valuable insights.

Thanks are also due to external and Chatham House reviewers for their helpful comments on earlier drafts of the paper.

The views expressed in this paper are the sole responsibility of the authors.

This paper was made possible by the generous support of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

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Cover image: A worker hand-picks cotton in a field in Wankaner, Gujarat, India on 15 December 2015.

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ISBN 978 1 78413 476 1

This publication is printed on FSC-certified paper.  
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