To what extent do EU trade and sustainable development instruments effectively promote labour rights in the Ready-Made Garment industry of South Asia?

Katrina Peake, LLB, LLM in Master of Laws

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ABSTRACT

This thesis analyses the extent to which EU trade and sustainable development instruments effectively promote labour rights in the Ready-Made Garment (RMG) industry of South Asia. It contextualises EU trade and sustainable development in the framework of the International Labour Organization standards, the United Nations' Sustainable Development Goals (SDGs), predominantly SDG 8 on decent work and economic growth, and international trade law. Underpinning the research is the EU's position as a normative actor in its external trade and development policies.

The RMG industry in South Asia is chosen on account of serious and systematic labour rights violations. It has a strong connection to the EU's single market. The selection of South Asia limits the research question to major RMG producing countries which form a large proportion of EU RMG imports. To this end, the thesis examines three countries in detail: Bangladesh, Sri Lanka and Vietnam. These are selected on account of RMG production, EU trade and sustainable development instruments, development status and proportion of RMG exports destined for the EU. The EU-ILO relationship is examined in depth in each case study.

The Bangladesh case study examines the EU's Generalised Scheme of Preferences (GSP) Everything But Arms (EBA), specifically the possibility of negative conditionality, withdrawing tariff preferences upon serious and systematic violations of labour standards in the RMG industry. It assesses the EU's route of 'deep engagement' in the Bangladesh Sustainability Compact as an alternative to negative conditionality. The case study uses interview data, giving a comprehensive picture of the GSP EBA and the Compact, and their impact in improving labour rights in the RMG industry.

The Sri Lanka case study explores the EU's GSP Plus in relation to the country's RMG industry. Specifically, the operation of negative conditionality, the withdrawal of GSP Plus in 2010 owing to violations connected to Sri Lanka's civil war, is contrasted to the operation of

positive conditionality, the re-grant of GSP Plus in 2017. To this end, it uses extensive interview data to present a picture of the limited effectiveness of the GSP Plus in promoting labour rights in the RMG industry.

The case study of Vietnam analyses the prospective EU-Vietnam "new generation" Free Trade Agreement (FTA) in relation to the country's RMG industry. It examines the Sustainable Development Chapter of the FTA and draws upon the EU-Vietnam's Partnership and Cooperation Agreement (PCA). It presents the FTA and PCA as instruments with potential to effectively improve labour rights in the restrictive context of the country's RMG industry.

The research is finalised with a comparative analysis of the case studies and conclusions formed to the overarching research question. This is followed by a presentation of a summary of general conclusions from the critical analysis of the international trade, labour and sustainable development framework underpinning the EU's actions. This thesis shows that the EU does promote labour rights in the RMG industry through trade and sustainable development instruments but needs to take further steps to make this more effective.

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List of Abbreviations

AB	Appellate Body
ASEAN	Association of Southeast Asian Nations
ATC	Agreement on Textiles and Clothing
BGMEA	Bangladesh Garment Manufacturers and Exporters Association
BOI	Board of Investment
CA	Cooperation Agreement
CAP	Corrective Action Plan
CAS	Committee on the Application of Standards
CAT	Convention Against Torture
CCC	Clean Clothes Campaign
CCP	Common Commercial Policy
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFA	Committee on Freedom of Association
CJEU	Court of Justice of the European Union
CLSs	Core Labour Standards
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DAG	Domestic Advisory Group
DCI	Development Cooperation Instrument
DG	Director-General
DSB	Dispute Settlement Body
DWA	Decent Work Agenda
EBA	Everything But Arms
EC	European Communities
EEAS	European External Action Service
EEC	European Economic Community

EIDHR	European Instrument for Democracy and Human Rights
ESC	European Social Charter
EPZ	Export Processing Zone
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GB	Governing Body
GSP	Generalised Scheme of Preferences
GSP+	Generalised Scheme of Preferences Plus
GVC	Global Value Chain
HRIA	Human Rights Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFC	International Finance Corporation
IfSP	Instrument contributing to Stability and Peace
ILC	International Labour Conference
ILO	International Labour Organization
IPA	Investment Protection Agreement
ITO	International Trade Organisation
ITUC	International Trade Union Confederation
JAAF	Joint Apparel Association Forum
LDC	Least Developed Country
LTA	Long-Term Arrangement Regarding Cotton Textiles
LTTE	Liberation Tigers of Tamil Eelam
MDG	Millennium Development Goal
MFA	Multifibre Agreement
MFN	Most-Favoured Nation
MIC	Middle Income Country
MIP	Multiannual Indicative Programme

MNE	Multinational Enterprise
MSs	Member States
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OSH	Occupational Safety and Health
PCA	Partnership and Cooperation Agreement
RBC	Responsible Business Conduct
RMG	Ready-Made Garment
SAARC	South Asian Association for Regional Cooperation
SDC	Sustainable Development Chapter
SDG	Sustainable Development Goal
SIA	Sustainability Impact Assessment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VGCL	Vietnam General Confederation of Labour
WPC	Worker Participation Committee
WTO	World Trade Organisation
WWA	Worker Welfare Association

Chapter 1 Introduction

I. Research Context

The European Union (EU) is a 'normative actor',[1] an international organisation with the competence to set and define standards. It is founded on respect for human rights.[2] Its external action is guided by the 'universality and indivisibility of human rights' and sustainable development,[3] rooted in fundamental rights' obligations in the EU's Charter of Fundamental Rights.[4] Human rights aspire to be the 'silver thread' running through EU external policies.[5] This ambitious mandate induces high expectations as to its responses to human rights' violations in non-EU countries.

The EU's normative role in its external relations was put into the spotlight after the Rana Plaza factory collapse in Bangladesh of April 2013, which killed 1,132 people and injured more than 2,500, mainly workers at the factory.[6] This was the deadliest of a number of disasters in the Ready-Made Garment (RMG) industry.[7] The catastrophe depicted contempt for human life and ranks 'among the most callous in the brutal history of industrialism',[8] an outcome of the pressures of 'fast fashion', characterised by low-cost clothing offering on-trend fashion and typically involving an expanse of little-worn clothing thrown into landfill.[9]

What has become clear after Rana Plaza is that labour rights' violations in the RMG industry are an international issue. The disaster signified a heartfelt cry for help to the multifarious global community

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[1] Ian Manners, 'Normative Power Europe: A Contradiction in Terms' (2002) 40(2) Journal of Common Market Studies 235.
[2] Treaty on European Union (Consolidated version 2016) [2016] OJ C202 ("Treaty on European Union"), Art 2.
[3] Treaty on European Union, Art 2, Art 3(5), Art 21.
[4] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.
[5] Commission, 'Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach' (Communication) COM(2011) 886 final.
[6] ILO, 'The Rana Plaza Accident and its aftermath' <www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm> accessed 27 November 2019.
[7] See Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, 'Introduction' in Yossi Dahan, Hanna Lerner and Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (Cambridge University Press 2016) 2.
[8] Jeremy Seabrook, *The Song of the Shirt* (Hurst & Company 2015) 21.
[9] Annamma Joy and others, 'Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands' (2012) 16(3) Fashion Theory 273.

constituting consumers, brands and retailers, trade unions, employers, international organisations such as the International Labour Organization (ILO) and the EU. The EU's role is particularly important. As the world's most powerful multi-state entity in the arena of international trade, it has great propensity to bring about change in the industry. This endows it with 'global clout' in trade, as the EU is a key exporting destination for RMGs.[10]

Through trade, labour rights can be upheld in the context of sustainable development.[11] EU external trade is governed by its Common Commercial Policy (CCP), an area of exclusive competence under Article 206 and 207 of the Treaty on the Functioning of the European Union (TFEU),[12] meaning that the Member States (MSs) have given the EU institutions the competence to adopt trade instruments and negotiate and conclude trade agreements on their behalf. There is a mandate on the EU to protect and promote human rights (including labour rights) consistently in its external relations by virtue of Article 21 of the Treaty on European Union (TEU).[13] Trade acts in parallel to development cooperation, which is an area of shared competence between the EU and its MSs under Articles 4 and 208 TFEU. It complements labour rights provisions in trade by providing funding to increase a country's capacity to meet them. The effects of the amalgamation of trade and development on labour rights in the RMG industry will be assessed in detail in this research.

South Asian RMG exporting countries are typically engaged in the lower levels of the Global Value Chain (GVC), defined as the

[10] Jan Orbie, 'The European Union's Role in World Trade: Harnessing Globalisation?' in Jan Orbie (ed), *Europe's Global Role: External Policies of the European Union* (Ashgate Publishing 2008) 36; Jan Erik Wetzel, 'Introduction' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 1.
[11] Tamara Takács, 'Human Rights in Trade: The EU's Experience with Labour Standards Conditionality and its Role in Promoting Labour Standards in the WTO' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 112.
[12] Treaty on the Functioning of the European Union (Consolidated Version 2016) [2016] OJ C202 ("TFEU"), Articles 206-207.
[13] Treaty on European Union, Art 21.

organisation and structure of an industry globally.[14] The stage at which a garment is made-up, involving cutting of fabric, sewing, trimming and ironing, is assessed. The RMG industry provides a source of employment in many developing countries and can play an important role in a country's development.[15] It has few barriers to entry,[16] making it the natural choice for countries to industrialise.[17] However, it is exploitative. Common labour rights' violations include physical and verbal abuse, which can be of a sexual nature, and withholding of wages.[18] Collective bargaining rights are frequently violated, and unions can face immense hurdles forming or in exercising union rights. The sparsity of labour rights has resulted in workers, mostly young women, sewing their 'youth and energy' into garments that are worn little and discarded.[19]

The RMG industry is part of globalisation, involving the liberalisation of international trade, the expansion of Foreign Direct Investment (FDI) and the emergence of cross-border financial flows.[20] This has ensured the success of fast fashion at the expense of workers' rights, typically described as a 'race to the bottom' as production is outsourced to low-cost locations to increase competition.[21] This leads to 'social dumping', where exports are competitive because of low labour

[14] John Humphrey and Hubert Schmitz, 'How does Insertion in Global Value Chains Affect Upgrading in Industrial Clusters?' (2002) 36(9) Regional Studies 1017, 1021.
[15] Jane Wills and Angela Hale, 'Threads of Labour in the Global Garment Industry' in Angela Hale and Jane Wills (eds), *Threads of Labour* (Blackwell Publishing 2005) 1.
[16] Umair Hafeez Ghori, 'Rising to the Challenge: Asian Survivors of the Quota Expiry in Global Textiles and Clothing Trade' (2009) 6(2) Manchester Journal of International Economic Law 95, 95.
[17] ibid.
[18] HRW, '"Whoever Raises their Head Suffers the Most" Workers' Rights in Bangladesh's Garment Factories' (2015) <www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment> accessed 27 November 2019.
[19] Seabrook (n 8) 61.
[20] World Commission on the Social Dimension of Globalization, 'A Fair Globalization: Creating Opportunities for All' (ILO 2004) 24 <www.ilo.org/public/english/wcsdg/docs/report.pdf> accessed 27 November 2019.
[21] See Anita Chan and Robert Ross, 'Racing to the Bottom: International Trade without a Social Clause' (2003) 24(6) Third World Quarterly 1011.

standards.[22] Low cost RMG production is the comparative advantage of many developing countries.[23]

At the top of these exploitative RMG GVCs are transnational corporations which deliver and drive consumer's fast fashion demands. They amass power,[24] engaging in complex transnational employment relationships. This pressurises the suppression of labour rights,[25] which should be upheld by governments.[26] As a result, corporations are often seen as the 'culprits'[27] behind disasters such as Rana Plaza and low labour standards within the industry. This provides a challenging context to the EU's pursuit of sustainable development through trade. Globalisation depends upon the policies, rules and institutions that govern its course, the values that underpin its actors like the EU and their capacity to influence the process.[28]

International labour law and international trade law 'co-exist' as opposed to inter-relate,[29] interacting with international human rights law. Concerns over the negative effects of international competition, the need for world peace and concepts of social justice prevailed in the early 20th century, leading to the establishment of the ILO and its legal framework,[30] with an objective to promote social development.[31] The ILO has built this framework with measures including Conventions, Recommendations and Declarations, which are used to address a particular labour right or

[22] Steve Charnovitz, *Trade Law and Global Governance* (Cameron May 2002) 212.
[23] Will Martin and Keith Maskus, 'Core Labor Standards and Competitiveness: Implications for Global Trade Policy' (2001) 9(2) Review of International Economics 317, 317-318.
[24] Miriam Ronzoni, 'Global Labour Injustice: A Critical Overview' in Yossi Dahan, Hanna Lerner and Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (Cambridge University Press 2016) 39.
[25] ibid 38.
[26] Chan and Ross (n 21) 1012.
[27] Aseem Prakash, 'Government Corruption Leads to Industrial Accidents, not Global Brands' (Open Democracy 29 May 2013) <www.opendemocracy.net/aseem-prakash/government-corruption-leads-to-industrial-accidents-not-global-brands> accessed 27 November 2019.
[28] World Commission on the Social Dimension of Globalization (n 20) 2.
[29] See Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing 2015).
[30] Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn, Kluwer Law and Taxation Publishers 1995) 17-25.
[31] ibid 27-28.

topic of concern and require promotion and protection by ILO members, including all EU MSs.

In 1998, the ILO brought a select number of these rights to the fore in the Declaration on Fundamental Principles and Rights at Work.[32] This commits ILO members to respect, promote and realise the principles concerning the fundamental rights of four categories: freedom of association and collective bargaining, forced or compulsory labour, child labour, and discrimination. These are 'Core Labour Standards' (CLSs). The Declaration has been hailed as promoting a concept of labour standards more 'palatable' to governments and employers, yet has attracted criticism as it queries the relationship between the ILO Conventions and the CLSs and the distinction between rights and principles.[33] CLSs are now regarded as 'human rights'.[34] The recognition of other labour rights as human rights is still in progress.[35]

International trade law is functionally separate to international labour law. The World Trade Organisation (WTO), established in 1994, replaced and broadened the General Agreement on Tariffs and Trade (GATT 1947) governing world trade.[36] After its establishment, there were attempts to combine labour rights and trade at WTO level by a social clause that would set a standard of protection. These were unsuccessful, influenced by concerns of developing countries who feared losing their comparative advantage to attempts by developed countries to dominate markets.[37] It was stressed that the body competent for dealing with labour standards was not the WTO but the ILO.[38] Nevertheless, on a

[32] International Labour Conference (86th Session) Declaration on Fundamental Principles and Rights at Work and its Follow-up (Geneva 18 June 1998).
[33] Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15(3) European Journal of International Law 457.
[34] Bob Hepple, *Labour Laws and Global Trade* (Hart Publishing 2005) 23.
[35] See Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005).
[36] See Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice and Policy* (Oxford University Press 2015) Chapter 1.
[37] Chan and Ross (n 21) 1011.
[38] Commission, 'Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation' (Communication) COM(2001) 416 final, 3.

bilateral and unilateral level linking the two is common and has been developed on a piecemeal basis globally, particularly by the EU.[39]

The importance of linking trade and labour rights has been highlighted by the global movement for sustainable development, defined by the United Nations (UN) as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[40] It has come to the fore in the Sustainable Development Goals (SDGs).[41] SDG 8 commits to creating 'conditions for sustainable, inclusive and sustained economic growth, shared prosperity and *decent work* for all, taking into account different levels of national development and capacities'.[42] Decent work is characterised by work opportunities that are productive and deliver, inter alia, 'a fair income, security in the workplace and social protection for families', a core objective of the ILO.[43] It is regarded as the 'cornerstone' of sustainable development.[44] It enables progress towards the elimination of modern slavery, an end to hunger, poverty and gender inequality. Labour rights available in law and practice indicate the level of decent work in a country.[45]

Decent work is a mandate for EU trade. The EU asserts itself as the 'frontrunner' in efforts to make trade work for sustainable development,[46] and believes that respect for social rights and labour

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[39] De Schutter (n 29).
[40] UN, 'The Sustainable Development Agenda' <www.un.org/sustainabledevelopment/development-agenda/> accessed 27 November 2019.
[41] UNGA Transforming Our World: The 2030 Agenda for Sustainable Development (21 October 2015) UN Doc A/RES/70/1.
[42] ibid.
[43] ILO, 'Decent Work' <www.ilo.org/global/topics/decent-work/lang--en/index.htm> accessed 27 November 2019.
[44] UN, 'Experts at UN see Decent Work as the Cornerstone of Sustainable Development' <www.un.org/sustainabledevelopment/blog/2015/04/experts-at-un-see-decent-work-as-the-cornerstone-of-sustainable-development/> accessed 27 November 2019.
[45] See ILO, 'Measurement of decent work based on guidance received at the Tripartite Meeting of Experts on the Measurement of Decent Work' (2008) <www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/meetingdocument/wcms_115402.pdf> accessed 27 November 2019.
[46] Commission, 'Ending Poverty and Giving the World a Sustainable Future' (Communication) COM(2013) 92 final, 17.

standards will lead to durable and equitable development.[47] Trade is 'in the service of sustainable development'.[48] Through this, the EU tackles critique that social and economic development is subordinate to trade liberalisation.[49] It employs several tools which can utilise conditional or promotional elements, bilateral or unilateral, sanction or incentive-based, dialogue or cooperation-based, or a mix of all these elements.[50]

The EU's unilateral trade scheme with developing countries, the Generalised Scheme of Preferences (GSP),[51] has been in place for decades. It stems from moves in the 1960s and 1970s to improve the position of developing countries in the global economy and foster their economic development.[52] This led to the adoption of the GATT's 'Enabling Clause' in 1979 that permits the grant of tariff preferences to developing countries,[53] a special form of trade treatment. The EU's GSP takes three forms. First, the standard GSP which grants tariff preferences to developing countries. Second, the GSP Plus (GSP+) which grants more favourable tariff preferences upon a trade partner's compliance with certain labour, environmental and governance standards contained in a list of conventions.[54] This is positive conditionality. Third, the GSP 'Everything But Arms' (EBA) arrangement which is provided to UN classified Least Developed Countries (LDCs) giving them duty-free and quota-free access to the EU market for all exports except arms. The number of GSP beneficiaries reduces as they develop. As of January 2019, there were 48 GSP EBA beneficiaries, 15 standard GSP

[47] Commission, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries' (Communication) COM(2001) 252 final, 8.
[48] See De Schutter (n 29).
[49] Orbie, 'Harnessing Globalisation' (n 10) 62.
[50] Franz C. Ebert and Anne Posthuma, 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives' (ILO 2011) 4 <www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf> accessed 27 November 2019.
[51] 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 ("GSP Regulation").
[52] De Schutter (n 29) 102.
[53] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (28 November 1979) BISD 265/203 ("Enabling Clause").
[54] GSP Regulation, Chapter III.

beneficiaries and eight GSP+ beneficiaries.[55] All forms of GSP can be revoked if certain conditions are breached, including standards in ILO Conventions. This is negative conditionality.

Conditionality is a contentious method of linking trade to sustainable development, as will be shown in the case studies of Bangladesh and Sri Lanka in this thesis. It is easier to impose conditions, as the GSP is unilaterally granted.[56] This research will examine the use of negative conditionality and consider the reasons why it has been rarely enacted. It also demonstrates that withdrawal generally occurs due to political disengagement.[57] At the other end is positive conditionality under the GSP+, the 'flagship EU trade policy instrument'.[58] This is less contentious because countries must apply to become a beneficiary. In theory, positive conditionality should lead to bolstered human rights protection. The case study of Sri Lanka will assess whether the GSP+ has worked to this effect in practice. Implementation of GSP+ conditions to a satisfactory level is questionable, even with monitoring utilising reports of international organisations.[59]

This research looks at EU trade and sustainable development instruments beyond conventional trade tools. The EU can be creative in adapting trade policy to specific country contexts. In response to the Rana Plaza disaster, the EU concluded the Bangladesh Sustainability Compact ("the Bangladesh Compact"), bringing together multiple actors including the ILO, Canada, Bangladesh, the U.S., trade unions and employers.[60] It set out a number of commitments made on the part of the

[55] Commission, 'List of GSP beneficiary countries' (2019) <trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157889.pdf> accessed 27 November 2019.
[56] Päivi Leino, 'European Universalism? The EU and Human Rights Conditionality' (2005) 24 Yearbook of European Law 330, 352-353.
[57] See Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 42-43.
[58] Commission, 'Trade, Growth and Development: Tailoring Trade and Investment Policy for those Countries in Need' (Communication) COM(2012) 22 final, 13.
[59] Jan Orbie and Lisa Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 European Foreign Affairs Review 663, 664.
[60] EU and others, 'Staying Engaged: A Sustainability Compact for Continuous Improvement in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh' (July 2013) ("Sustainability Compact") available in: Manpreet Ark and others, 'The Integration of EU development, trade and human rights

EU and Bangladesh to be fulfilled, centralising dialogue and cooperation. Research in this thesis will analyse the Compact's role in promoting labour rights in the RMG industry in combination with GSP EBA and ILO leverage, in order to identify whether it has been effective.

Contrary to the GSP, bilateral instruments are an outcome of negotiation with trade partners. Trade agreements are significant for the EU, especially where South Asian trading partners are involved owing to the importance of South Asian exports for the EU, including RMGs. Bilateralism is more practical than multilateralism, at WTO level, and unilateralism, as a strategy for trade and sustainable development for several reasons. First, and foremost, it enables the EU to orientate itself around the deadlock at the WTO. Secondly, labour rights within the instruments are country-specific and there are clear institutional mechanisms for monitoring and enforcement.[61] EU trade tools cannot be 'one-size fits all'. Thirdly, owing to their bilateral nature, the EU's trade partners commit to respecting labour rights as contained within an agreement.[62] In theory, it is a partnership as opposed to a unilateral imposition of labour standards.

There has been a steep rise in the number of trade agreements globally that contain labour provisions in the past 20 years, the substance of which differs.[63] Traditionally, human rights were epitomised within trade agreements by an essential elements' clause. This stated that respect for human rights form an 'essential element' of the agreement in question,[64] and was occasionally coupled with a clause allowing the EU to take 'appropriate measures' where human rights are violated, representing a sanction-based form of trade instrument. The focus of these clauses is human rights, not sustainable development.

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policies' (FRAME Deliverable 9.4) Annex 5 <www.fp7-frame.eu/wp-content/uploads/2017/03/Deliverable-9.4.pdf> accessed 27 November 2019 ("FRAME Report 9.4").

[61] Takács, (n 11) 111.

[62] Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003) 350.

[63] Ebert and Posthuma (n 50) 7.

[64] Commission, 'The Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries' (Communication) COM(95) 216 final.

The EU has adopted 'new generation' Free Trade Agreements (FTAs) that are comprehensive and ambitious in coverage in comparison to their predecessors as a result of its 2006 Global Europe Strategy.[65] They contain 'Sustainable Development Chapters' (SDCs).[66] SDCs include commitments to uphold ILO Conventions and/or the 1998 ILO Declaration and dialogue.[67] A further innovative layer is their connection to EU Partnership and Cooperation Agreements (PCAs) which are often concluded prior to the entry into force of an FTA. These add more sustainable development conditions and can include an extra route of enforcement, as seen in the prospective EU-Vietnam FTA analysed in this thesis.

This thesis draws upon the international context of the fragmentation of international trade, development, and labour law, in the context of the pressures of fast fashion and the expectation of responsible business conduct (RBC), to critically examine the EU's policies in trade, development and human rights.

II. Research Questions

This thesis evaluates the EU's trade and sustainable development instruments in three South Asian country case studies: Bangladesh, Sri Lanka and Vietnam. These countries are selected because of their RMG production, reliance on EU trade instruments, development status and the proportion of RMG exports destined for the EU. The overarching research question for the thesis is:

> To what extent do EU trade and sustainable development instruments effectively promote labour rights in the RMG industry of South Asia?

[65] Commission, 'Global Europe: Competing in the World: A Contribution to the EU's Growth and Jobs Strategy' (Communication) COM(2006) 567 final, 9.
[66] Commission, 'Trade, Growth and Development' (n 58) 13.
[67] Laura Beke and others, 'The Integration of Human Rights in EU Development and Trade Policies' (FRAME Deliverable 9.1 2014) 75 <www.fp7-frame.eu/wp-content/uploads/2016/08/07-Deliverable-9.1.pdf> accessed 27 November 2019 ("FRAME Report 9.1").

A. Bangladesh

Bangladesh is a UN-classified LDC.[68] It ranks third as a top exporter of clothing globally.[69] The EU is its largest export destination, receiving 48.7% of Bangladesh's exports, 91.9% of which consist of clothing, in 2018.[70] The EU grants Bangladesh the GSP EBA. The RMG industry has been under global scrutiny since the Rana Plaza disaster, and labour rights violations have been consistently highlighted in ILO monitoring, escalating into a 'special paragraph'[71] adopted in 2016.

After Rana Plaza, the EU opted for 'deep engagement', adopting, in partnership with the ILO, the Bangladesh Compact. This represents a new form of EU trade policy and integrates multiple actors, including local civil society. Through it, the EU's role in relationship with the ILO was to support labour rights' in the RMG industry, including through funding. Within the framework of the overarching research question, the case study in this thesis seeks to answer the following questions:

1. To what extent does the threat of negative conditionality in the GSP EBA promote decent work in Bangladesh's RMG industry?
2. To what extent has the Bangladesh Compact effectively promoted decent work in the RMG industry in partnership with the ILO?

B. Sri Lanka

Sri Lanka is a lower Middle-Income Country (MIC).[72] It is a key exporter of RMGs and the EU is its largest export destination constituting 30.1%

[68] UN, 'List of Least Developed Countries (as of December 2018)' (2018) <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf> accessed 27 November 2019.
[69] WTO, 'World Trade Statistical Review 2018' (2018) 167 <www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf> accessed 27 November 2019.
[70] Commission, 'Trade in goods with Bangladesh' (2019) 4 and 8 <webgate.ec.europa.eu/isdb_results/factsheets/country/details_bangladesh_en.pdf> accessed 27 November 2019.
[71] An ILO special paragraph is a form of condemnation by the ILO, highlighting severe cases of labour rights violations. See Chapter Two.
[72] The World Bank, 'Sri Lanka Development Update' (2019) <openknowledge.worldbank.org/bitstream/handle/10986/31261/SLDU-Feb2019.pdf?sequence=3&isAllowed=y> accessed 27 November 2019. accessed 30 May 2019.

of its exports.[73] 58.2% of EU imports from Sri Lanka consist of clothing.[74] Sri Lanka is a GSP+ beneficiary, it has ratified and implemented the required 27 conventions. The EU withdrew the GSP+ in 2010 due to human rights violations that occurred during its civil war.[75] In 2017, Sri Lanka was re-granted the GSP+ coinciding with a change in government.

This research assesses the factors that led to GSP+ withdrawal and the role of the RMG industry. In turn, the research sheds light on the operation of the GSP+ and the enhanced engagement propelled forwards by the EU. This case study provides a detailed picture of the effects of negative and positive conditionality. Within the framework of the overarching research question, the case study in this thesis seeks to answer the following questions:

1. To what extent has the EU's strategy of GSP+ withdrawal affected decent work in the RMG industry of Sri Lanka?
2. To what extent has the re-granting of the GSP+ effectively promoted decent work in the RMG industry of Sri Lanka?

C. Vietnam

Vietnam is a lower MIC.[76] It ranks fourth as a top exporter of clothing globally.[77] The EU is its second largest export destination, after the U.S, with 17.6% of exports, 9.2% of which comprise clothing in 2018.[78] Vietnam is transitioning from the EU's standard GSP to a new generation FTA. This is a route that several countries will take as they graduate from the GSP and move to higher MIC status. The text of the EU-Vietnam FTA was signed in June 2019 but has not entered into force.[79] The negotiation

[73] Commission, 'European Union, Trade in goods with Sri Lanka' (2019) 4 and 8 <webgate.ec.europa.eu/isdb_results/factsheets/country/details_sri-lanka_en.pdf> accessed 27 November 2019.
[74] ibid.
[75] Regulation (EU) 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka [2010] OJ L45/1.
[76] The World Bank, 'Vietnam' <data.worldbank.org/country/vietnam> accessed 27 November 2019.
[77] WTO (n 69) 167.
[78] Commission, 'European Union, Trade in goods with Vietnam' (2019) 4, 8 <webgate.ec.europa.eu/isdb_results/factsheets/country/details_vietnam_en.pdf> accessed 27 November 2019.
[79] Commission, 'Vietnam' <ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/index_en.htm> accessed 27 November 2019.

process led to the conclusion of the 2016 EU-Vietnam PCA.[80] The SDC depicts the EU's push for sustainable development, incorporating decent work and ILO standards and institutions for monitoring and enforcement. Within the framework of the overarching research question, this thesis analyses the FTA and PCA and seeks to answer the following questions:

1. To what extent does the PCA support the promotion of decent work and link to the FTA in Vietnam?
2. What is the potential for the practical application of the FTA's SDC to effectively promote labour rights in the RMG industry?

III. Literature Review

The literature surrounding this research topic, which touches upon the RMG industry, RBC, international and national labour law, sustainable development, EU law and trade law, is vast. This section aims to highlight a selection of academic work and briefly demonstrate the gap that it fills. A full bibliography is given in the Annex.

As expanded upon in the section below on theoretical perspectives, the thesis is based on the theory of EU normativity progressed by Manners.[81] The essence of this concept is that the EU has an obligation to set and define certain standards globally. This normativity is slotted within a wider international framework of trade and labour law.[82] A wealth of literature is used to assess this framework, namely concerning the WTO, ILO and SDGs.[83] Dahan, Lerner and

[80] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part [2016] OJ L 329/8.
[81] Manners, 'Normative Power Europe' (n 1).
[82] Literature on norms include Naila Maier-Knapp, 'The European Union as a Normative Actor and its External Relations with Southeast Asia' (2014) 10(2) Journal of Contemporary European Research 221; Ian Manners, 'The normative ethics of the European Union' (2008) 84(1) International Affairs 45; Ian Manners, 'The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective' (2009) 14(5) European Foreign Affairs Review 785; Päivi Leino, 'The Journal Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008).
[83] For example Steve Charnovitz, *Trade Law and Global Governance* (Cameron May 2002); Kent Jones, *Reconstructing the World Trade Organisation for the 21st Century* (Oxford University Press 2015); Francis Maupain, *The Future of the International Labour Organisation in the Global Economy* (Hart Publishing 2013); Jeffrey D.Sachs, *The Age of Sustainable Development* (Columbia University Press 2015); Alston, 'Core Labour Standards' (n 33).

Milman-Sivan place international labour law within a sphere of justice, including with regard to RBC.[84] Academic critique of these fields and the relationship between them varies from Alston's review of the ILO's core labour standards to ideas about integrating trade and labour law from Bartels.[85] Further literature provides an analysis of the UN SDGs, including an assessment of the affiliation of sustainable development with human rights.[86]

An array of literature paints a contextual picture of labour rights in the RMG industry in the case studies and the wider South Asian context.[87] Seabrook provides a journalistic narrative of industrial disasters, deprivation of living standards and labour rights in Bangladesh's garment industry.[88] Wills and Hale contribute an in-depth analysis of the garment industry within the context of globalisation.[89]

Literature discusses EU trade and development policies, relevant for assessment of the EU's GSP in operation in Bangladesh and Sri Lanka and the prospective EU-Vietnam FTA.[90] The EU's GSP has

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[84] See Yossi Dahan, Hanna Lerner and Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (Cambridge University Press 2016)

[85] Literature includes Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) Journal of World Trade 353; Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999); Bartels (n 57).

[86] Dominic McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception' (1996) 45(4) International and Comparative Law Quarterly 796; Luis Camacho, 'Sustainable Development Goals: kinds, connections and expectations' (2015) 11(1) Journal of Global Ethics 18.

[87] For example: Lucy Siegle, *To Die For: Is Fashion Wearing Out the World?* (Fourth Estate 2011); Jane Wills and Angela Hale (eds), *Threads of Labour* (Blackwell Publishing 2005); Joy and others (n 9); Caitrin Lynch, 'The Politics of White Women's Underwear in Sri Lanka's Open Economy' (2002) 9(1) Social Politics: International Studies in Gender, State and Society 87; ActionAid, 'Stitching a better future: Is Vietnam's boom in garment manufacturing good for women?' (2017) <www.actionaid.org.uk/sites/default/files/publications/stitching_a_better_future.pdf> accessed 27 November 2019; CCC, 'Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry' (2017) <cleanclothes.org/resources/publications/follow-the-thread-the-need-for-supply-chain-transparency-in-the-garment-and-footwear-industry/view> accessed 27 November 2019.

[88] Seabrook (n 8).

[89] Hale and Wills (n 87).

[90] Country-specific literature includes Ashani Abayasekara, 'GSP+ Removal and the Apparel Industry in Sri Lanka: Implications and Way Forward' (2013) 14(2) South Asia Economic Journal 293; Lisa Clay, 'The Effectiveness of the Worker Rights Provisions of the Generalised System of Preferences: The Bangladesh Case Study' (2001) 11 Transnational Law and Contemporary Problems 175; Ha Hai Hoang, 'Normative

attracted considerable attention in relation to its conditionality approach to human rights. Orbie highlights how the limited use of the clause has hindered its effectiveness,[91] whereas Hepple describes it as 'soft unilateralism'.[92] De Schutter slots the GSP into the 'service of sustainable development', discussing the forms of GSP, and GSP+ withdrawal from Sri Lanka.[93] Fierro assesses the EU's approach to human rights conditionality in practice, providing a doctrinal and socio-legal analysis of many forms of EU conditionality not limited to the GSP.[94] Other authors, including Novitz and Kenner, talk of the issue of double standards, asking for certain standards to be complied with by non-EU countries where EU MSs have their own deficiencies.[95]

Moreover, the EU's GSP has been assessed from the perspective of its connection to ILO standards. Orbie, Vos and Tavernier's research reveals a process of 'ILO-isation' characterised by shifts towards soft governance in line with the ILO's approach to labour standards.[96] Orbie and Portela depict a level of coherence between ILO and EU actions and decisions.[97] Novitz analyses the connection between ILO and EU

Power Europe through trade: Vietnamese perceptions' (2016) 30(2) International Relations 176; Democracy Reporting International, 'GSP+ and Sri Lanka' (2016) <democracy-reporting.org/wp-content/uploads/2016/06/GSP-and-Sri-Lanka_ENG-1.pdf> accessed 27 November 2019; Grumiller J and others, 'The economic and social effects of the EU Free Trade Agreement with Vietnam' (2018) 8/2018 OFSE Research Report <www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/8_Vietnam_Study.pdf> accessed 27 November 2019; HRW, 'Bangladesh: Stop Persecuting Unions, Garment Workers' (2017) <www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers> accessed 27 November 2019.

[91] Orbie, 'Harnessing Globalisation?' (n 10) 60.

[92] Hepple (n 34) 103.

[93] De Schutter (n 29).

[94] Fierro (n 62).

[95] Tonia Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO' in Philip Alston (eds), *Labour Rights as Human Rights* (Oxford University Press 2005); Jeff Kenner, 'The Remodeled European Community GSP+: A positive response to the WTO ruling?' in Bermann GA and Mavroidis PC (eds), WTO Law and Developing Countries (Cambridge University Press 2007).

[96] Jan Orbie, Hendrik Vos and Liesbeth Taverniers, 'EU Trade Policy and a Social Clause: A Question of Competences?' (2005) 17 Politique Europeénne 159, para 25.

[97] Jan Orbie and Claire Portela, 'Sanctions under the EU Generalised System of Preferences and Foreign Policy: Coherence by Accident?' (2014) 20(1) Contemporary Politics 63.

approaches to GSP monitoring of labour standards.[98] Brandtner and Rosas argue that conditionality should not be used lightly, discussing the potential impact of trade withdrawal and the greater likelihood of suspension if the trade measure has been granted unilaterally.[99] These are considerations reflected in the country studies.

This author contributed to an in-depth report on the Bangladesh Compact for the EU's multi-institutional project on Fostering Human Rights Among European Policies (FRAME) 2013-17.[100] This report used Bangladesh as a case study to analyse EU trade and development policies in the country's RMG industry. It made recommendations for best practice and highlighted the effectiveness of initiatives like the ILO's Better Work Programme. Following this report, an article by this author and Kenner has depicted the Compact as a form of global experimentalist EU governance, reflecting research on the Compact's nature as a facilitator of bottom-up governance including trade unions, and the prospective effectiveness of this approach.[101] This author and Kenner have also addressed the issue of modern slavery and the RMG industry in Bangladesh, within the context of the EU's external relations.[102]

The EU's new generation FTAs and its approach to labour rights in trade agreements have attracted a wide range of research.[103] Van den

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[98] Tonia Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO' in Philip Alston (eds), *Labour Rights as Human Rights* (Oxford University Press 2005).
[99] Barbara Brandtner and Allan Rosas, 'Trade Preferences and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999).
[100] FRAME Report 9.4.
[101] Jeff Kenner and Katrina Peake, 'The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?' (2017) 19 Cambridge Yearbook of European Legal Studies 86
[102] Katrina Peake and Jeff Kenner, ''Slaves to Fashion' in Bangladesh and the EU: Promoting Decent Work' (2020) European Labour Law Journal (*In Press*).
[103] Including Billy Melo Araujo, 'Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality' (2018) International and Comparative Law Quarterly 233; James Harrison and others, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's trade and sustainable development chapters' [2018] Journal of Common Market Studies 1; James Harrison and others, 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda' [2018] World Trade Review 1; Ha Hai Hoang and Daniela Sicurelli, 'The EU's Preferential Trade Agreements with Singapore and Vietnam. Market vs Normative Imperatives' (2017) 23(4) Contemporary Politics 369.

Putte and Orbie have researched civil society mechanisms in these FTAs and the rise of labour rights provisions within them.[104] EU engagement with civil society is assessed in a book chapter co-authored by this author with Kenner and Wallace, looking at the instruments of engagement and difficulties of dialogue.[105] Campling and others assess the EU's FTAs, discussing the potential and limits of the SDCs.[106] Fierro portrays the EU's approach to conditionality as ambiguous and without coherency and certainty.[107] Much of the literature is prospective or assesses FTAs already in force.

The literature introduced so far does not, excepting the FRAME report and its related article, assess the effectiveness of the EU trade and sustainable development instruments in promoting labour rights in the South Asian RMG industry. This is particularly so given the lack of qualitative research as a method to address this issue, which will shed greater light on EU trade and labour rights and ensure a more accurate assessment is undertaken of their effects. This thesis is intended to fill a gap in the literature and offer a new perspective on the EU's ability to promote labour rights through its trade and sustainable development instruments with a focus on the RMG industries of the EU's trade partners and beneficiaries in South Asia.

IV. Methodology

A. Theoretical Perspectives

The foundation to the thesis is the EU's role as a 'normative', cosmopolitan actor.[108] The main tenets of cosmopolitanism are

[104] Lore Van den Putte and Jan Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) 31(3) The International Journal of Comparative Labour Law and Industrial Relations 263; Jan Orbie and others, 'Promoting sustainable development or legitimising free trade? Civil society mechanisms in EU trade agreements' (2016) 1(4) Third World Thematics: A TWQ Journal 526.
[105] Jeff Kenner, Katrina Peake and Stuart Wallace, 'The EU's Engagement with Civil Society' in Jan Wouters and others (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020) (in press).
[106] Liam Campling and others, 'Can Labour Provisions Work beyond the Border: Evaluating the Effects of EU Free Trade Agreements' (2016) 155 International Labour Review 357.
[107] Fierro (n 62).
[108] Manners, 'Normative Power Europe' (n 1).

individualism, egalitarianism and universalism.[109] It stems from the Kantian theory in which international law is connected with domestic justice.[110] The predominant concept is that the individual is the relevant unit of moral worth which should be applied to all human beings equally and universally.[111]

Cosmopolitanism thus imagines a world order where human rights constitute a basic principle of justice and mechanisms of global governance are established for their protection.[112] As a result, this theory is described as a normative and idealistic one as opposed to a realistic one.[113] As the EU acts to uphold the universality and indivisibility of human rights and fundamental freedoms in its external relations as stipulated within the treaties,[114] it is in turn seeking ways of applying cosmopolitan values. Thus, it has been labelled a cosmopolitan polity.[115] The subjection of EU law to international labour law, and the inclusion of international labour law within EU external instruments such as trade agreements further draws upon the nature of the EU's normativity.[116] Normativity in this sense becomes the lifeblood to the EU's external relations.

Normativity also relates to the methods deployed by the EU to carry out its external agenda. It utilises governance methods that differ from the norm in order to adapt to pressures such as democratic legitimacy. Theories of 'new governance'[117] and 'experimentalist

[109] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 46.
[110] See Fernando R.Tesón, 'The Kantian Theory of International Law' (1992) 92(1) Columbia Law Review 53.
[111] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 46.
[112] Robert Fine, 'Cosmopolitanism and Human Rights' (2007) 1 Law, Social Justice & Global Development Journal, 3.
[113] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 47.
[114] Article 21 TEU.
[115] Erik Oddvar Eriksen, 'The EU – A Cosmopolitan Polity?' (2006) 13(2) Journal of European Public Policy 252, 252.
[116] ibid 261.
[117] Gráinne de Búrca and Joanna Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 2.

governance'[118] are increasingly commonplace within EU external relations, with the advantages of including civil society within policymaking processes, monitoring and revision of goals. Experimentalist 'spillover' follows naturally from the inclusion of tenets of experimentalist governance within EU external relations.[119] This maps a 'bottom-up' agenda for the EU, as opposed to its traditional 'top-down' approach to governance. It is the approach adopted by the trade and sustainable development instruments examined in this thesis, such as new generation FTAs, the GSP+ and the Bangladesh Compact.

B. Doctrinal Research

Doctrinal research, the focus on the law underpinning the thesis, forms the traditional element to this thesis. It enables the identification, analysis and synthesis of the content of the primary and secondary law relevant to the thesis,[120] and relevant commentary and analysis of the law.[121] In this thesis, EU primary law, Treaty provisions relevant to human rights, trade and development cooperation are identified and analysed with reference to the EU's normativity. The text of the EU-Vietnam FTA, the Bangladesh Compact, the GSP instruments and Cooperation Agreements (CAs) are core features. EU policy documents, such as Commission Communications, are assessed, as they form important pointers for the EU's approach to trade, labour rights and sustainable development. Relevant ILO instruments and guidance, WTO law and the UN SDGs form central features of the research.

A pure doctrinal method would be limiting for the thesis and hinder the identification of the practical effectiveness of the EU trade and sustainable development instruments under analysis. Doctrinal researchers are criticised for analysing laws in isolation from practice and

[118] Jeff Kenner and Katrina Peake, 'The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?' (2017) 19 Cambridge Yearbook of European Legal Studies 86.
[119] Ibid.
[120] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9.
[121] ibid 13.

from the theories underlying them.[122] As such, the thesis takes a broader outlook.

C. Socio-Legal Research/Law in Context

The thesis expands into a method based on the law in context and socio-legal research. It takes a broad definition of what constitutes 'socio-legal research'. The term 'socio' encompasses the law in context and 'law in action', allowing it to embrace a range of contexts that relate to the operation of law.[123] The law in context approach is imperative for analysing effects. It brings into account both international and national contexts, ranging from the RMG GVC to factors relevant to country case studies, such as the political agenda of governments or social, cultural and economic factors impacting on the ability of trade unions to organise within the RMG industry.[124] It reveals how the EU's normativity can take an international role, with transnational effects.

There is a separation that has been made between the 'law in books', those which purport to govern the relations of man and the 'law in action', rules that in fact govern them.[125] The law in context approach enables a linkage between the two, and when analysing effect, it is the degree of similarity between them that may lead to the conclusion that 'law in books' is effective in practice.[126] This thesis touches upon gaps between these two in assessing the operation of the trade instruments in improving labour rights in the RMG industry.

D. Empirical Research

Empirical research in the form of interviews was conducted for this thesis. 21 interviews were conducted in total. Research participants included

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[122] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for what kind of Discipline? In Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for what Kind of Discipline?* (Hart Publishing 2013) 3.
[123] Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013).
[124] See Brian Langille, 'Seeking Post-Seattle Clarity-and Inspiration' in Joanne Conaghan, Richard Michael Fischl and Karl Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2002) 139.
[125] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44(1) American Law Review 12, 15.
[126] See David A Harris, '"Driving While Black" and all other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops' (1997) 87 Journal of Criminal Law and Criminology 544.

NGOs, trade unions, businesses, and officials of governments, ILO and EU officials. These interviews were undertaken during the author's placements as a Visiting Scholar in the Bangladesh and Sri Lanka country offices of the ILO utilising research funding provided by the Midlands4Cities Doctoral Training Partnership.[127]

Interviews were selected as they provide access to others' first hand experiences and perceptions of EU trade and sustainable development instruments.[128] They are deemed 'extremely effective at garnering data on individuals' perceptions or views and on the reasoning underlying the responses'.[129] Such high-quality empirical research not only informs policy makers, but also furthers the understanding of the role of law and legal institutions.[130] Empirical research ensures individuality within the thesis and new insights are made concerning EU trade and sustainable development to benefit legal scholarship.

Ethical considerations pervade every stage of research, from conception to evaluation,[131] but particularly when conducting empirical research. In order to undertake interviews, the University's ethics code was complied with and ethical approval given.[132] Ethics provides protection for interviewees; key principles of respect for autonomy, non-maleficence and beneficence must be complied with.[133] Emails were sent to research participants, including an information sheet and a consent form, in some instances the recording of the interview was sent securely. For interviews conducted after the EU General Data Protection Regulation was introduced, additional statements were included. Participants were offered the chance to view the transcript. For some,

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[127] Research funding was obtained from the Midlands3Cities Student Development Fund.
[128] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M.Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 936.
[129] ibid 937.
[130] Paddy Hillyard, 'Law's Empire: Socio-Legal Empirical Research in the Twenty-First Century' (2007) 34(2) Journal of Law and Society 266, 279.
[131] Andrew Boon, 'The Formalisation of Research Ethics' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 307.
[132] See The University of Nottingham, 'Code of Research Conduct and Research Ethics' (Version 6, April 2016).
[133] Boon (n 131) 302.

the relevant chapter was sent in advance. All research participants opted for anonymity, which has resulted in participants being referenced by numbers.

There were limitations to undertaking interviews. Access formed a difficult obstacle at first and was obtained in Bangladesh once the author had been selected for a position as a Visiting Scholar with the ILO which then assisted with obtaining a similar placement with the ILO in Sri Lanka. This involved the delivery of seminars to ILO staff, a guide to trade and labour rights for the ILO team in Bangladesh and research on the informal economy for the ILO in Sri Lanka. There were some language barriers and a translator was used on one occasion. There were time constraints and difficulties obtaining some interviews owing to the perceived sensitivity of the research topic. Interviews were not conducted in Vietnam as this case study is a prospective one.

E. Comparative Law

The comparative law technique is used to answer the overarching research question. Comparative law involves law as an object, and comparison as a process.[134] Comparative law provides 'new methods of thought, new systematic concepts, new methods of posing questions'.[135] It also allows for the identification of ways to unify laws and so improve their effectiveness.[136] The role of a comparative international lawyer is distinct from traditional comparative lawyers,[137] as they are analysing 'the complex patchwork of sub-fields of international and EU law'[138] as opposed to merely domestic law.

This thesis will take a predominantly functional comparative law approach that focuses on the relevant case study trade instruments and the extent to which they can be considered effective in promoting labour

[134] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 2.
[135] ibid 46.
[136] Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 402.
[137] Boris N Mamlyuk and Ugo Mattei, 'Comparative International Law' (2011) 36(2) Brooklyn Journal of International Law 385, 393.
[138] ibid 420.

rights in implementation.[139] Comparison occurs throughout the case studies and in the conclusion.

V. Structure

The thesis substantively commences with a discussion, in Chapter Two, of the relevant international-level norms, bodies and rules that govern international trade and the promotion of decent work worldwide. Chapter Three addresses EU trade and sustainable development policies and instruments, uncovering and analysing, from a general perspective, the forms of GSP and the new generation FTA. This gives the backdrop to the subsequent chapters. Chapter Four provides an assessment of the RMG industry in South Asia, outlining its development, the challenges and opportunities faced by the industry particularly where it has been impacted by international trade law, and common labour rights violations.

Chapters Five, Six and Seven are the country studies. They are ordered as follows: firstly, the case study of Bangladesh, involving the GSP EBA and the Bangladesh Compact as a unique approach to conditionality and deep engagement; secondly, Sri Lanka and negative and positive conditionality of the EU's GSP+; thirdly, Vietnam and the prospective new generation FTA with the development-oriented PCA. Chapter Five, on Bangladesh, reflects on the deep engagement used to create what this research terms a 'bridge' between trade and sustainable development in the Compact. Here, interview data is used to answer the research question. Chapter Six, on Sri Lanka uses interview data to assess the operation of GSP+'s positive and negative conditionality on labour rights. It sheds light on the receipt of positive conditionality by unions and employers, discussing the expectation of benefits from the GSP+ to workers, such as higher wages in factories. Chapter Seven, on Vietnam, paints a different picture on the promotion of labour rights to that of Bangladesh and Sri Lanka, the focus being a bilateral instrument following the EU's 2006 global Europe strategy. The EU-Vietnam FTA is not yet in force (as of November 2019) but the final text has been signed.

[139] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 342.

The SDC of the FTA is premised on decent work and bolstered by a connection to the PCA, adding not just another layer to enforcement but prospects of deeper engagement on issues like RBC and gender equality in the RMG industry.

The conclusion brings together these country case studies in the light of the prior contextual chapters, discussing relevant themes and contrasting EU approaches and effects of these on the effective promotion of labour rights in the RMG industry. It shows that the EU adapts trade and development policy to country context, not operating negative conditionality needlessly and avoiding significant negative impacts on economic and social development. It reflects upon the EU's engagement in dialogue and cooperation, especially with civil society. The research contrasts the use of conditionality in the GSP schemes to the new generation FTA, drawing upon points of improvements in labour rights and best practice from the country studies.

Chapter 2 The EU, Trade and Sustainable Development within the International System

I. Introduction

The global framework in which EU trade and sustainable development operates consists of international trade law, labour law and development. These elements work towards a just global order,[1] at times in tension with one another.[2] International labour law and development can be at odds with economic objectives pursued by international trade, especially as trade liberalisation can erode workers' rights. This has influenced attempts at a social clause at WTO level. In contrast, the ILO affirms that labour is not a commodity and promotes decent work.[3] SDG 8 reinforces the role of decent work in sustainable development.

The EU fits distinctively within this framework of complex interactions. It exercises normative power, including the promotion of decent work, through its trade and development policies. It is a WTO member, regular engager with the ILO and an active supporter of the UN SDGs. This legitimises EU promotion of labour rights through trade. The EU MSs are ILO Members, and the EU is keen to ensure social justice both internally, through the Charter of Fundamental Rights and externally, using and promoting ILO standards in trade and development policy.

This Chapter first assesses the ILO's law and policy. The subsequent section addresses the position of labour rights and developing countries at the WTO, providing a background to the sporadic inclusion of labour rights in trade instruments, trade restrictions on textile and clothing, and development of the GSP. Finally, the chapter evaluates the UN's 2030 Agenda, with a focus on SDG 8.

[1] Frank J.Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle' (1999) 25 Brooklyn Journal of International Law 51, 63.
[2] ibid.
[3] UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1.

II. The ILO: Law and Policy

A. Clothes are the Commodity, Not Workers

The founding 1919 Constitution of the ILO defines the purpose of international labour law as threefold: to promote social justice, consolidate international peace and correct the pattern of international competition.[4] It responds to the urgent need to improve conditions of labour, involving 'injustice, hardship and privation' to workers.[5] Distinguishing labour from commodities, international labour rights are human rights.[6] They are conventionally considered part of the second generation of human rights, economic and social rights, the first being individual and political rights and the third being collective rights.[7]

ILO standards are the source of labour rights in UN human rights instruments. The UN Charter commits members to promote higher standards of living and full employment.[8] The Universal Declaration of Human Rights (UDHR) sets out a right to work, enjoy equal pay and form and join unions.[9] Finally, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for various elements of decent work and prohibits discrimination in the enjoyment of these rights.[10]

The ILO's broad remit works to ensure workers' rights internationally.[11] Its objectives are constantly challenged, leading to adaptation and adoption of law and policy to secure social justice and

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[4] Victor-Yves Ghebali, *The International Labour Organisation* (Martinus Nijhoff Publishers 1989) 62.
[5] The Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919) Part XIII (The Constitution of the International Labour Organization) ("ILO Constitution")
[6] Clarence Wilfred Jenks, *Human Rights and International Labour Standards* (Steven & Sons Limited 1960) 5.
[7] Luis Linares and Julio Prado, 'Measuring of Progress of Decent Work to Support the MDGs and Post-MDGs' in Debapriya Bhattacharya and Andrea Ordóñez Llanos (eds), *Southern Perspectives on the Post-2015 International Development Agenda* (Routledge 2017) 1.
[8] Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) Articles 55-56.
[9] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)
Articles 2, 22, 23 and 24.
[10] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Articles 2, 6-10.
[11] See International Labour Conference (87th Session) Report of the Director-General (Geneva June 1999).

respond to the context in which it operates. In 1944, the Declaration of Philadelphia, an annex to the ILO Constitution, was adopted.[12] It reacted to the degrading and inhuman treatment of persons by totalitarian regimes in the 1930s and during World War Two.[13] The Declaration extends the ILO's competences to work-related social policy, promoting objectives like the protection of the life and health of workers.[14]

Perhaps most significantly is the Declaration's principle that 'labour is not a commodity', the first time it had been stated unconditionally.[15] This pre-empts exploitation of workers, placing value in their status as human beings as opposed to their status in the economy. It is the clothes that workers produce in the RMG industry that should be the commodity, not the workers. The principle is one of the most fundamental of international labour law,[16] running through the ILO's lifeblood and providing a basis for its pursuit of decent work, discussed in the final section to this Chapter. It also influenced the GATT's establishment.[17] In 1946, the ILO became a specialised body of the UN.[18] This reaffirmed the leading role of the ILO as a setter of standards.[19]

The ILO's egalitarian values are pursued through social dialogue.[20] It is a tripartite body comprising employers, governments and workers from each member. Each of these are independent and can act

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[12] International Labour Conference (26th Session) Declaration of Philadelphia (Philadelphia, 10 May 1944).
[13] Janice R.Bellace, 'Achieving Social Justice: The Nexus Between the ILO's Fundamental Rights and Decent Work' (2011) 15 Employment Rights and Employment Policy Journal 5, 11.
[14] Gillian MacNaughton and Diane F.Frey, 'Decent Work, Human Rights and the Sustainable Development Goals' (2015) 47 Georgetown Journal of International Law 607, 617.
[15] Stein Evju, 'Labour Is Not a Commodity: Reappraising the Origins of the Maxim' (2013) 4 European Labour Law Journal 222, 229.
[16] Paul O'Higgins, ''Labour is not a Commodity' – an Irish Contribution to International Labour Law' (1997) 26(3) Industrial Law Journal 225, 233.
[17] Philip Alston and James Heenan, 'Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?' (2003-2004) 36 NYU Journal of International Law and Politics 221, 225.
[18] International Labour Conference (27th Session) Resolution concerning the relationship between the International Labour Organization and the United Nations (Paris, October-November 1945).
[19] Paul O'Higgins, 'The Interaction of the ILO, the Council of Europe and European Union Labour Standards' in Bob Hepple (ed), *Social and Labour Rights in a Global Context* (Cambridge University Press 2002) 58.
[20] Ghebali (n 4) 29.

without interference.[21] Engaging these actors at the international level ensures they have a voice,[22] especially significant for workers as the more vulnerable party to an employment contract. Social dialogue is a democratic process.[23] It occurs in many formats - international, supranational, transnational, national or in-country. For example, the EU has a system of supranational social dialogue which can lead to legislation and has on a few occasions.[24] More usually the EU's social dialogue leads to framework agreements, softer forms of law.[25] The ILO's influence has been pertinent to ensuring social partners have been given such a voice at EU level.

Tripartite dialogue leads to the adoption of international labour standards by the International Labour Conference (ILC). The ILC is the annual conference of the ILO which involves tripartite members, forming an 'international parliament of labour'.[26] ILC outcomes include conventions, recommendations and declarations. These outcomes do not mean social dialogue is always effective, even at ILO level. If any of the tripartite actors, such as unions from the national level, are weak or non-existent then social dialogue becomes a 'fiction', a concern further deepened by extensive informal economies in developing countries without tripartite representation.[27] Thus, the ILO's standard-setting has been criticised as being 'contaminated by the weakness and lack of genuine independence of national organisations'.[28]

B. ILO Law and Enforcement: Not Entirely 'Toothless'?

Bearing this weakness in mind, conventions are the primary expression of the ILO's standards. Through them, the ILO serves its normative

[21] Ebere Osieke, *Constitutional Law and Practice of the International Labour Organisation* (Martinus Nijhoff Publishers 1985) 12-13.
[22] Lee Swepston, 'The Future of ILO Standards' (1994) 117 Monthly Labor Review 16, 17.
[23] ILC (87th Session) (n 11).
[24] See Jeff Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing 2003) Chapter 6, part VIII.
[25] Eve C Landau and Yves Beigbeder, *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Brill 2008) 60.
[26] See ILO, 'International Labour Conference' <www.ilo.org/global/about-the-ilo/how-the-ilo-works/international-labour-conference/lang--en/index.htm> accessed 27 November 2019.
[27] Bob Hepple, *Labour Laws and Global Trade* (Hart Publishing 2005) 53.
[28] ibid 54.

function, as the objectives and principles of the ILO Constitution are rendered international, and once ratified, national, law.[29] As conventions are adopted, they are deemed to reflect common values,[30] essential to ensure they are ratified. Ratification is a voluntary, not compulsory, obligation on members.[31]

The EU cannot ratify ILO conventions as it is not an ILO member, but its interaction with its MS ratifications is multifaceted. EU Council Decisions can be adopted urging for ratification. This was done for Convention No.189 concerning decent work for domestic workers because its provisions on migrant domestic workers affected freedom of movement, an area under EU exclusive competence.[32] This is intertwined with the duty of fidelity upon MSs.[33] MSs are called upon to be an example in ratifying and implementing ILO conventions,[34] which has led to a mixed picture of ILO ratification across the EU.[35] This leads to double standards when the EU is using ILO standards as benchmarks for trade partners.[36]

Ratification shows a country is committing to an international benchmark of fairness,[37] preventing the regression of law.[38] It is not always a simple process, particularly for developing countries. ILO members may face technical difficulties, tackled through the establishment of ILO country offices, legal obstacles where collective

[29] Francis Maupain, *The Future of the International Labour Organisation in the Global Economy* (Hart Publishing 2013) 6.
[30] International Labour Conference (91st Session) Working Out of Poverty: Report of the Director-General (Geneva, 1 June 2003) ("ILC Working Out of Poverty")
[31] It was proposed that conventions should be proposed that would be binding on all members with opt-out clauses, but this was not adopted, see Antony Alcock, *History of the International Labour Organisation* (The Macmillan Press Ltd 1971) 28.
[32] Council Decision 2014/51/EU of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189) [2014] OJ L 32/32, Preamble para 3.
[33] TEU, Article 4(3).
[34] Commission, 'Renewed Social Agenda: Opportunities, Access and Solidarity in 21st Century Europe' (Communication) COM (2008) 412.
[35] See Commission, *Analysis – in the light of the European Union Acquis – of ILO up to date Conventions* (European Union 2014).
[36] See Tonia Novitz, ''A Human Face' For the Union or More Cosmetic Surgery? EU Competence in Global Social Governance and Promotion of Core Labour Standards' (2002) 9 Maastricht Journal of European and Comparative Law 231, 261.
[37] ILC Working Out of Poverty.
[38] Maupain (n 29) 41.

bargaining is central to the law's adoption, detailed and complex conventions, and slow national administrative processes.[39] Where ratification does not occur, conventions may still influence national law and practice and be used as a template for labour law.[40]

Once a convention is ratified, members must take necessary action to make its provisions effective and even if not ratified have the obligation to report from time to time on obstacles to ratification.[41] Monitoring and enforcement of these go hand-in-hand. The ILO lacks punitive sanctions and cannot expel a member for not effectively applying the conventions.[42] When the ILO was created, it was considered the threat of sanctions would deter smaller and developing countries from ratifying conventions,[43] since sanctions were against the principle of universality.[44] Instead, ILO monitoring targets defying members, publicly shaming them. They are a form of restriction on state sovereignty.[45] These procedures are criticised as 'more political than judicial' and supervision through it 'notoriously ineffectual'.[46] Their sanctioning capacity is restricted to the 'potential embarrassment of states'.[47] They are, however, effective in ensuring regular monitoring and severe concerns are brought to the attention of all ILO tripartite partners, both nationally and internationally.

Ratification sets in motion ILO supervisory procedures under Article 22 of the ILO Constitution, requiring members to submit an annual report to the Director-General (DG) on the measures it has taken to give effect to the convention.[48] Monitoring is carried out by two committees: the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on the Application of

[39] Osieke (n 21) 153-154.
[40] ibid 167.
[41] ILO Constitution, Article 19(5)(e).
[42] Osieke (n 21) 240.
[43] Alcock (n 31) 23.
[44] Osieke (n 21) 50.
[45] Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press 2003) 109.
[46] Novitz, 'A Human Face' (n 36) 237.
[47] Novitz, *International and European Protection of the Right to Strike* (n 45) 207.
[48] In practice owing to the increase in conventions and ILO members, this has become every 2 or 4 years, see Osieke (n 21) 164.

Standards (CAS). Established in 1926, these are regarded as the 'pillars' of the ILO's supervisory process.[49] The CEACR consists of 20 jurists appointed by the Governing Body (GB).[50] It provides impartial and technical evaluations of applications of labour standards. The CEACR comments on the reports in the form of observations or direct requests, which emphasise serious or longstanding failures.[51]

The CAS, a tripartite committee, examines the report submitted by the CEACR. It makes conclusions recommending steps to remedy a problem, ILO missions or technical assistance. CAS may highlight special problems. It has special paragraphs on which specific failures by member states are indicated. This is reserved for 'cases of continued failure or deficiency', the most serious cases being mentioned in a special paragraph.[52] The non-compliant government may then be more malleable to ILO efforts to improve labour standards.[53] In 2016 a special paragraph was inserted on freedom of association and collective bargaining in Bangladesh which is discussed in greater detail in Chapter Five.[54] At the time of the cold war, where communist systems were considered by ILO committees to be incompatible with ILO principles on freedom of association and forced labour, these countries accused the ILO supervisory bodies of partiality.[55] The perception was that the special paragraph procedure was used for political propaganda.[56]

The ILO's Committee on Freedom of Association (CFA) deals with freedom of association, complementing the above. It was established

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[49] Brian A.Langille, 'Can We Rely on the ILO?' (2006-2007) 13 Canadian Labour and Employment Law Journal 273, 279.
[50] ILO, 'Committee of Experts on the Application of Conventions and Recommendations' <www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> accessed 27 November 2019.
[51] Hepple (n 27) 49.
[52] ibid.
[53] Jeff Kenner and Katrina Peake, 'The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?' (2017) 19 Cambridge Yearbook of European Legal Studies 86.
[54] ILO, 'Report of the High-Level Tripartite Mission to Bangladesh' (17-20 April 2016) <www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_488339.pdf> accessed 27 November 2019.
[55] Hepple (n 27) 34.
[56] See Osieke (n 21) 176.

after the adoption of Conventions No.87 and No. 98.[57] It can examine complaints regardless of ratification, reflecting the value of freedom of association. This is justified on the basis that a member accepted the principle as embodied in the Constitution and the Philadelphia Declaration when it joined the ILO.[58] The CFA adopts reports on the substances of cases and gives them publicity. It invites the government to show the effect given to its recommendations.[59] There is also a Fact-Finding and Conciliation Commission, which has powers of investigation and can report to the ILO's GB or the Economic and Social Council of the UN.[60]

Representations and complaints are more 'adversarial'[61] procedures of enforcement. Representations are made under Article 24 and 25 of the ILO Constitution by employer and worker organisations to the GB. They assert that a member has failed to secure the effective observance of a convention it has ratified. The GB may set up a tripartite committee and communicate this representation to the relevant government, inviting it to make a statement. It can then publish the representation and the statement.

Complaints are made against an ILO member for not complying with a ratified convention, which can be brought by another member who also ratified the convention, delegate to the ILC or the GB.[62] The GB appoints a Commission of Inquiry, formed of three independent members, to consider the complaint.[63] This prepares a report and makes

[57] Convention (No 87) concerning freedom of association and protection of the right to organise (adopted 9 July 1948, entered into force 19 July 1950) 68 UNTS 17 ("ILO Convention No.87"); Convention (No 98) concerning the application of the principles of the right to organise and to bargain collectively, as modified by the Final Articles Revision Convention, 1961 (adopted 1 July 1949, entered into force 24 July 1951) 96 UNTS 257 ("ILO Convention No.98").
[58] Hepple (n 27) 52.
[59] ibid.
[60] Langille, 'Can We Rely on the ILO?' (n 49) 281.
[61] ibid, 49.
[62] ILO Constitution, Article 26(1).
[63] ibid, Article 26.

recommendations.[64] It is 'the strongest measure' of ILO supervision, usually 'the end of the road',[65] thus is rarely resorted to.[66]

Upon failing to meet the Commission's recommendations, the GB can recommend to the ILC action 'it may deem wise and expedient to secure compliance' in Article 33 of the ILO Constitution. This presents a picture of an ILO which is not, as has been argued, inherently weak and 'toothless'.[67] The language of 'action' has legal ambiguity.[68] It has the potential to allow for trade sanctions, resolutions addressed to the MS and equivalent measures. In Article 33's original wording, the measures recommended could be 'of an economic character', which was amended to broaden the remedial powers available.[69] Economic measures were undesirable.[70] Theoretically, the GB could also request all members under Article 33 to apply equivalent measures to make the Commission of Inquiry's recommendations effective, leaving the decision concerning which measure to adopt to the discretion of each individual country.[71]

Article 33 was invoked for the first time in 2000, when the GB asked the ILC to take measures to end the use of forced labour in Myanmar. This was after '30 years of persistent CEACR observations'.[72] The GB recommended several steps, including to review relationships with Myanmar. Within that ILC, many governments did not support Article 33 as it was a strict position, preferring cooperation to punitive action.[73] One of the swaying features of its use was both Myanmar's situation and

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[64] ibid, Articles 28-29.
[65] Kari Tapiola and Lee Swepston, 'The ILO and the Impact of Labor Standards: Working on the Ground After an ILO Commission of Inquiry' (2010) 21 Stanford Law and Policy Review 513, 517.
[66] ibid.
[67] Kimberly Ann Elliott, 'Getting Beyond No…! Promoting Worker Rights *and* Trade' in Jeffrey J.Schott, (eds), *The WTO After Seattle* (Institute for International Economics 2000) 190.
[68] Hepple (n 27) 55.
[69] Robert Howse and others, 'The World Trade Organisation and Labour Rights: Man Bites Dog' in Virginia A.Leary and Daniel Warner (eds), *Social Issues, Globalisation and International Institutions* (Martinus Nijhoff Publishers 2006) 195.
[70] Osieke (n 21) 186.
[71] Maupain (n 29) 158.
[72] Hepple (n 27) 54.
[73] International Labour Conference (88th Session) Measures recommended by the Governing Body under Article 33 of the Constitution – Implementation of Recommendations contained in the report of the Commission of Inquiry entitled *Forced Labour in Myanmar (Burma)'* (Geneva, June 2000) para 35.

challenges faced at the ILO. The point was raised at the ILC that if the ILO did not invoke the article, it would become a 'talking shop' and was threatened with perceived incompetence.[74]

The ILO's condemnation instigated economic sanctions. The US, for example, imposed a trade embargo on Myanmar after the ILC resolution.[75] The fact this was not challenged at the WTO has been said to 'speak volumes about the legitimacy the embargo derived from the ILO's authorisation'.[76] The EU initiated the process of GSP withdrawal in response to a complaint filed by international unions. This was approved in 1997,[77] prior to publication of the report of the Commission of Inquiry and the GB's Article 33 recommendations being approved by the ILC.[78] It might be argued this shows a legal linkage between trade and labour rights violations condemned at the ILO.[79]

The use of Article 33 in the case of Myanmar did not, as was predicted, result in the re-emergence of the Article as an effective instrument.[80] Perhaps this is due to the controversy over the nature of the measures endowed by it, whether economic or otherwise. The rarity of using the more adversarial routes challenged the ILO's monitoring and enforcement capacity of conventions.

C. The ILO: A Brave New World

This challenge was strengthened by the rise of neoliberalism and globalisation in the 1980s and the aftermath of the Cold War.[81] The fall of the Berlin Wall and collapse of Communism in the Socialist Bloc caused some to question the ILO's *raison d'etre*.[82] Its conventions were

[74] ibid, para 47.
[75] Robert L.Howse and Jared M.Genser, 'Are EU Trade Sanctions on Burma Compatible with WTO Law' (2008) 29(2) Michigan Journal of International Law 165, 176-178.
[76] Maupain (n 29) 168; ibid 178.
[77] Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalised tariff preferences from the Union of Myanmar [1997] OJ L85/8.
[78] *Myanmar (Case No CO29)* (2 July 1998) Report of the Commission of Inquiry (Vol LXXXI 1998 Series B Special Supplement) ("Report of the Commission of Inquiry").
[79] Maupain (n 29) 168.
[80] See Howse and others (n 69) 194.
[81] MacNaughton and Frey (n 14) 619.
[82] Bellace (n 13) 13.

harshly criticised for their failure to impact on national law and practice.[83] For example, the UK denounced some ILO conventions, limiting labour rights, especially in areas of freedom of association, without any significant action being taken.[84] The ILO had to adopt a new approach, one that would maintain the promotion and protection of international labour standards, yet appease concerns by offering a fresh agenda. This led to ILO responses in the thread of 'revitalising international labour standards by making them more coherent and integrated'.[85] Change came in the form of the adoption of the 1998 Declaration on Fundamental Principles and Rights at Work, the 2001 Decent Work Agenda (DWA), the 2008 Declaration on Social Justice and Globalisation, and an emphasis on ILO technical assistance programmes. These tools promote more malleable forms of normativity than conventions.

i. The 1998 Declaration: 'Core Labour Standards'

The 1998 Declaration signified a promotional approach to international labour standards.[86] It sets out four labour standards: freedom from forced labour, freedom from child labour, freedom from discrimination at work, and freedom to form and join a union and to bargain collectively, which are related to eight ILO conventions.[87] The rights contained within the Declaration are 'core labour standards' (CLSs), the idea being respect

[83] Jean-Michel Servais, 'A New Declaration at the ILO: What For?' (2010) 1 European Labour Law Journal 286, 289.
[84] Novitz, *International and European Protection of the Right to Strike* (n 45).
[85] Hepple (n 27) 56.
[86] International Labour Conference (86th Session) ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (Geneva, 18 June 1998) ("ILO Declaration 1998").
[87] ILO Convention No.87; ILO Convention No.98; Convention No.105 concerning the abolition of forced labour (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291 ("ILO Convention No.105"); Convention (No.29) concerning forced or compulsory labour, as modified by the final Articles Revision Convention, 1946 (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55 ("ILO Convention No.29"); Convention (No.138) concerning minimum age for admission to employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 ("ILO Convention No.138"); Convention (No.182) concerning the prohibition and immediate action for the elimination of the worst forms of child labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161 ("ILO Convention No.182"); Convention (No.100) concerning equal remuneration for men and women workers for work of equal value (adopted 29 June 1951, entered into force 23 May 1953) 165 UNTS 303 ("ILO Convention No.100"); Convention (No.111) concerning discrimination in respect of employment and occupation (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31 ("ILO Convention No.111")

for these is fundamental and requires no further justification.[88] It serves as a reference point for global labour rights,[89] taking a role similar to ILO conventions yet being more influential in scope, placing obligations on all ILO members.

The Declaration represents the 'centrepiece' of efforts to create a new form of international labour standards.[90] It embodies the soft law spirit of the ILO.[91] It established the importance of universal implementation of fundamental rights to enable workers to claim a fair share of generated wealth. Moreover, it facilitated an understanding of the consequences of universal recognition of fundamental rights.[92] In part, the Declaration aimed at resolving the debate over trade and labour standards through inconspicuous references to a country's comparative advantage.[93] The idea is that labour standards should not be used for protectionist purposes, and requiring compliance with the CLSs is not of itself protectionist, but rather an objective for international labour rights as governed by the ILO. In this way, the Declaration does not create a link between trade and labour standards.[94]

The elevation of the CLSs has been both appraised and criticised. On the one hand, they provide a global floor of labour rights.[95] ILO members must 'respect, promote and realise' them.[96] The eight fundamental conventions have close to universal ratification.[97] Of the 187 ILO members, Convention No 182 has received 186 ratifications, at the highest of the eight, and Convention No 87, the lowest, at 155

[88] ILC (87th Session) (n 11).
[89] ibid.
[90] Maupain (n 29) 51.
[91] ILC (87th Session) (n 11).
[92] Francis Maupain, 'New Foundations or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation' (2009) 20(3) The European Journal of International Law 823, 841.
[93] Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 460.
[94] Hilary Kellerson, 'The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future' (1998) 137(2) International Labour Review 223.
[95] ILC Working Out of Poverty, 70.
[96] ILO Declaration 1998, para 2.
[97] Maupain (n 29) 126.

ratifications.[98] They can be justified by their nature as basic human rights and role as 'enabling rights'.[99] They are closely related to 'first generation rights' civil liberties and personal freedoms,[100] privileged over rights like health and safety.[101] This could be problematic for RMG workers, where rights violations span across a spectrum.

On the other hand, the conventions remain legally binding only upon states that have ratified them, a point that has generated some confusion after the Declaration's establishment.[102] It is disputed to what extent members are obliged to comply with it. Alston deems the CLSs to be the 'harbinger of revolutionary transformation'.[103] They emphasise principles over rights, a term used in international law to indicate a norm of lesser importance than a right.[104] It is suggested countries can adhere to these 'vague principles' without respecting the specific rights in the eight conventions.[105] This reduces emphasis on legal enforcement in preference of promotion, dialogue and technical assistance.[106] Moreover, elevating CLSs could be contrary to the principles of universality, indivisibility and the interdependence of human rights,[107] values upheld by the EU in its external relations.

Given high ratification rates of the fundamental conventions, coupled with the role of the CLSs as enabling rights, it appears that the critique is outdated and the ILO's CLS approach is appropriately holistic in accounting for country context in promoting labour standards. Promotion, dialogue and technical assistance can all build foundations for labour rights, especially in developing countries.

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[98] ILO, 'Ratifications of Fundamental Conventions by Country' <www.ilo.org/dyn/normlex/en/f?p=1000:10011:::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F> accessed 27 November 2019.
[99] Maupain (n 29) 53, 144-145.
[100] Jenks (n 6) 8-9.
[101] Brian Langille, 'Core Labour Rights – The True Story (Reply to Alston)' (2005) 16(3) European Journal of International Law 409, 434.
[102] Langille, 'Can We Rely on the ILO?' (n 49) 280.
[103] Alston, 'Core Labour Standards' (n 93) 458.
[104] ibid, 483.
[105] Hepple (n 27) 62.
[106] Alston and Heenan (n 17) 233.
[107] Linares and Prado (n 7) 155.

ii. The Decent Work Agenda

The ILO adopted the Decent Work Agenda (DWA) with the aim of contributing to its 'image re-vamping'.[108] Decent work is an objective to be achieved, defined as 'productive work in which rights are protected, which generates an adequate income, with adequate social protection', sufficient work whereby all have access to income-earning opportunities' and 'opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity'.[109] It is premised on equality.[110] It is further assessed in the final section to this Chapter.

The DWA affirms the social justice principles of the ILO's Constitution and the Declaration of Philadelphia,[111] reflecting the ILO's goal as not just the creation of jobs, but the creation of jobs of acceptable quality.[112] It clarifies and strengthens the ILO's role, setting out four pillars which go beyond the CLSs. The first, 'Rights at Work', incorporates the CLSs and core ILO Conventions. The second, 'Fostering Employment', focuses on the need for full employment with appropriate pay as a goal for national policies. The third, 'Expansion of Social Protection', highlights the need for (a) health and safety measures (b) protection for workers from oppressive working conditions and (c) social security when workers are unable to work due to illness, injury, old age, pregnancy or dismissal from work. The fourth, 'Fostering Tripartite Agreements and Social Dialogue', calls for information sharing, consultation and negotiation between employers and workers. It underpins a broader development agenda for social justice and 'working out of poverty'.[113]

The combination of these pillars has resulted in the DWA being regarded the 'most prominent normative framework for full employment and decent work'.[114] It is broader than the CLSs, giving 'new coherence'

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[108] Maupain (n 29) 53.
[109] ILC (87th Session) (n 11).13.
[110] Hepple (n 27) 64.
[111] MacNaughton and Frey (n 14) 629.
[112] ILC (87th Session) (n 11).4.
[113] ILC Working Out of Poverty, 3.
[114] Diane F.Frey and Gillian MacNaughton, 'Full Employment and Decent Work in the Post-2015 Development Agenda' in Noha Shawki (ed), *International Norms,*

to international labour standards based on a 'socio-economic floor'.[115] The DWA is translated into ILO member level through technical assistance such as Decent Work Country Programmes. In support of the DWA, the European Commission, in its 'Decent Work for All' Communication expresses the specific role the EU can play in promoting decent work, particularly through trade and promoting international and multilateral governance including working with civil society.[116]

The decent work concept has attracted criticism. It has been stated that 'the idea of 'decency'' seems to come at such a low cost that fundamental rights have become a 'deluxe option' in comparison.[117] The DWA could be seen as another corrosive tool, eroding ILO rights and replacing them with something more 'malleable'.[118] Nevertheless, the DWA sets a direction for the ILO across its activities, providing staff with a set of core principles to direct their work. It does not erode fundamental rights but ties them in with other key areas of work. Rights are not the 'do all and end all' of international labour rights. They arise from a job, which requires employment, and provides for adequate social protection for workers and opportunities for social dialogue.

iii. The 2008 Declaration: Social Justice for a Fair Globalisation

Pressures as a result of globalisation meant the ILO again adjusted to ensure it remained relevant.[119] The 2008 Declaration on Social Justice for a Fair Globalisation bolstered support for the DWA and its integral role within social justice.[120] It was the first occasion since the Declaration of Philadelphia that the ILO reviewed the relevance of its objectives,

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Normative Change and the UN Sustainable Development Goals (Lexington Books 2016) 197.

[115] Hepple (n 27) 65.

[116] Commission, 'Promoting Decent Work for All: The EU's contribution to the implementation of the decent work in the world' (Communication) COM(2006) 249 final, 8-10.

[117] Maupain (n 29) 55.

[118] ibid.

[119] Maupain, 'New Foundations or New Façade?' (n 92) 831.

[120] International Labour Conference (97th Session) ILO Declaration on Social Justice for a Fair Globalization (Geneva, 10 June 2008) para 1 ("ILO Declaration 2008"); Bellace (n 13) 23.

including the principle that labour is not a commodity, and its capacity to achieve them.[121]

The Declaration emphasised the objectives of the ILO's DWA,[122] ensuring consistency in the ILO's policies and reinforcing its purpose. It has connections to trade, stating that the survival of the global economy would be imperilled if the ILO's objectives were not promoted.[123] In addition, it emphasised the ILO's role in evaluating employment effects of trade policies to achieve the aim of 'placing employment at the heart of economic policies'.[124] This is the ILO's trade 'social clause'.

iv. ILO Technical Assistance

The pursuit of social justice manifested in decent work is an ambitious objective given the difficulties faced by workers around the world, from restrictive access to union membership to expansive informal economies. Some ILO members, especially developing countries, lack capacity to implement international labour standards. The ILO thus provides technical assistance. Technical assistance programmes were established in the 1930s, becoming a permanent feature in the 1950s.[125] They were emphasised as a way to accelerate ratification of conventions relevant to the CLSs.[126] They have led to stretched resources,[127] emphasising the need for member support, which can be through development cooperation funding.

Technical assistance can be industry specific. A prominent example is the ILO's 'Better Work' programme in the RMG industry. Better Work operates in eight countries, including Bangladesh and Vietnam, thus featuring in the case studies in this thesis. The project stems from a previous US-Cambodia Agreement conditioning trade quotas on labour rights,[128] which was coupled with an ILO and

[121] Maupain, 'New Foundations or New Façade?' (n 92) 824.
[122] ILO Declaration 2008, 9.
[123] Maupain, 'New Foundations or New Façade?' (n 92) 833.
[124] ILO Declaration 2008, 15.
[125] Alcock (n 31) 139.
[126] Bellace (n 13) 14.
[127] Hepple (n 27) 61.
[128] See Kevin Kolben, 'Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 Yale Human Rights & Development Law Journal 79.

International Finance Corporation (IFC) monitoring programme that provided factory owners with incentives to respect labour rights.[129] It benefited management, labour and buyers as it increased transparency, fostered cooperation, training and outreach and documented factory and industry improvements in labour standards.[130]

Better Work is a positive initiative leading to much-needed change and in-depth, long term improvements in factory safety.[131] It is regarded one of the most important international attempts to promote labour rights, incorporating third-party monitoring of factory conditions and an outreach and education programme, responding to the lack of enforcement that poses the greatest obstacle to decent work in the garment industry.[132] Langille goes so far as to suggest it could lead to a re-imagination for the ILO and a Better Work Convention.[133] Instead of being 'another re-imagination', the project should be thought of as emboldening the ILO's existing soft-law framework. A specific Better Work Convention is difficult to conceive as better work should encompass a range of relevant ILO conventions.

As an observer, the EU works with the ILO to progress decent work, including support of the Better Work programme as explored in the case studies. It has concluded an 'EC-UN Financial and Administrative Framework Agreement'[134] and an 'ILO-EC Strategic Partnership in the Field of Development'.[135] As of 2005, this has led to a progressive recognition of employment, social dialogue, social protection and rights at work in development cooperation.[136] The EU's Action Plan on Human

[129] ibid, 106.
[130] John A.Hall, 'The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labour rights?' (2010) 21 Stanford Law and Policy Review 427, 458.
[131] FRAME Report 9.4, 76.
[132] Hall (n 130) 429 and 435.
[133] Brian Langille, ''Hard Law Makes Bad Cases': The International Labour Organisation (Nervously) Confronts New Governance Institutions' (2016) 32(4) The International Journal of Comparative Labour Law and Industrial Relations 407, 423.
[134] Financial and Administrative Framework Agreement between the European Union represented by the European Commission and the United Nations (adopted 29 April 2003).
[135] ILO, 'The ILO and the EU, Partners for Decent Work and Social Justice' (2012) 7 <www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_195135.pdf> accessed 27 November 2019.
[136] ibid.

Rights and Democracy 2015-2019 has a commitment to promote international labour rights.[137] Through cooperation with the ILO, it has funded projects across the world contributing 'on the ground' to sustainable development.[138] This plays out the EU's normative role.

v. Too little leverage?

The question has been raised whether the ILO is losing 'the bet on persuasion', and ultimately whether it should find different, more sustainable forms of regulation.[139] It must face the 'sobering reality' that the goal of universal labour standards is far from being realised.[140] Whilst it could be regarded as having too little leverage, in fact this chapter has shown there is a breadth of ILO instruments and enforcement mechanisms which are utilised and whilst not being perfect, are actively applied. CLSs have led to impressive rates of ratification of the eight fundamental conventions, which should impact on ratification of other conventions as they are enabling rights. Universal labour standards may not be reached, but they are being worked towards.

The ILO's softer approaches were heavily influenced by the WTO's menacing shadow. The 'global movement' towards the WTO has come from the outer limits of the ILO.[141] The failure to incorporate a social clause into international trade law led to a sudden focus upon the ILO, placing it in a 'perplexing position'[142] and resulting in the 1998 and 2008 Declarations reaffirming the ILO's mandate.[143] The WTO's influence is thus beneficial for the ILO, acting to the ILO's credit as it gave it the opportunity to redress its labour standards.[144]

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[137] Council of the European Union, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019' (20 July 2015) 10897/15 <ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf> accessed 27 November 2019.
[138] ILO, 'The ILO and the EU' (n 135) 23.
[139] Maupain (n 29) 17.
[140] ibid 126.
[141] Brian A.Langille, 'Labour Law is Not a Commodity' (1998) 19 Industrial Law Journal 1002, 1014.
[142] Howse and others (n 69) 182.
[143] ibid.
[144] Langille, 'Core Labour Rights' (n 101) 421.

III. The World Trade Organisation

A. WTO Principles and Exceptions

The WTO was established in 1995 by the Agreement establishing the WTO, to which the amended General Agreement on Tariffs and Trade (GATT) is appended, with broader, more ambitious rules expanding beyond international trade in goods.[145] It was a turning point for international trade law.[146] The WTO's core functions are to implement and monitor global trade rules, settle disputes among members and negotiate new trade deals.[147] Negotiations occur in 'rounds', although are not always successful as the WTO has reached an impasse upon the failure of the Doha Development Round, which had intended to address the marginalisation of developing countries in global trade.

The core principle of the WTO is non-discrimination. This is represented in the GATT's Most-Favoured Nation (MFN) clause which prohibits the grant of any benefit, favour, privilege or immunity affecting custom duties, charges, rules and procedures to a particular country or group of countries unless they are made available to all like products originating in other WTO members.[148] It is also represented in the National Treatment obligation, where WTO members are prohibited under certain conditions from discriminating between imported and domestic products.[149] The WTO additionally prohibits quota systems.[150]

There are exceptions to these prohibitions. First, general exceptions include non-trade concerns ranging from environmental to moral issues.[151] Second, a unique exception enabled a quota system for trade in textiles and clothing, which severely affected exports of

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[145] Marrakesh Agreement establishing the World Trade Organization (with final act, annexes and protocol) (adopted 15 April 1994, entered into force 1 January 1995) 1867-1869 UNTS ("WTO Agreement"); Kent Jones, *Reconstructing the World Trade Organisation for the 21st Century* (Oxford University Press 2015) 22.
[146] Mary E Footer, 'Technical Assistance and Trade Law Reform Post-Doha: Brave New World' in John Harchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century* (Cavendish Publishing 2003) 108.
[147] See Jones (n 145).
[148] General Agreement on Tariffs and Trade (GATT 1947) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 ("GATT") Article I.
[149] ibid, Article III.
[150] ibid, Article XI.
[151] ibid, Article XX.

developing countries and their ability to participate in the global RMG market.[152] Third, there is a special form of tariff preferences granted under the GSP to developing countries to foster their economic development.[153]

B. The Social Clause: No Point Crying Over Spilt Milk?

The separation of international trade and labour law has led to calls for a social clause at the WTO to tackle suppressed labour rights in developing countries, giving them an unfair comparative advantage.[154] The Havana Charter that would have created an International Trade Organisation (ITO) as the institutional part of the GATT in the 1940s dealt with labour rights and employment issues thoroughly, creating an unambiguous link with the ILO, but it was not ratified.[155] This was not followed in the WTO, which lacks a labour rights dimension and ILO relationship.[156] The term 'worker' is not even mentioned in the WTO Agreement.[157]

At the 1996 Singapore Ministerial meeting, the WTO concretely separated international trade and labour law.[158] The Singapore Declaration defined the ILO as the competent body dealing with labour standards and highlighted the WTO's commitments to the establishment of the CLSs.[159] It is regarded obvious that the ILO is the competent body on labour standards, and 'no one has seriously argued that the WTO should poach on that turf'.[160] The Declaration does not ignore the ILO, but it is considered to terminate its role in trade and labour standards,[161]

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[152] WTO, 'Textiles Monitoring Body (TMB) The Agreement on Textiles and Clothing)' <www.wto.org/english/tratop_e/texti_e/texintro_e.htm#MFA> accessed 27 November 2019.
[153] Enabling Clause.
[154] Maupain (n 29) 135; David Ricardo, *On the Principles of Political Economy & Taxation* (John Murray 1819).
[155] UNCTAD, Havana Charter for an International Trade Organization: Final Act and Related Documents (1948) UN Doc.E/Conf.2/78.
[156] Steve Charnovitz, 'The (Neglected) Employment Dimension of the World Trade Organisation' in Virginia A. Leary and Daniel Warner (eds), *Social Issues, Globalisation and International Institutions* (Martinus Nijhoff Publishers 2006).
[157] ibid 136-137.
[158] Singapore Conference, Singapore – Draft Singapore Ministerial Declaration (13 December 1996) WT/MIN(96)/DEC <docsonline.wto.org> accessed 27 November 2019.
[159] ibid.
[160] Charnovitz (n 156) 150.
[161] Howse and others (n 69) 181.

dismissing the ILO as ‘marginal and irrelevant at best’ to the WTO’s efforts in governing international trade.[162]

The failure to incorporate a social clause in the WTO is not as unfortunate as some perceive it to be. Whilst the clause would have demonstrated a commitment to labour rights, a sanctions-based clause would have been vulnerable to its use for political purposes.[163] It would also lack an appreciation of country context, being a ‘huge club’ only credibly applied by developed countries against developing ones, ignoring their domestic economy and unfairly targeting the exporting industry.[164]

Alternatives to a sanctions-based social clause have been proposed in a more flexible format. Alston suggests a fact-finding and conciliation mechanism activated by receipt of a complaint by an ILO body.[165] This is too similar to the ILO’s Commission of Inquiry and Article 33 process. Through the ILO, trade-related issues are taken to the relevant enforcement bodies such as a lack of freedom of association in export industries. This proposal may draw attention away from the ILO to its detriment.

Maupain proposes an ILO Recommendation promoting the policy coherence of social, economic and trade policies, with an aim of encouraging MSs to design a coherent social policy and optimise the social benefits from economic interdependence.[166] Fundamental rights would be the precondition for workers to obtain their fair share of those benefits.[167] This is similar to the principles rooted in the ILO’s DWA, and the 1998 and 2008 Declarations. Maupain also suggests the introduction of commercial clauses in ILO Conventions,[168] which may detract from its wider purpose as labour law.

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[162] ibid 182.
[163] Philip Alston, 'International Trade as an Instrument of Positive Human Rights Policy' (1982) 4 Human Rights Quarterly 155, 155.
[164] Carnegie Endowment for International Peace, 'Breaking the Labor-Trade Deadlock' (2001) Working Paper No.25, 3-4 <carnegieendowment.org/files/17Warden-IAD.pdf> accessed 27 November 2019.
[165] Alston, 'International Trade’ (n 163) 182.
[166] Maupain (n 29) 110.
[167] ibid.
[168] ibid 166.

These alternatives place the ILO at the centre. A social clause in the WTO that is based on cooperation and dialogue is unnecessary as this is the ILO's task, hence the WTO's passing on of the baton. Therefore, there is no point crying over spilt milk. Several steps are necessary to improve the ILO's relationship with the WTO which should be preliminary actions to the above suggestions and can be utilised without the intention of a social clause alternative.

The ILO should be granted official observer status at the WTO.[169] It is problematic that the ILO does not have this status. An agreement with the WTO would enable the discussion of issues of common interest and define cooperation based on aligned interests, such as employment.[170] Within this, the WTO should not usurp the ILO but work together to facilitate understanding of trade and labour rights.[171] A closer relationship between the WTO and ILO could come through ILO acknowledgement of the WTO when it makes statements dealing with protectionism and comparative advantage.

To what extent are these solutions suitable? A social clause is not necessary, and neither are the above substitutes, but a relationship with the WTO is. Alternative efforts have been made to ensure a place for the WTO in trade and labour rights through expansive interpretation of existing WTO provisions, notably Article XX, which allows for non-trade exceptions to be utilised by WTO members.[172]

C. Article XX Exceptions: No Place for Labour Rights?

Article XX provides for general exceptions to the core WTO principles. Trade has always permitted room for non-economic issues.[173] They need to be accounted for to 'level the playing field' and suitably shape trade.[174] Their aim is to ensure that trade measures are justified on the basis of exact criteria, rather than being used as a 'back door' to trade

[169] Howse and others (n 69) 192.
[170] ibid 112.
[171] Jeffrey J.Schott, 'The WTO After Seattle' in Jeffrey J.Schott (eds), *The WTO After Seattle* (Institute for International Economics 2000) 30.
[172] Maupain (n 29) 161.
[173] Lisa Garwood, 'Trade Law as a Form of Human Rights Protection?' (2010) 3 NUJS Law Review 13, 15.
[174] De Schutter (n 29) 3.

advantages.[175] The criteria is both limited and conditional.[176] It includes public morals, the environment and prison labour, but not labour rights. Maupain asks, 'Do workers exposed to asbestos during its removal not deserve just as much compassion as sea mammals, no matter how cute they may appear in photos?'[177] The WTO has embraced sustainable development so perhaps there should be scope for a wider interpretation or revision of Article XX.

Efforts have been made to expand the Article XX exceptions to labour rights. This is through use of Article 3.2 of the Dispute Settlement Understanding incorporating Article 31(3)(c) of the Vienna Convention on the Law of Treaties,[178] which states that an interpreter can and should read Article XX provisions consistently with international human rights norms.[179] The general rule of interpretation in Article 31 of the Vienna Convention is that, first, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; second, the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, its preamble and annexes.[180]

The preamble to Article XX refers to sustainable development.[181] Thus, decent work does have a place in the WTO. Some of the Article XX exceptions have been highlighted as possible avenues for expansion which could be used by a WTO member when it is considered another member violates labour rights in the pursuit of trade, for example adopting a trade embargo on RMGs produced in Bangladesh.

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[175] Maupain (n 29) 163.
[176] WTO, *United States -Section 337 Tariff Act* (7 November 1989) L/6439-36S/345, para 5.9.
[177] Maupain (n 29) 165.
[178] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ("Vienna Convention")
[179] Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) Journal of World Trade 353, 353-354.
[180] Vienna Convention.
[181] Markus W.Gehring and Marie-Claire Cordonier Segger, 'Introduction' in Markus W.Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law* (Kluwer Law International 2005) 10.

Firstly, Article XX(a), the public morals exception, is one of the most obvious.[182] Morality of violating labour rights for the benefits of international trade was a contributing factor to the ILO's establishment. This clause requires a measure be designed to protect public morals and be necessary to that end.[183] The Dispute Settlement Body (DSB) Appellate Body (AB) and Panel, bodies established to address disputes between WTO members, have taken a wide approach to the definition of public morals, stating that they denote standards of right and wrong conduct maintained on or behalf of a community or nation.[184] Morals are very similar to the rights/principles debate concerning the 1998 ILO Declaration, being akin to a principle. A provision based broadly on morals, therefore, may be one incorporating ILO Declarations but not conventions. Exploiting RMG workers could be seen as immoral, but the argument would need to show severe exploitation to gain traction.

Secondly, Article XX(b), protecting human life, provides a further opportunity to protect labour rights through trade. The violation of CLSs threatens the life or health of workers.[185] It would need to be shown human life is at risk in RMG factories, which could be with reference to disasters like Rana Plaza. Article XX(e), goods produced by prison labour, may be extended towards the protection of goods produced by forced labour, by its reinterpretation to allow countries to ban imports of goods produced by forced labour.[186] To be able to successfully expand these provisions, WTO members would have to communicate acceptance, or their use may lead to further hurdles at WTO level on top of the Doha stalemate.

If labour rights were included in the Article XX exceptions, it would be difficult to benefit from invoking them as there are stringent requirements that must be satisfied. A two-tier test is used: a measure

[182] See Maupain (n 29) 165.
[183] See WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (21 December 2009) WT/DS263/AB/R.
[184] WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (10 November 2004) WT/DS285/R, para 6.463.
[185] Howse and others (n 69) 205.
[186] Elliott (n 67) 198.

must meet the requirements of one of the subparagraphs of Article XX and its chapeau.[187]

Measures under the above listed Article XX exceptions must be 'necessary', which involves a weighing and balancing of factors including the importance of the common interests or values and the accompanying impact of the law or regulation on imports or exports.[188] The insulation of WTO law from the ILO has meant any such measures are highly unlikely to be considered necessary. Less trade-restrictive measures might be available, such as establishing a system of social labelling.[189] Social labelling is incentive-based, such as fair trade labels, with the prospect of boosting a product's place in the market.[190] Social labels would have to be agreed upon by both WTO members and incorporate brands, retailers and producers across the RMG supply chain. It is not widespread, and its effectiveness and feasibility is questionable.[191]

The chapeau of Article XX requires the measure to not constitute an 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. There is a delicate 'line of equilibrium' between general exceptions and unrestricted trade measures.[192] Three elements must be met to be 'arbitrary and unjustifiable' discrimination: there must be resulting discrimination from the application of the measures, this must be arbitrary or unjustifiable in character and the discrimination must occur between countries where the same conditions prevail.[193] It is not difficult to conceptualise a scenario whereupon Article XX exceptions are invoked upon measures restricting trade from countries that violate CLSs and this is discriminatory as it is not applied to other countries with similar violations of rights;[194] no country, after all, is free from labour rights

[187] WTO, *United States – Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, 22.
[188] WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (11 December 2000) WT/DS161/AB/R, para 164.
[189] Howse and others (n 69) 205.
[190] Langille (n 141) 1013.
[191] Howse and others (n 69) 205.
[192] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, para 159.
[193] ibid para 150.
[194] Howse and others (n 69) 206.

violations. If considered justifiable, it would undoubtedly be arbitrary and could block developing country participation within the WTO as these are most likely to be targeted if Article XX is to be broadened to include labour rights.

Extraterritoriality would be an additional hurdle. Scott defines this as a measure that 'imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state'.[195] In *Shrimp/Turtle,*[196] a restrictive trade measure was imposed by the US on certain products produced in a different country by a method of fishing harmful to turtles. The US was justified in imposing these restrictions because there was a link between the shrimp and the method of fishing, and the US due to the presence of relevant sea turtles in US waters. It would be particularly controversial, if not revolutionary, if a measure prohibited importation of certain goods, such as RMGs, with regards to human rights violations in a different country and difficult to provide a connection – it is unlikely this would be that RMG workers from that country immigrate to the country that imposed the restriction.[197] It is perhaps the greatest hurdle to Article XX expansion.

Any Article XX general exception would have to tackle protectionist concerns of developing countries,[198] which are unlikely to be subdued by the fact that the 'social clause' had been integrated into pre-existing exceptions. They blocked social clause attempts because of fears that it would be a 'Trojan horse of signing onto protectionist measures in disguise'.[199]

D. Developing Countries in the WTO System

Developing countries face development challenges that are an obstacle to effective involvement in WTO governance whilst being subject to

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[195] Joanne Scott, 'Extraterritoriality and Territorial Expansion in EU Law' (2014) 62(1) The American Journal of Comparative Law 87, 89-90.
[196] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R.
[197] Bartels (n 179) 354-355.
[198] Protectionism in this context is defined as 'the result of a normal reaction to a situation of competition perceived as unfair', Viviane De Beaufort, 'The European Union and the New Face(s) of International Trade' (2015) 1 International Business Law Journal 39, 41.
[199] FRAME Report 9.1, 9.

restrictive trade measures justified by general exceptions. Such challenges are heightened when expanding industries, such as RMG, are threatened.

i. Protectionism in the RMG Industry

Protectionist concerns are generated from fear that developed countries will impose measures that protect their own industries, restricting the expansion of those in developing countries.[200] The strongest example of protectionism was the quota-system for textiles and clothing imposed for half a century. This began with Voluntary Export Restraints imposed on Japan in the 1950s by the US due to the effects of cheaper Japanese textiles and clothing exports on US manufacturers.[201] Agreements on textile trade were concluded in the 1960s and 70s.[202] The regulation was a result of perceived damage to developed country industries due to cheaper RMG industries from developing countries.[203] It prevented natural market operation.[204] After the lapse of these agreements, the 1974 Multifibre Agreement (MFA) ensured continued regulation.[205]

Regulation was adopted prior to the ILO's conclusion that the problem of the textiles industries in high-wage countries 'cannot be primarily attributed to the alleged unfairness of competition from low-wage underdeveloped countries'. [206] The outcome fell on deaf ears. Paradoxically, the system had some positive effects. It facilitated geographical dispersion of textiles and clothing production,[207] creating niche opportunities for countries to take advantage of restrictions

[200] Kenner and Peake (n 53).
[201] Umair Hafeez Ghori, 'Rising to the Challenge: Asian Survivors of the Quota Expiry in Global Textiles and Clothing Trade' (2009) 6(2) Manchester Journal of International Economic Law 95, 97.
[202] International Trade in Cotton Textiles (adopted 21 July 1961) 12.1 UST. 1674, TIAS 4884; for an example of the operation of the long-term arrangement see: India: Trade in Cotton Textiles (adopted 31 August 1967) 18.3 UST 2325, TIAS 6333.
[203] Jörg Mayer, 'Not Totally Naked: Textiles and Clothing Trade in a Quota-free Environment' (2005) 39(3) Journal of World Trade 393, 396.
[204] See Mark Anner, 'Social Downgrading and Worker Resistance in Apparel Global Value Chains' in Kirsty Newsome and others, *Putting labour in its Place: Labour Process Analysis and Global Value Chains* (Palgrave Macmillan 2015) 156.
[205] Ghori (n 201) 100.
[206] ILO, 'Trade, Wages and Employment in Textiles' (1963) 87(1) International Labour Review 1, 28.
[207] Mayer (n 203) 396.

imposed on comparatively more developed producing countries.[208] Sri Lanka's industry, for example, accelerated due to quota-hopping East Asian garment exporters.[209]

After the MFA, the GATT contracting parties concluded the Agreement on Textiles and Clothing (ATC) which phased out the MFA quotas over ten years until 2005.[210] This was deemed to strengthen transparency and non-discrimination, core WTO principles.[211] The change was due to increases in wealth, more efficient allocation of resources and price decreases.[212] It was a 'watershed'[213] moment in the history of the RMG industry. It created a sense of euphoria among developing countries over future unrestrained and improved market access, yet this was short-lived owing to fears that China and other countries considered to have a greater comparative advantage in the industry would dominate trade.[214] Quota expiry brought about an accelerated shift towards faster and more flexible production and lower prices,[215] as it exposed the industry to normal market competition. Some countries even sought a quota extension.[216]

Many of the perceived victims of the quota system became the winners, including Bangladesh,[217] Vietnam and Sri Lanka, each adopting different post-quota strategies.[218] They were helped considerably by the EU's GSP as part of the special and differential treatment afforded to developing countries under the WTO,[219] providing tariff preferences dependent on development status that in part became their new comparative advantage.

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[208] Ghori (n 201) 115.
[209] Saman Kelegama, 'Ready-Made Garment Exports from Sri Lanka' (2009) 39(4) Journal of Contemporary Asia 579, 580.
[210] WTO Agreement on Textiles and Clothing <www.wto.org/english/docs_e/legal_e/16-tex_e.htm> accessed 27 November 2019.
[211] Mayer (n 203) 393.
[212] ibid.
[213] Ghori (n 201) 95.
[214] ibid 103.
[215] ILO, 'Wages and Working Hours in the Textiles, Clothing, Leather and Footwear Industries' (Geneva 2014).
[216] Ghori (n 201) 107.
[217] See Kenner and Peake (n 53).
[218] Ghori (n 201) 155.
[219] ibid, 121.

Special and differential treatment for developing countries under the WTO system reflects a further paradox. Whilst developed countries could impose protectionist measures on RMG industries with the greatest potential to enable economic development, the WTO established 'special and differential treatment' for developing countries.

ii. 'Special and Differential' Treatment: Developing Countries' Best Interests at Heart?

a. Special Treatment and Sustainable Development

Special and differential treatment does not take the best interests of developing countries to heart. When the GATT was established, most developing countries were represented by colonial powers.[220] Newly independent developing countries knew little of the GATT's substance, did not apply GATT provisions fully and did not include trade in their programme of economic development; instead, they found themselves faced with unprecedented obligations in the field of international trade.[221] Nevertheless, they were active GATT participants and were involved in negotiations for the International Trade Organisation (ITO) out of which the GATT emerged.[222] The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a body aiming to support developing countries to access the benefits of a globalised economy.[223] It gained prominence as an intergovernmental forum for North-South dialogue and negotiations on economic issues of interest to developing countries.[224]

Changes were made to mainstream the interests of developing countries. Part IV GATT was added at a special session of UNCTAD in 1964,[225] which institutionalised the notion that they were entitled to

[220] Rorden Wilkinson and James Scott, 'Developing Country Participation in the GATT: A Reassessment' (2008) 7(3) World Trade Review 473, 478-479.
[221] Footer (n 146) 113.
[222] Wilkinson and Scott (n 220) 477.
[223] UNCTAD, 'About UNCTAD' <unctad.org/en/Pages/aboutus.aspx> accessed 27 November 2019.
[224] Gehring and Segger (n 181) 8.
[225] GATT, Part IV.

'special and differential treatment'.[226] This enables the grant of non-reciprocity for developing countries with regards to tariffs, elevating and legitimising ‘free-riding’, by which a country that does not make trade concessions benefit from those made at the WTO.[227] The idea behind this was not altruistic. It was considered that developing countries had little to offer in terms of market access that would interest developed countries.[228] This is contrary to the current climate where developing countries have more of a voice. The major weakness of these provisions is that they are not binding or enforceable,[229] merely urging developed countries to account for the needs of developing ones.[230] However, it opened up the possibility of creating preferential trading systems favouring developing countries.[231] It helped them to increase and diversify their exports.[232]

This unique treatment is linked to sustainable development. The Preamble to the WTO Agreement recognises trade should be conducted with a view to allow for the optimal use of the world’s resources in accordance with sustainable development,[233] reaffirmed in Ministerial Declarations.[234] It is prima facie an environmentally oriented objective. WTO case law supports sustainable development in its broader format. In the *US-Shrimp Products* case, the AB observed that the Preamble to the WTO Agreement’s reference to sustainable development is ‘generally accepted as integrated economic and social development and

[226] Norma Breda dos Santos, Rogério Farias and Raphael Cunha, 'Generalised System of Preferences in General Agreement on Tariffs and Trade/World Trade Organisation: History and Current Issues' (2005) 39(4) Journal of World Trade 637, 642.
[227] Edwini Kessie, ‘The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements’ in George A.Bermann and Petros C.Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007) 17.
[228] Jones (n 145) 49.
[229] Gustavo Olivares, 'The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs' (2001) 35(3) Journal of World Trade 545, 551.
[230] Jones (n 145) 49.
[231] Wilkinson and Scott (n 220) 496-497.
[232] Kessie (n 227) 34.
[233] Marrakesh Agreement Establishing the World Trade Organisation (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.
[234] Ministerial Declaration (Doha, adopted 14 November 2001) WT/MIN(01)/DEC/1, para 6; Ministerial Declaration (Geneva, adopted 25 May 1998) WT/MIN(98)/DEC/1.

environmental protection'.[235] It is a reflection of the international shift towards all aspects of sustainable development, an objective further mirrored in the GSP.

b. The GSP: Altruism at its finest?

The GSP was created out of 'special and differential' treatment. It is, in theory, an altruistic measure.[236] The possibility of granting developing countries tariff preferences was first established in the second UNCTAD session in 1968, which called for the establishment of a 'generalised, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least developed among the developing countries'.[237] It called for the formation of a Special Committee on Preferences to coordinate consultation on the issue.[238] This led to a GATT waiver of the MFN in 1971 set to last 10 years,[239] which was replaced in 1979 by the Enabling Clause that extended it indefinitely.[240]

The GSP was intended to be a positive step towards a more balanced and integrated global partnership.[241] This is how it has been perceived by the EU, who labels it the 'flagship EU trade policy instrument' supporting sustainable development.[242] It has not been without controversy as obtaining the tariff preferences comes with hurdles, like narrow lists of eligible products and stringent rules of origin.[243] Textiles and clothing, for example, are excluded from the US GSP.[244] In addition, the GSP is a unilateral measure, considered a form of 'gift' from developed nations to developing nations, ironic given the

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[235] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, paras 129 and note 107.
[236] Kessie (n 227) 15.
[237] Proceedings of the United Nations Conference on Trade and Development (Second Session, 1968) TD/97, Vol.1, Resolution 21(II).
[238] ibid.
[239] GATT, Generalised System of Preferences, Decision of 25 June 1971, BISD 18S/24.
[240] Enabling Clause.
[241] dos Santos, Farias and Cunha (n 226) 638.
[242] Commission, 'Trade, Growth and Development: Tailoring Trade and Investment Policy for those countries in need' (Communication) COM(2012) 22 final, 13.
[243] See Sangeeta Khorana, 'Do Trade Preferences Enhance Market Access for Developing Countries' Agricultural Products? Evidence from Switzerland' (2007) 41(5) Journal of World Trade 1073.
[244] See US Trade Act of 1974.

protectionist measures the former have deployed in the past.[245] This is further so given the conditions that can be attached to the GSP.

A notable WTO AB case on the EU's GSP conditions is *EC-Tariff Preferences,*[246] in which a complaint was brought by India over the provisions of preferential tariffs applied by the (then) European Communities (EC). At the time, the EC provided a general preferential tariff and four special arrangements that granted enhanced preferences.[247] These were for LDCs, the control of drug production and trafficking, the protection of the environment, and the protection of labour rights. The case concerned the arrangement on drug production. The AB determined that the assessment of the development, financial and trade needs of a developing country must be done according to an objective standard and there must be a nexus between the preference and the likelihood of alleviating the identified need.[248] The EC failed to show that the scheme was objectively granted because no further countries could apply to benefit from the drug preferences scheme and there was a closed list of beneficiaries.[249]

While the case allows for discrimination among countries in different positions objectively assessed, the power is strongly unilaterally skewered in favour of developed countries. Non-discrimination is watered down so that deviation still occurs.[250] At the same time, GSP conditions, such as those applied by the EU and US, have resulted in 'perverse' reciprocity.[251] The discretion afforded developed countries seems to have gone too far, resulting in an 'arm-twisting tool'.[252] Recent

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[245] Jones (n 145) 49.
[246] WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (20 April 2004) WT/DS246/AB/R ("EC-Tariff Preferences AB Report")
[247] Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L 346/1.
[248] EC-Tariff Preferences AB Report, para 163-164.
[249] EC-Tariff Preference AB Report.
[250] Anastasios Tomazos, 'The GSP Fallacy: A Critique of the Appellate Body's Ruling in the GSP Case on Legal, Economic and Political/Systemic Grounds' in George A. Bermann and Petros C.Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007) 322.
[251] ibid 321.
[252] Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (Zed Books 2004) 153.

trade negotiations have shown developing countries to be in a strengthened position, and may indicate some changes in future.

c. The Doha Stalemate

The current issue facing the WTO is the stalemate of its negotiating concessions process, at the Doha Development Round, which was intended to address the concerns of developing countries. It failed for a number of reasons including a large and diverse WTO membership.[253] The Round was regarded by developing countries as a renewed effort to apply special and differential treatment which would be pro-development and pro-trade.[254] It provided a utopian picture of world trade, at least from the perspective of developing countries. To progress trade negotiations and reaffirm special and differential treatment, development needs must be aligned with the UN's 2030 Agenda. This is pertinent as sustainable development is already supported by the WTO.

IV. The UN and the SDGs

A. Defining Sustainable Development

Sustainable development is defined in the 1987 Brundtland Report as development that meets the needs of the present without compromising the needs of future generations.[255] The notion reflects a conflict between development and sustainability.[256] Over time the focus on the intergenerational aspect of sustainable development has become more about a holistic approach to development linking economic development, social development (incorporating labour rights) and environmental protection as interdependent and mutually reinforcing pillars.[257] This is the triple bottom-lined approach to human well-being.[258] The pillars link to the three forms of international law: international environmental law,

[253] ibid 5-6.
[254] Jones (n 145) 195.
[255] World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 43.
[256] Luis Camacho, 'Sustainable Development Goals: Kinds, Connections and Expectations' (2015) 11(1) Journal of Global Ethics 18, 18.
[257] Jeffrey D.Sachs, *The Age of Sustainable Development* (Columbia University Press 2015) 17.
[258] Jeffrey D.Sachs, 'From Millennium Development Goals to Sustainable Development Goals' (2012) 379 Lancet 2206, 2206.

international human rights law and international economic law.[259] Here, international human rights law covers international labour law.

The UN SDGs were established after the MDGs and the 2002 World Summit on Sustainable Development, which was intended to 'shape a renewed political commitment'.[260] As part of implementing that commitment, the EU considered that corporate social responsibility (CSR) lay 'at the heart of the debate on sustainable globalisation'.[261] The SDGs have been vital in boosting decent work, bringing together a comprehensive and ambitious agenda to ensure sustainable development in all its formats. It complements the ILO's standards and underpins actions by the WTO and its members adopting trade measures in the pursuit of sustainable development, including RBC.

B. The 2030 Agenda on Sustainable Development: MDGs to SDGs

The MDGs were the predecessor to the SDGs and established global targets from 2000 to 2015, raising the profile and awareness of development issues, changing the terms of international development policy and bringing a stronger focus to neglected social rights.[262] They marked 'a historic and effective method of global mobilisation to achieve a set of important social priorities worldwide'.[263]

However, the 'good news narrative' of the MDGs has been highly criticised.[264] They provided a 'fig leaf for authoritarian regimes', masking inequalities and structural discrimination and oppression.[265] Bangladesh, for example, has been regarded as a success story for the MDGs even

[259] Dominic McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception' (1996) 45(4) International and Comparative Law Quarterly 796.
[260] Commission, 'Ten years after Rio: Preparing for the World Summit on Sustainable Development in 2002' (Communication) COM(2001) 53 final, 2.
[261] Commission, 'The World Summit on Sustainable Development one year on: implementing our commitments' (Communication) COM(2003) 829 final, 20.
[262] Mac Darrow, 'The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda' (2012) 15 Yale Human Rights & Development Law Journal 55, 56-57.
[263] Sachs, 'From Millennium Development Goals' (n 258) 2206.
[264] Jason Hickel, 'The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals' (2016) 37(5) Third World Quarterly 749.
[265] Darrow (n 262) 60.

with serious and ongoing labour rights violations.[266] In addition, the MDGs have been achieved in many countries without efforts to reach marginalised populations.[267] Their failure may come down to the way in which they were designed behind closed doors,[268] despite principles of 'global partnership' lauded in sustainable development forums and agendas.

Under the 2030 Agenda, poverty has become 'everybody's business'[269] as opposed to focusing on developing countries. They have mainstreamed sustainable development as a central concept,[270] addressing the failures of the MDGs being formulated with global scope and encompassing a variety of issues,[271] expanding the goals from eight to 17. The essence of the sustainable development agenda is to set out a 'holistic vision of what a good society should be'.[272] It is more about 'global partnership' and thus is supported internationally by states individually and together through the G20, the ILO, EU, businesses and civil society.

Through the SDGs the UN has adopted a rights-based approach to development, recognising and emphasising the role of human rights within the global development framework.[273] The EU has adopted this approach.[274] It is intended to respect the rights of those that development

[266] FRAME Report 9.4.
[267] Darrow (n 262) 66.
[268] Debapriya Bhattacharya and Andrea Ordóñez Llanos, 'Exploring the Post-2015 Development Agenda from Southern Perspectives' in Debapriya Bhattacharya and Andrea Ordóñez Llanos (eds), *Southern Perspectives on the Post-2015 International Development Agenda* (Routledge 2017) 1.
[269] International Labour Conference (105th Session) Report of the Director-General (Geneva, 2016) 19, para 84.
[270] Sachs (n 257) 14.
[271] Noha Shawki, 'Norm Evolution and Change: Analyzing the Negotiation of the Sustainable Development Goals' in Noha Shawki (ed), *International Norms, Normative Change and the UN Sustainable Development Goals* (Lexington Books 2016) 2.
[272] Sachs (n 257) 21.
[273] See UN, 'HRBA Portal' <hrbaportal.org/mainstreaming-hrba> accessed 4 July 2019.
[274] Council of the EU, 'Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights' (Brussels, 19 May 2014) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/142682.pdf> accessed 27 November 2019.

aims to help and create opportunities for participation.[275] With the SDGs also comes a strengthened focus on labour rights, further backed by actors' adoption of rights-based approaches to development.

C. Is the Decent Work Goal Decent Enough?

SDG 8, the new decent work goal, is a success of the SDGs. It integrates decent work within the global development framework, which the MDGs had failed to do. The outcry regarding the absence of a decent work goal within the MDGs had led to a new decent work target being added to the MDG framework in 2007, unfortunately 'simply too little and too late'.[276] Its form as a 'target' as opposed to a goal, the fact that the target was not time bound, and its detachment from the international labour rights framework, all contributed to the fact that it constituted a missed opportunity.[277] SDG 8 goes beyond the disappointment created by the lack of decent work in the MDGs. It is time-bound, improving accountability as regards its results and raising the profile of decent work.[278] SDG 8 is an 'enabling goal' as decent work leads to less poverty, gender inequality, hunger etc.

SDG 8 combines decent work with economic growth. It is considered this makes full employment and decent work *dependent* on economic growth, and that this is a negative factor, meaning that the goal 'is not people-centred, but is rather economy centred'.[279] This has led to calls for a single stand-alone goal.[280] One of the rationales put forward for this is that it is unclear why economic growth should be merged with decent work while education, health, governance, and environmental sustainability are all stand-alone goals.[281]

This is not correct, and is very different to the ILO's perspective of the 2030 Agenda as having a strong normative character and setting a

[275] Peter Uvin, 'From the right to development to the rights-based approach: how 'human rights' entered development' (2007) 17(4-5) Development in Practice 597, 602.
[276] MacNaughton and Frey (n 14) 612.
[277] ibid, 638.
[278] ibid, 652.
[279] ibid, 652-653.
[280] ibid, 658.
[281] ibid, 663.

'truly human rights-centred path to sustainable development'.[282] Economic and social policies are both development policies, serving the purpose of improving people's economic and social well-being through economic development.[283] Furthermore, the ILO has always promoted social justice and international labour standards as part of development. Economic growth has a central role within this, especially as the ILO is a tripartite organisation, representing government, labour and employers.

The ILO mobilised to ensure that the 2030 Agenda embodies the essentials of the DWA, evident within SDG 8,[284] and has consistently maintained that economic and social development are two aspects of the same process which sustain and reinforce each other.[285] The CLSs, for example, are about 'translating economic growth into social equity and employment at all stages of the development path'.[286] If the ILO considers economic growth an important part of decent work, then the SDGs should reflect this.

Decent work is a process leading from economic growth. It recognises the role of Multinational Enterprises (MNEs) and RBC in achieving the SDGs.[287] SDG 8's aim is 'to stimulate economic strategies in which more and better jobs generate the purchasing power that promotes investment, which in turn lifts productivity and brings competitiveness and success in a global market'.[288] It tackles the assumption that it is inevitable international trade will create a race to the bottom. It is important to understand, therefore, that it combines trade and labour rights not directly, but indirectly. The goal does not serve as a substitute to a social clause but it does serve as an alternative. By indirectly putting the trade and labour rights connection within the remit of sustainable development, it sets the stage for the inclusion of labour rights, within the CLSs, DWA or ILO Conventions and Declarations, in

[282] ILC (105th Session) (n 269) 8, para 26.
[283] Gary S.Fields, 'Decent Work and Development Policies' (2003) 142(2) International Labour Review 239, 240.
[284] ILC (105th Session) (n 269) 2, para 3-4.
[285] ILC (87th Session) (n 11).
[286] ibid.
[287] ibid.
[288] ILC (105th Session) (n 269) 6, para 22.

comprehensive trade agreements and arrangements under the overarching UN sustainable development framework. This is most relevant for recent agreements, such as the EU's new generation FTAs. It ensures a human rights approach is taken towards international trade.

Decent work engages a plethora of rights and concepts. It should not be recognised as a human right in and of itself, as this would over-simplify its complexity.[289] There is no simple indicator,[290] and international labour rights are included in different ways. The ILO's role and standards are vital, and international instruments like the ICESCR provide foundations to the decent work framework. Indicators of decent work under SDG 8 cannot feasibly include *all* existing international labour rights – although undeniably this would purport to be a particularly 'decent' form of decent work.[291] A reference point is needed, and this could be through the ILO and its 1998 Declaration and the DWA.

The success of SDG 8 and the determination of whether the goal is 'decent' enough depends on the degree to which it matches the DWA and its indicators. It encompasses the CLSs. When the CLSs were adopted, it was considered that respect for them would facilitate development itself.[292] Taking the approach of decent work to SDG 8 would ensure a human rights approach to development, with an appreciation of the universality, indivisibility and interdependence of rights and thus that sustainable development is the effective realisation of 'individual, political, economic, social and cultural rights',[293] and that human rights are truly the centre of concern.[294] This may lead to some

[289] For calls for decent work as a human right see Frey and MacNaughton, 'Full Employment and Decent Work' (n 114) 196.
[290] A variety of indicators are suggested, see Dharam Ghai, 'Decent Work: Concept and Indicators' (2003) 142(2) International Labour Review 113; Richard Anker and others, 'Measuring Decent Work with Statistical Indicators' (2003) 142(2) International Labour Review 147; David Bescond, Anna Châtaigner and Farhard Mehran, 'Seven Indicators to Measure Decent Work: An International Comparison' (2003) 142(2) International Labour Review 179; Florence Bonnet, José B.Figueiredo and Guy Standing, 'A Family of Decent Work Indexes' (2003) 142(2) International Labour Review 213.
[291] See MacNaughton and Frey (n 14) 655.
[292] ILC (87th Session) (n 11).
[293] Linares and Prado (n 7) 155.
[294] Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) A/CONF.151/26 (Vol.1) Principle 1.

difficulties monitoring but it gives an appropriate scope to account for varied country contexts and for actors involved in sustainable development to have a role in its implementation.[295]

Labour rights are addressed in SDG 8.8, the goal being to 'protect labour rights and secure working environments for all workers, including migrant workers, in particular woman migrants, and those in precarious employment'. This refers 'obliquely' to labour rights and it is unclear whether the target refers to all rights covered under the ICESCR, all the ILO labour standards or the ILO CLSs.[296] The only reference to the ILO is to the 'Global Jobs Pact' in SDG target 8.B. As opposed to constituting an ILO standard, or even referring to one of the ILO Declarations, SDG 8 elects to refer to a set of policy measures designed ultimately to ease the impact of the 2008-2009 financial crisis.[297] It could have referred to the 1998 or 2008 Declaration, or the ILO's DWA which, as shown, would have been more effective, although may have been a step too far on the side of decent work as opposed to economic growth.

Balancing these scales is no easy feat, particularly within the RMG industry where labour rights violations for the purpose of gaining comparative advantage are interconnected with global trade. Much will need to be done to ensure that the SDG 8 is effectively applied to RMG workers.

V. Conclusion

This chapter has shown that there is an intricate international framework surrounding the RMG industry and the EU's distinct role within this as a normative actor, supporting the ILO's agenda, following WTO rules and promoting the UN SDGs.

The ILO has been prominent in adapting standards to global context, ensuring that labour is not a commodity through use of a network of tools in the pursuit of social justice. This chapter shows that the ILO is not in fact entirely toothless, with the CAS's special paragraphs,

[295] MacNaughton and Frey (n 14) 655.
[296] ibid.
[297] ILO, 'Global Jobs Pact: About the Pact' <www.ilo.org/jobspact/about/lang--en/index.htm> accessed 5 July 2019.

alongside the Commission of Inquiry and Article 33 recommendations, reflecting an ILO that does have strength in enforcement. Failures of ILO members are thus brought to the attention of not just governments across the world, but tripartite partners which can rally to support workers at risk in suppressive working environments. The ILO has clearly faced challenges, to which it has adapted with measures like the 1998 Declaration.

The ILO is not isolated from trade. Declarations include the understanding that labour standards cannot be used for protectionism. The CLSs promoted by the 1998 Declaration are not as detrimental as critics like Alston assert. They have set the stage for gradual ratification of the eight fundamental conventions. Technical assistance provided to support this such as through the Better Work programme, allows for small-scale, deep engagement at specific RMG industry-level. This is beneficial for actors across the global supply chain.

The WTO has had a backstage role in trade and labour standards, its inaction providing the impetus for ILO renewal. The failure to adopt a social clause should not be perceived negatively and efforts at stretching Article XX general exceptions to cover labour rights are unrealistic attempts at creating further friction at WTO level. The outcome should be better coordination between the ILO and WTO but not a pursuit of social clause alternatives.

Conversely, the WTO has both restricted developing countries' ability to trade through clothing quotas at the same time as intending to promote their trade through special and differential treatment. A notable outcome of the latter is the GSP, which should be provided according to an objective standard – the *EC-Tariff Preferences* case providing a wake-up call for the EU to avoid adopting arbitrary, closed forms of GSP. The GSP is central to ideals of sustainable development, especially for the EU.

Within the SDGs, decent work has taken up a new, more important role as a separate goal combined with economic growth, a combination which is to be welcomed not criticised. Some steps are

needed to ensure the decent work goal becomes clearer in its agenda, such as rooting it in the ILO’s DWA.

Chapter 3 EU Trade and Sustainable Development Policies

I. Introduction

The EU has a significant role within the global framework of trade, labour rights and international development. The failure of the WTO social clause has led to normative trade ambitions,[1] putting trade in the 'service of sustainable development'.[2] Part of this is an emphasis on dialogue and cooperation.[3] The EU must conduct RMG trade as a 'messenger of good values'[4] and intertwine human rights into its external policies consistently.[5] The EU's exclusive competence in its CCP and shared competence in its development cooperation policies impacts on their adoption of norms.[6] The major EU trading instruments with Asia are the GSP, new generation FTAs and initiatives like the Bangladesh Compact.

This chapter first examines the EU's normativity in trade, development and labour rights. It assesses the integration of decent work and development of the CCP. It critically analyses the three forms of GSP and their substantive and procedural natures. The chapter evaluates the use of the GSP and its conditionality in practice. It then addresses the new generation FTAs and their SDCs as a newer form of EU trade policy.

II. The EU as a normative actor in trade and labour rights

The EU portrays itself as a normative actor in its external relations. A concept coined by Manners, it describes the ability of the EU to promote and protect norms.[7] It is a unique international actor,[8] with a normative difference from other international actors, due to its history, nature as a

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[1] Bart Kerremans and Jan Orbie, 'The Social Dimension of European Union Trade Policies' (2009) 14 European Foreign Affairs Review 629, 632.
[2] Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing 2015).
[3] TEU, Article 21(1).
[4] Päivi Leino, 'The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) 260.
[5] ibid.
[6] TFEU, Article 3(1)(e) and Article 4.
[7] Ian Manners, 'Normative Power Europe: A contradiction in terms?' (2002) 40(2) Journal of Common Market Studies 235.
[8] Selin Özoğuz-Bolgi, 'Is the EU Becoming a Global Power After the Treaty of Lisbon?' in Astrid Boening, Jan-Frederik Kremer and Aukje van Loon (eds), *Global Power Europe – Vol. 1: Theoretical and Institutional Approaches to the EU's External Relations* (Springer 2013) 3.

hybrid polity and political-legal constitution.[9] It can shape norms of global politics away from being state-centric,[10] whilst avoiding the undermining of state sovereignty.[11] Altruism is one way of explaining the EU's support of rights,[12] but it is more likely to be politically motivated. The EU promotes normative principles that are generally acknowledged by the UN as universally applicable.[13]

Manners asserts that there are five core norms promoted by the Union: peace, liberty, democracy, the rule of law and respect for human rights.[14] These are reinforced and expanded, allowing for adaptation to new global contexts and EU priorities.[15] Identifying key norms can be helpful to ensure consistency across EU external relations policies.

Of the five norms, human rights are the most central. The TEU places it as a founding value,[16] although there is an absence of rights in the previous European Economic Community (EEC).[17] Human rights within the treaties now hold a 'foundational and pervasive character'.[18] There is an emphasis on promoting and protecting the universality and indivisibility of human rights. They are a 'silver thread' running through external policies.[19] All aspects of policy making must defer to human rights.[20] Placing human rights at the centre of policies, for example in a human rights-based approach to development, legitimises EU actions,

[9] Manners, 'Normative Power Europe' (n 7) 240.
[10] ibid, 239; Ian Manners, 'The normative ethics of the European Union' (2008) 84(1) International Affairs 45, 45.
[11] Naila Maier-Knapp, 'The European Union as a Normative Actor and its External Relations with Southeast Asia' (2014) 10(2) Journal of Contemporary European Research 221, 228.
[12] Samantha Velluti, 'The promotion and integration of human rights in EU external trade relations' (2016) 32(83) Utrecht Journal of International and European Law 41, 47.
[13] Manners, 'The normative ethics of the European Union' (n 10) 46.
[14] Manners, 'Normative Power Europe' (n 7) 242.
[15] ibid, 244.
[16] TEU, Article 2.
[17] Gráinne de Búrca, 'The road not taken: the European Union as a global human rights actor' (2011) 105(4) The American Journal of International Law 649, 649-650.
[18] Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Faciticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1661.
[19] Council of the EU, 'EU adopts Strategic Framework on Human Rights and Democracy' (Press Release, 25 June 2012) 11737/12; TEU, Article 21.
[20] Commission, 'The European Union's role in promoting human rights and democratisation in third countries' (Communication) COM(2001) 252 final, 8.

particularly when the values it promotes are internationally-adopted rights.[21]

As shown in the previous chapter, decent work is part of sustainable development, which the EU aims to contribute to.[22] For Manners, sustainable development is a 'minor norm' which is more contested than human rights, most likely stemming from its environmental connotations.[23] Sustainable development has become a 'core' norm and 'decent work' a minor norm, evident in EU support of the DWA and UN SDGs as illustrated in the 2017 European Consensus on Development.[24] The EU defines itself ambitiously as the 'frontrunner' in efforts to make trade work for sustainable development.[25]

Labour rights have been on the EU's agenda for decades, influenced by the Community Social Charter of 1989, the European Social Charter (ESC) of the Council of Europe of 1963,[26] the revised ESC 1996,[27] and the EU's relationship with the ILO as an observer and EU MSs as ILO members. Internal protection is manifested within the EU's Charter of Fundamental Rights, 2000, which has the same legal status as the treaties.[28] The Charter is designed to transcend the 'artificial and somewhat arid debate about the labelling of 'rights'' and emphasise the international human rights framework.[29] It does not mention ILO

[21] Armin Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' (2000) 37 Common Market Law Review 1307, 1308.
[22] TEU Article 21(1), Article 3(1)(5).
[23] Manners, 'Normative Power Europe' (n 7) 242-243.
[24] EU Joint Statement, 'The New European Consensus on Development: 'Our World, Our Dignity, Our Future' (2017) para 13 <ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf> accessed 27 November 2019.
[25] Commission, 'Ending Poverty and Giving the World a Sustainable Future' (Communication) COM (2013) 92 final, 17.
[26] TFEU, Article 151.
[27] European Social Charter (revised) (entered into force 1 July 1999, opened for signature 3 May 1996) (1999) ETS.No.163.
[28] TEU, Art 6(1).
[29] Jeff Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in Tamara K Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart Publishing 2003) 4.

conventions or refer to them as inspirational sources,[30] quite different from the use of ILO standards in trade instruments.

III. The EU and Multilateral Cooperation in Norm Implementation

Treaty provisions on the EU's external action mandate the seeking of relationships and partnerships with 'third countries, and international, regional or global organisations' sharing principles of human rights, and the promotion of 'multilateral solutions to common problems, in particular in the framework of the UN'.[31] Normativity in trade and labour rights is a form of 'experimentalist spillover',[32] a phenomenon propelled by the increasing use of experimentalist governance in external relations. This is characterised by engagement with civil society, monitoring and revision of goals, features apparent in the case studies, especially of Bangladesh.[33] It is a way of implementing norms more effectively than top-down governance.

The EU's relationship with the ILO is a central feature of its normative transformation. This was instigated in 1958 and developed in 1989 with an exchange of letters whereby the former EC would be invited to meetings of the ILC and in turn the Commission invited ILO representatives to meetings on social and labour issues.[34] In 2001, an exchange of letters outlined that owing to globalisation, both the EU and ILO would benefit from increasing cooperation in the field of labour rights and sustainable development.[35] The EU declared itself a supporter of the ILO's 1998 Declaration.[36] It is a reflection of shared normative interests.

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[30] Petra Herzfeld Olsson, 'The ILO Acquis and EU Labour Law' in Mia Rönnmar (ed), *Labour Law, Fundamental Rights and Social Europe* (Hart Publishing 2011) 38.
[31] TEU, Article 21(1).
[32] Jeff Kenner and Katrina Peake, 'The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?' (2017) 19 Cambridge Yearbook of European Legal Studies 86, 90.
[33] Charles F.Sabel and Jonathan Zeitlin, 'Learning from Difference: the New Architecture of Experimentalist Governance in the EU' (2008) 14(3) European Law Journal 271.
[34] Paul O'Higgins, 'The Interaction of the ILO, Council of Europe and European Union labour standards' in Bob Hepple, *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press 2002) 62
[35] Corrigendum to the exchange of letters between the Commission of the European Communities and the International Labour Organisation [2001] OJ C 165/23; O'Higgins (n 34) 62.
[36] Exchange of Letters (n 35).

In 2004, the EU and ILO established a strategic partnership in the field of development.[37] This provides for, inter alia, working towards the goal of reduced poverty and the ILO's DWA 'by making the greatest possible contribution to strengthening the social dimension of development cooperation'.[38] It permits for enhanced cooperation at all levels, including financial cooperation.[39] The EU supports implementation of ILO conventions as part of the DWA.[40]

The EU has enjoyed a degree of autonomy, the power to act independently of MSs and other international actors, in its human rights agendas,[41] in theory being an autonomous legal actor in its external relations.[42] The stumbling block to its accession to the European Convention on Human Rights was the perceived impact of accession on its autonomy.[43] Engaging with the ILO bolsters the EU's autonomy to promote and protect labour rights in non-EU countries.[44] A relationship with the ILO ensures that the EU contributes to 'durable and equitable social and economic development'.[45] It legitimises EU promotion of labour rights externally, tackling critique that labour rights are second

[37] Commission and ILO, 'Memorandum of Understanding: Concerning the establishment of a strategic partnership between the ILO and the Commission of the European Communities in the field of Development' (2004) <www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_169299.pdf> accessed 27 November 2019.
[38] ibid 1; see Chapter 2 for more information.
[39] ibid 2.
[40] De Schutter (n 2).
[41] Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v Nederlandse Inland Reveue Administration* [1963] EU:C:1963:1; Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] EU:C:1986:166; Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] EU:C:1964:66.
[42] Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] EU:C:2008:461; TEU, Art 21(1), 47.
[43] Opinion 2/13 pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties [2014] EU:C:2014:2454 (*Opinion 2/13*) para 185.
[44] Opinion delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty – Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work [1993] EU:C:1993:106.
[45] Commission, 'The European Union's Role' (n 20) 8.

best to free trade.[46] At the same time, use of ILO standards raises the ILO's profile, especially when it faced credibility questions.[47]

This is distinguishable from subjecting internal labour law to ILO standards,[48] which the EU has been reluctant to do in the past. Implementation of ILO norms within the EU was at first minimal, contrasting to its external promotion of standards.[49] On some occasions, the CJEU case law does not align ILO standards with those of the EU.[50] The EU is increasingly changing the situation, encouraging MSs to ratify ILO standards, and directives may also reference ILO conventions.[51] This helps to address issues of double standards.[52]

The EU is defining itself as a coherent, consistent and clear normative actor in the field of trade and labour rights. A strengthened relationship with the ILO ensures the EU can act legitimately and merge both economic and social development in its trade instruments. This acts in tension with the pressure that too much human rights promotion could negate the EU's global market share.

IV. EU Development Cooperation

The EU aims to dovetail its trade policy with development policies so that they are mutually reinforcing.[53] Development cooperation is an area of shared competence,[54] though it is also an area in which MSs have clear obligations under Articles 208 and 210 TFEU to integrate EU values as

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[46] Jan Orbie, 'The European Union's Role in World Trade: Harnessing Globalisation?' in Jan Orbie (ed), *Europe's Global Role: External Policies of the European Union* (Ashgate Publishing 2008) 62.
[47] Tonia Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005) 239.
[48] See Jill Murray, *Transnational Labour Regulation: The ILO and EC Compared* (Kluwer Law International 2001)
[49] Novitz, 'The European Union and International Labour Standards' (n 47) 216.
[50] C-438/05 *Viking Line* [2007] EU:C:2007:772; C-341/05 *Laval* [2007] EU:C:2007:809; Olsson (n 30) 27.
[51] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299, Preamble recital 6; The EU strongly encourages the adoption of the ILO's Maritime Conventions, see Commission, 'Maritime' <ec.europa.eu/transport/modes/maritime/seafarers/employment_en> accessed 27 November 2019.
[52] Novitz, 'The European Union and International Labour Standards' (n 47) 241.
[53] Commission, *Trade for all: Towards a more responsible trade and investment policy* (European Union 2015) 7.
[54] TFEU, Article 4.

in Article 21 TEU and under a duty of fidelity.[55] The EU promotes a 'rights-based approach to development' which integrates rights into the needs analysis of poverty eradication.[56] It aims to reduce and eradicate poverty within the context of human rights.[57] This is a new face for the EU's normativity, shifting from a conventional development cooperation approach that 'paid scant attention' to human rights.[58] The 2030 Agenda bolsters this human rights-based approach, forming the foundation to the EU's development policies.[59]

Development cooperation is guided by the 2017 European Consensus on Development, the 'cornerstone' of EU development policy,[60] and complemented by the EU's Action Plan on Human Rights and Democracy covering 2015-2019.[61] It aims at, inter alia, boosting ownership of local actors and addressing human rights.[62] The Consensus frames the implementation of the 2030 Agenda and aims for 'decent work for all'.[63] Like trade policy, development cooperation is increasingly focusing on civil society and decent work. The EU and its MSs are mandated to promote economic development that creates decent jobs and ensures sustainable value chains.[64] Within this, it makes a commitment to working with social partners to promote 'responsible, sustainable and effective approaches' to trade.[65] Support is provided in specific sectors tailored to country contexts,[66] evident in the Bangladesh Compact. It is also carried out in partnership with the ILO.

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[55] TEU, Article 4(3); FRAME Report 9.1, 94.
[56] Commission, 'A rights-based approach, encompassing all human rights for EU development cooperation' (Staff Working Document) SWD (2014) 152 final, 6.
[57] TFEU, Article 208(1).
[58] Bruno Simma, Jo Beatrix Aschenbrenner and Constanze Schulte, 'Human Rights Considerations in the Development Co-operation Activities of the EC' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 572.
[59] Commission, 'Next steps for a sustainable European future: European action for sustainability' (Communication) COM (2016) 739 final.
[60] The New European Consensus on Development (n 24) para 10.
[61] Council of the EU, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019' (20 July 2015) 10897/15.
[62] ibid.
[63] The New European Consensus on Development (n 24) para 7, 22.
[64] ibid, para 47.
[65] ibid.
[66] ibid, para 77.

The EU's financial instruments implement its commitment to development and human rights, including the Development Cooperation Instrument (DCI), the European Instrument for Democracy and Human Rights (EIDHR) and the Instrument contributing to Stability and Peace (IfSP).[67] They are governed by a horizontal EU regulation which ensures civil society involvement.[68] In the RMG industry, this would involve incorporating, inter alia, civil society organisations (CSOs) sharing concerns over labour rights' violations in the RMG industry, including within and outside of the EU, such as Clean Clothes Campaign (CCC), the International Trade Union Confederation (ITUC) and country-specific unions, brands, businesses and factories. A form of cooperation that brings together these actors would hence meet the EU's ambitious partnership objectives. Civil society dialogue must be carried out transparently, at appropriate times and with representative actors.[69]

Development cooperation agreements may be concluded with a developing country. They highlight areas of cooperation for the countries on development issues and aim to 'provide technical and financial assistance' in the pursuit of economic development.[70] The 1996 case of *Portugal v Council*[71] was a primary push for intertwining human rights and development. The Court upheld a human rights clause in the light of the then Article 177(2) TEC (now Article 208 TFEU), on development cooperation, which provided for Community policy to respect human rights and fundamental freedoms.[72] The objectives pursued are 'merely a reflection of normal standards in international relations'.[73] Promotion of human rights 'is in itself' development policy.[74] Advocate General La

[67] FRAME Report 9.1, 98.
[68] European Parliament and Council Regulation (EU) 236/2014 lying down common rules and procedures for the implementation of the Union's instruments for financial external action [2014] OJ L77/95, Article 1.
[69] Jeff Kenner, Katrina Peake and Stuart Wallace, 'The EU's Engagement with Civil Society' in Jan Wouters and others (eds), *The European Union and Human Rights: Law and Policy* (OUP 2020) (in press)
[70] Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 263.
[71] Case C-268/94 *Portuguese Republic v Council of the European Union* [1996] EU:C:1996:461.
[72] Ibid, para 24.
[73] Fierro (n 70) 29.
[74] Ibid, 254.

Pergola noted that the failure to adopt the clause would compromise the legality of the EU's actions.[75] Critique asserts that there is confusion over 'what the Treaty *does* say with what it '*should*' say',[76] although the case is a clear step towards human rights.

V. The CCP

A. EU Trade: A Powerful Tool

The CCP is a powerful tool for the EU to utilise to promote its values, fitting within the WTO framework discussed in Chapter 2. The EU is the largest export market for around 80 countries, constituting 16% of total world imports and exports.[77] Through trade, it can promote and protect decent work. RMG exporting countries have a variety of trading relationships with the EU. Many exporting countries are developing countries, warranting their benefit of the GSP. For countries advancing towards MIC status, or MICs, the EU's new generation FTAs or conventional FTAs will be granted. EU trading relationships are primarily bilateral or unilateral. Block trading relationships have not been developed with Asian RMG countries, although the EU has an interest in a region-to-region trade agreement with the Association of Southeast Asian Nations (ASEAN), which would replace FTAs negotiated with ASEAN countries individually.[78] This fits with the EU's ambitions to deepen its economic ties with the entire Asia-Pacific region.[79]

B. An Expansion of Competences

The wide scope of different trading relationships, and their connection to labour rights, has been an area of expanding competence for the EU. *Portugal v Council* set the stage for the EU's Treaty of Lisbon emphases on human rights as a core normative value in Articles 2, 3(5) and 21 TEU.

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[75] Case C-268/94, Opinion of Mr Advocate General La Pergola [1996] EU:C:1996:207, para 29.
[76] Steve Peers, 'Case C-268/94, Portugal v Council, (development policy), [1996] ECR I-6177 (Full Court)' (1998) 35(2) Common Market Law Review 539, 551.
[77] Commission, 'EU position in world trade' <ec.europa.eu/trade/policy/eu-position-in-world-trade/index_en.htm> accessed 27 November 2019.
[78] Commission, *Trade for all* (n 53) 32.
[79] Commission, 'A Balanced and Progressive Trade Policy to Harness Globalisation' (Communication) COM(2017) 492 final, 4.

The Treaty developed the exclusive competence of the CCP in goods, services, trade-related Intellectual Property Rights (IPRs) and FDI.[80] It brought about institutional changes, for example in the introduction of amendments to the Council's decision-making procedures and the European Parliament's role in trade.[81] These are set out in 207 TFEU, operating in the context of the CCP's objectives in Article 206 TFEU, including the abolition of restrictions on international trade. All essential EU trade legislation, such as trade preferences and their potential human rights aspects must go through Parliament.[82] This expansion has led to difficulties with the EU's mixed agreements, those which are signed by the EU and its MSs.

Opinion 2/15 provided 'welcome clarity' on the division of competence in trade agreements.[83] This concerned the EU's powers to conclude the EU-Singapore FTA. It was made clear that some provisions of the FTA, namely those relating to non-direct foreign investment and dispute settlement did not fall within the EU's exclusive competence.[84] The FTA would be a mixed agreement of both shared and exclusive competence requiring conclusion by both the EU and its MSs. Developing further *Portugal v Council*, the Court discussed human rights and sustainable development objectives.[85] It was made evident that 'the objective of sustainable development' is 'an integral part' of the CCP.[86] The *Opinion* reaffirmed the status of sustainable development as a core norm and its place in FTAs.

The SDC in the EU-Singapore FTA was found to have 'direct and immediate effects' on trade for several reasons.[87] First, because the parties committed not to encourage trade by reducing social and

[80] Yole Tanghe, 'The Borders of EU Competences with Regard to the International Regulation of Intellectual Property Rights: Constructing a Dam to Resist a River Bursting its Banks' (2016) 32(82) Utrecht Journal of International and European Law 27, 28.
[81] FRAME Report 9.1, 26.
[82] ibid.
[83] Commission, 'A Balanced and Progressive Trade Policy' (n 79) 6.
[84] Case Comment, 'Free Trade Agreement with Singapore requires Member State Approval' [2017] EU Focus 36, 36.
[85] Opinion 2/15 of the Court [2017] EU:C:2017:376, para 142.
[86] ibid, para 147.
[87] ibid, para 157-161.

environmental protection and not to apply the standards in a protectionist manner. These are commitments likewise referred to in the ILO's 1998 Declaration. Secondly, by promoting free trade on an equal footing. Thirdly, to address certain forms of unsustainable trade. Finally, through the enforcement provisions connected to labour rights and environmental protection. As the SDC did not harmonise labour or environmental standards, it fell within the EU's exclusive competence,[88] a weakness because the EU's role is limited to promotion. To an extent, it has a blank canvas on which to delineate the boundaries of labour rights in trade.

C. Protecting Labour Rights through Trade

The EU is described as a 'champion' of including labour rights in trade instruments.[89] It is experimental in the way it does this. The EU aims to shape trade policy to make 'globalisation work'.[90] It aligns its normative interests with the international agenda of the ILO's pursuit of a social dimension of globalisation.[91]

The EU's traditional method of integrating labour rights in trade agreements was an 'essential elements' clause. This was a narrow clause, which stated that human rights are an essential element of the relevant agreement.[92] The lack of use of prior human rights clauses has provided the 'catalyst' for a deeper EU-ILO relationship.[93] Currently there is an expanse of labour rights integration. Labour rights clauses go beyond essential elements clauses, from the SDCs devoted to sustainable development to conditionality, and newer, separate instruments like the Bangladesh Compact. There remains a difference between the labour rights obligations on GSP beneficiaries and FTA partners, which has attracted critique that the EU is not promoting human

[88] ibid, para 167.
[89] Orbie, 'The European Union's Role in World Trade' (n 46) 58.
[90] Commission, 'A Balanced and Progressive Trade Policy' (n 79) 3.
[91] International Labour Conference (97th Session) ILO Declaration on Social Justice for a Fair Globalization (Geneva, 10 June 2008).
[92] Commission, 'The inclusion of respect for democratic principles and human rights in agreements between the community and third countries' (Communication) COM(95) 216 final, 7.
[93] Jeff Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?' in Bart Van Vooren, Steven Blockmans and Jan Wouters, T*he EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013) 308-309.

rights that are universal and indivisible,[94] although it consistently draws upon ILO standards.

Where labour rights clauses are coupled with enforcement, trade partners can be concerned the EU is motivated by trade protectionist purposes,[95] as opposed to the protection of labour rights. Clauses are included in FTAs committing parties to not use standards in a protectionist manner. Protectionist concerns are heightened by, at times, an asymmetric power dynamic in favour of the EU, especially in the GSP.[96] However, for bilateral FTAs, enforcement is a procedure open to both parties. Bilateral and regional FTAs are more effective in integrating labour rights and in their monitoring than with unilateral trade relationships like the GSP.[97]

D. EU Trade and Responsible Supply Chain Management

Trade instruments provide an opportunity for the EU to take up a role engaging in RBC, as its businesses are part of the RMG global supply chain which is usually the spotlight of actions of global brands and retailers. RBC has been on the EU's radar for some time.[98] Businesses are key actors in reconciling stakeholders to sustainability,[99] and can be vital support in trade and development policies.

RBC is based on the premise, as expressed in the preamble to the ILO's Tripartite Declaration of Principles concerning MNEs and Social Policy, that advances made by MNEs in organising may lead to abuse of concentrations of economic power and conflicts with national policy

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[94] Päivi Leino, 'European Universalism? The EU and Human Rights Conditionality' (2005) 24 Yearbook of European Law 330, 358.
[95] De Schutter (n 2) 29.
[96] Orbie, 'The European Union's Role in World Trade' (n 46) 36.
[97] Tamara Takács, 'Human Rights in Trade: The EU's Experience with Labour Standards Conditionality and its Role in Promoting Labour Standards in the WTO' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 111.
[98] Menno T. Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 563.
[99] Commission, 'Promoting a European Framework for Corporate Social Responsibility' (Communication) COM (2001) 366, 3.

objectives and the interests of the workers.[100] RBC is part of the ILO's focus on global supply chains, which should form a dominant part of the EU's connection with the ILO.[101] Its pursuit of RBC in its external relations can influence the contribution of brands and retailers to establish measures building up decent work in the RMG industry.[102]

The EU's support for RBC broadens its labour rights agenda. It has taken steps to form industry and country-specific initiatives as part of efforts to place RBC at the heart of the RMG supply chain, for example the Bangladesh Compact. The European Commission aims to establish similar initiatives in future, expanding civil society and governmental engagement and a mix of soft tools to bring about legislative change.[103] Civil society engagement reduces the EU's democratic deficit.[104] It facilitates working with actors like the Organisation for Economic Cooperation and Development (OECD).[105]

The European Parliament has expressed support for an EU flagship initiative on the garment industry, instigated following the Rana Plaza factory collapse.[106] It welcomes increasing attention on decent work, such as through the UK's Modern Slavery Act.[107] The EU supports the OECD due diligence guidance for responsible supply chains and calls for the Commission to extend CSR through binding legislation on due diligence for the garment sector to fulfil human rights, including ILO standards.[108] Binding legislation would be an innovative but controversial step forwards in labour rights protection. Any such legislation should complement EU trade instruments. The Parliament ensures price is an

[100] International Labour Office (204th Session, amended 279th, 295th and 329th sessions) Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (2017).
[101] International Labour Conference (105th Session) Resolution concerning decent work in global supply chains (Geneva 10 June 2016)
[102] Commission, 'Next steps' (n 59) 11.
[103] Commission, *Trade for all* (n 53) 24.
[104] Catherine Barnard and Simon Deakin, 'Corporate governance, European governance and social rights' in Bob Hepple, *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press 2002) 122.
[105] Commission, *Trade for all* (n 53) 25.
[106] European Parliament, 'Resolution of 27 April 2017 on the EU flagship initiative on the garment sector' (2017) (2016/2140(INI)).
[107] ibid, para 1.
[108] ibid, para 7.

issue which is put on the EU's agenda, calling for wage-setting mechanisms in accordance with ILO conventions,[109] something which, as will be shown in the case studies, is an issue often side-lined.

VI. The EU's GSP: Aiming for Economic Development?

A. The three forms of GSP

The (former) EEC launched its GSP in June 1971, permitted by the GATT waiver from the MFN principle,[110] with the intention of the GSP as a 10-year scheme. The WTO Enabling Clause continues to permit the GSP on the basis of special and differential treatment, as described in Chapter 2.[111] Initially it was largely about maintaining relationships with former MS colonies.[112] It provides unilateral and non-reciprocal trade preferences to developing countries to help integrate them into the global trading system and ensure their economic development.[113] The way in which it fosters economic development is by providing tariff preferences that boost exports to the EU and so increase export earnings in GSP beneficiaries.[114] This generates revenue that can, in theory, be invested into development and export diversification.[115] It is guided by the EU's normative objectives,[116] including sustainable development.

There are three forms of EU GSP: the standard GSP, the GSP EBA, which provides duty-free and quota free access to the EU market for all products except arms and ammunition to UN classified LDCs, and the GSP+, which provides for more favourable tariff preferences upon a country's compliance with certain standards, 'positive' conditionality.[117] Negative conditionality, the withdrawal of tariff preferences upon a country's violation of standards, including labour standards, is a possibility for all forms of GSP. It has been asserted that there is a blurry line between positive and negative conditionality, the denial of the more

[109] ibid, para 21.
[110] The MFN principle is described in Chapter 2.
[111] Enabling Clause, see Chapter 2.
[112] De Schutter (n 2) 102-103.
[113] ibid.
[114] Gene M. Grossman and Alan O.Sykes, 'A preference for development: the law and economics of GSP' (2005) 4(1) World Trade Review 41, 60 .
[115] GSP Regulation, Preamble Recital 7.
[116] ibid, Preamble Recital 2.
[117] GSP Regulation.

favourable benefits if they do not satisfy the additional standards, or where there is withdrawal owing to the fact a country has not met certain standards.[118] All the same, positive conditionality is regarded as a benefit, a 'reward' and negative conditionality a punishment.[119]

Through this conditionality approach, the EU's trade policy is 'fully supportive of sustainable development worldwide', mainly through the EBA and GSP+.[120] The EBA is the 'showpiece',[121] or 'flagship'[122] instrument of EU trade policy supportive of development because it provides the most favourable trade benefit, allowing its beneficiaries, LDCs, greater scope to economically develop as they are developmentally most at need. The EU encourages other WTO members to adopt an EBA scheme.[123] The Bangladesh case study in Chapter 5 examines the EBA in more detail, an example of both the accelerated trade the EBA can bring but also a heavy reliance on preferences by one main export industry.

The GSP+ is 'based on the concept of sustainable development'.[124] First established in 2005,[125] its effect is to suspend the Common Customs Tariff ad valorem duties on products, being more favourable than the standard GSP and less favourable than the GSP EBA.[126] The standard GSP is rarely promoted by the EU as a sustainable development instrument, even though the preamble to the GSP Regulation states that the EU aims to 'foster the sustainable, economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'[127] through all forms in particular through the list of conventions annexed to the GSP.

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[118] De Schutter (n 2) 29.
[119] ibid.
[120] Commission, 'Next steps' (n 59) 14.
[121] Gerrit Faber and Jan Orbie, 'Everything But Arms: Much More than Appears at First Sight' (2009) 47(4) Journal of Common Market Studies 767, 768.
[122] Commission, 'Report on the Generalised Scheme of Preferences covering the period 2016-2017' (Communication) COM(2018) 36 final, 5.
[123] Faber and Orbie (n 121) 768.
[124] Commission, 'Report on the GSP' (n 122) 8.
[125] Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences [2005] OJ L169/1.
[126] GSP Regulation, Article 12.
[127] ibid, Preamble Recital 3.

This aim was hindered by restrictive rules of origin that were eliminated when the GSP was updated in 2012.[128] GSP beneficiaries were reduced by more than half in 2014.[129] In the period of 2016-2017, there were 10 GSP+ beneficiaries, 23 standard GSP beneficiaries and 49 EBA beneficiaries.[130] The three countries that constituted the largest chunk of all EU imports from GSP beneficiaries were India, Vietnam and Bangladesh.[131] Textiles and clothing, including RMGs, constitute a substantial part of these imports. In 2016, India exported EUR 7.6 billion worth of textiles and clothing to the EU, EUR 5.7 billion of this under the standard GSP.[132] Bangladesh takes up the largest share of exports under the EBA, at 66%.[133] Coupled with the fact that the RMG industry provides an entry level industry for developing countries to economically progress, the GSP has been particularly encouraging for garment exports.

B. Negative Conditionality in the GSP

The GSP's human rights hallmark is conditionality. The aim of negative conditionality is to promote the objectives of the human rights conventions contained within the GSP.[134] It is a 'sanction', a measure 'taken against a state that violates an international obligation in order to influence governmental behaviour'.[135] All forms of GSP may be withdrawn temporarily 'in respect of all or of certain products originating in a beneficiary country' for reasons including: drug and fishery issues, the export of goods produced by prison labour,[136] and, notably, 'serious

[128] Laura Beke and Nicolas Hachez, 'The EU GSP: A Preference for human rights and good governance? The case of Myanmar' (2015) Working Paper No.155, 14 <ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp155-beke-hachez.pdf> accessed 27 November 2019.
[129] Commission, 'Revised EU trade scheme to help developing countries applies on 1 January 2014' (Memo, 2013) <ec.europa.eu/commission/presscorner/detail/en/MEMO_13_1187> accessed 27 November 2019.
[130] Commission, 'Report on the GSP' (n 122) 1-2.
[131] ibid, 3.
[132] ibid, 4.
[133] ibid, 5.
[134] GSP Regulation, Preamble Recital 24.
[135] Christine Kaufmann, *Globalisation and Labour Rights* (Hart Publishing 2007) 238.
[136] GSP Regulation, Article 19(1)(b).

and systematic violation of principles' that are laid down in conventions listed in Part A of Annex VIII to the GSP Regulation.[137]

There are 15 conventions listed,[138] including the ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[139] and all eight ILO fundamental conventions.[140] Including ILO conventions is notable as the EU recognises the functional autonomy of the ILO in setting and supervising global labour standards and its influence and power.[141] This differs from the narrow focus of the past on civil and political rights.[142] There are 12 additional conventions on the environment and governance which apply only to GSP+ beneficiaries.

The list cherry picks conventions. This may violate the promotion of the universality and *indivisibility* of human rights in Article 21(1) TEU. It could be considered a narrow labour rights list, with a choice of conventions that are 'vague and easily manipulated'.[143] Although conventions standards may be unclear, the EU has made wise choices in its list, even though it does not include ILO conventions not part of the CLSs. The list encompasses wage issues, demands reasonable working conditions and emphasises women's rights. The ICESCR addresses

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[137] ibid, Article 19(1)(a).

[138] Eight fundamental ILO conventions (see Chapter 2); Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1996, entered into force 4 January 1969) 660 UNTS 1; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; ICESCR; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 ("CEDAW"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1456 UNTS 85; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[139] CEDAW.

[140] GSP Regulation, Annex VIII, Part A.

[141] Jeff Kenner, 'The Remodeled European Community GSP+: A positive response to the WTO ruling?' in George A. Bermann and Petros C. Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007) 296-297.

[142] Barbara Bandtner and Allan Rosas, 'Trade Preferences and Human Rights' in in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 708; FRAME Report 9.1, 32.

[143] Andrew Clapham, 'Where is the EU's Human Rights Common Foreign Policy and How is it Manifested in Multilateral Fora?' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 653.

broader aspects of workers' rights in Articles 6-9. Article 7 has an objective of 'just and favourable conditions of work' including equal remuneration. CEDAW covers gender equality in the workplace. By integrating these conventions alongside the eight ILO fundamental conventions, the EU has ensured flexibility in the scope of rights and allowed for a decent work perspective to be adopted through the GSP.

As the GSP is revised in future, it could better fit into the trend of trade in the *service* of sustainable development,[144] paying greater attention to the UN SDGs. This does not require a broad labour rights clause referring to international labour standards, as this would have less legal certainty, but rather an emphasis on the conventions as part of the ILO's DWA. The European Parliament's proposed flagship initiative on the garment sector has called on the Commission to introduce tariff preferences for textiles that are produced sustainably on the basis that the goods are submitted on a voluntary basis for certification.[145] This would add an extra dimension to the GSP, although the technical capacity to introduce such a measure is lacking, both on the part of the EU and of RMG producing countries. Moreover, the scope of conditionality needs to be clarified.[146] As it stands it has broad scope for GSP beneficiaries to challenge withdrawal decisions on the basis of arbitrary selection and punishment.[147] This ties into the need for consistency and coherency in the way the EU acts with regards to human rights abuses in GSP beneficiaries to ensure it is a legitimate normative actor. To clarify its scope, the boundaries of the standards contained in the 15 conventions should be delineated.[148]

As 'serious and systematic' indicates a 'last resort', it could be that the clause restricts the ability to protect and promote labour standards as

[144] De Schutter (n 2).
[145] European Parliament (n 106) para 23.
[146] Karin C.J.M. Arts, 'European Community development cooperation, human rights, democracy and good governance: at odds or at ease with each other?' in Konrad Ginther, Erik Denters and Paul J.I.M. de Waart (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff Publishers 1995) 263.
[147] Bruce Wardhaugh, 'GSP+ and Human Rights: Is the EU's Approach the Right One' (2013) 16(4) Journal of International Economic Law 827, 846.
[148] Clapham (n 143) 655.

the threshold is too high.[149] The EU's relationship with the ILO may assist in this regard, as the EU's actions on labour rights are guided by the ILO,[150] and there is a need for the EU to act by collective means.[151] Portela and Orbie assert that there exists 'coherence by accident' between the EU and the ILO in the GSP.[152] Where there is authoritative condemnation by the ILO, there is more likely to be a push for GSP withdrawal, particularly from trade unions.[153] The clause is synchronised with ILO condemnation. When the ILO issues a special paragraph, it is upon an understanding that there have been 'consistent and serious violations of labour rights, including those enshrined in core labour standards'.[154] It could also act as a way of giving the ILO's condemnations 'teeth'.

In the previous GSP Regulation two special paragraphs triggered withdrawal, now it is considered that the Commission has the perspective that at least one special paragraph is necessary.[155] This is not a legal position and the Commission has been criticised for placing too much weight on the CAS as the ''official' voice of the ILO'.[156] There is certainly a trend of 'ILO-isation', characterised by increasing emphasis on the ILO, a shift towards 'soft governance' and a growing role for RBC.[157] If case law is frequently assessed at the ILO's CFA and there are continual emphases on a country's situation in the ILC, in particular a special paragraph, this could constitute a serious and systematic violation for the purposes of the GSP. This will ultimately lead to 'mutually reinforcing EU-

[149] Kaufmann (n 135) 198.
[150] Jan Orbie and Clara Portela, 'Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?' (2014) 20(1) Contemporary Politics 63, 61.
[151] TEU, Article 21(1).
[152] Orbie and Portela (n 150) 672.
[153] ibid.
[154] ILO, 'Special Paragraphs: Colombia' <www.ilo.org/actrav/info/pubs/WCMS_111422/lang--en/index.htm> accessed 27 November 2019.
[155] Jeffrey Vogt, 'A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized Scheme of Preferences (GSP)' (2015) 31(3) The International Journal of Comparative Labour Law and Industrial Relations 285, 294.
[156] ibid, 293.
[157] Jan Orbie, Hendrik Vos and Liesbeth Taverniers, 'EU Trade Policy and a Social Clause: A Question of Competences?' (2005) 17 Politique Européenne 159, para 25.

ILO strategies' which can strengthen the 'labour-trade-development-investment human rights nexus'.[158]

The withdrawal procedure is complex. Any EU MS or natural or legal person 'that shows an interest in withdrawal can bring violations to the attention of the Commission' which empowers, or rather influences it to commence an investigation.[159] It is not obligated to initiate a GSP investigation, the Commission '*may*' withdraw the tariff preferences.[160] Trade unions and NGOs have generally been unsuccessful in initiating GSP withdrawal, examples being Uzbekistan and Georgia where the ITUC and ETUC drew upon ILO condemnation.[161] The Commission has 'ample' discretion to launch an investigation and the Council as to the decision of suspension.[162] It must consider there are sufficient grounds to justify temporary withdrawal.[163] It is assisted by a General Preferences Committee that has the power to 'examine any matter relating to the application of this Regulation', comprised of representatives of the Commission, EEAS, EP's INTA committee and MSs.[164]

An implementing act initiates the procedure,[165] a transparent action by the EU as the notice is published in the Official Journal.[166] The Commission monitors and evaluates the situation in the beneficiary country for six months from the date of its publication.[167] It is a 'soft' situation. The beneficiary country is given every opportunity to cooperate.[168] The Commission can establish rules with respect to deadlines, rights of parties, confidentiality and review.[169] It is obligated to seek and consider 'all information it considers necessary' including the

[158] Kenner, 'Economic Partnership Agreements' (n 93) 321.
[159] Orbie and Portela (n 150) 66.
[160] GSP Regulation, Article 19(1).
[161] Vogt (n 155) 296.
[162] Orbie and Portela (n 150) 66.
[163] GSP Regulation, Article 19(3).
[164] FRAME Report 9.1, 34.
[165] GSP Regulation, Article 19(3).
[166] ibid, Article 19(4).
[167] ibid.
[168] ibid, Article 19(5).
[169] Commission delegated regulation (EU) No 1083/2013 of 28 August 2013 establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalised tariff preferences [2013] OJ L 293/16, Preamble.

'conclusions and recommendations of the relevant monitoring bodies'.[170] Third parties, including local civil society which could contribute to local knowledge and expertise,[171] can make their views known and the Commission can consider them where 'they are backed by sufficient evidence'.[172] International bodies, such as the ILO, are important here.[173]

After the monitoring period, the Commission submits a report to the beneficiary, which has the right to submit comments for a period not exceeding one month.[174] Within six months of that, the Commission can decide to terminate or temporarily withdraw the preferences.[175] Withdrawal takes place six months after its decision.[176] In total, this can be 22 months spent on the withdrawal process. Even where the decision for withdrawal has been made, the Commission can repeal the temporary withdrawal procedure.[177] If GSP withdrawal is carried out, it can be stopped at a later stage.[178] The essence in this long procedure is in intensifying dialogue with GSP countries. While the process is probably too long, it ensures there are solutions to the issues regarding the standards that have fallen short.[179]

Conditionality has become deep engagement. In Myanmar, the EU has embraced deep engagement in the GSP with an 'Initiative to Improve Labour Rights and Practices in Myanmar' in partnership with the ILO, U.S., Japan and Denmark.[180] Akin to the Bangladesh Compact, it is likely further initiatives like these will mould future EU trade and sustainable development policy. It might be argued that conditionality is

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[170] GSP Regulation, Article 19(6); ibid, Article 1(1).
[171] Fabienne Zwagemakers, 'The EU's Conditionality Policy: A New Strategy to Achieve Compliance' (2012) IAI Working Papers 12/03, 15 <www.iai.it/sites/default/files/iaiwp1203.pdf> accessed 27 November 2019.
[172] Commission delegated regulation (EU) No 1083/2013 of 28 August 2013 establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalised tariff preferences [2013] OJ L 293/16, Article 1(2).
[173] Orbie and Portela (n 150) 66.
[174] GSP Regulation, Article 19(7).
[175] ibid, Article 19(8).
[176] ibid, Article 19(12).
[177] ibid, Article 19(13).
[178] ibid, Article 20.
[179] Commission, 'Report on the GSP' (n 122) 5.
[180] ibid, 6.

a form of coercion, and coercion and cooperation are mutually exclusive.[181] This no longer seems the case with the EU's GSP. Cooperation and coercion seem to come hand in hand.

In practice, negative conditionality is rare. Its impact on the EU's normative objectives have, in the opinion of some, been 'modest'.[182] The rarity of triggering it has also led to criticism that there is a lack of consistency in its application,[183] which an effective human rights conditionality policy necessitates and Art 21 TEU dictates.[184] A strong basis for withdrawal is needed to be persuasive,[185] even given the EU's scope for flexibility initiating GSP withdrawal. The EU needs to consider not only human rights, but also political, economic and social factors.[186] Some take the view that this replaces the EU's desire to realise labour rights through trade.[187] Instead it is about the EU's desire to ensure *sustainable* development as stipulated in the GSP's preamble.

This requires an engaging process of weighing the impact it would have on the general population and degree to which GSP withdrawal will help the situation. Trade sanctions can not only pressure a government, but also convey the message that a country is potentially bad business.[188] Yet GSP withdrawal can affect the population of the GSP beneficiary.[189] This could be in a counter-productive manner, resulting in further violations of human rights.[190] Kaufmann makes the notable point that sanctions cannot tackle the root of a problem where the reason for

[181] Arts (n 146) 303.
[182] Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 37.
[183] Zwagemakers (n 171) 5.
[184] ibid.
[185] Marika Lerch and Guido Schwellnus, 'Normative by nature? The role of coherence in justifying the EU's external human rights policy' (2006) 13(2) Journal of European Public Policy 307.
[186] Beke and Hachez (n 128) 21.
[187] ibid.
[188] Kryvoi Yaraslau, 'Why European Union Sanctions Don't Work' (2008) 17 Minnesota Journal of International Law 239.
[189] Wardhaugh (n 147) 846; Tilahun Weldie Hindeya, 'Unilateral Trade Sanctions as a Means to Combat Human Rights Abuses: Legal and Factual Appraisal' (2013) 7(1) Mizan Law Review 101, 102.
[190] Hindeya (n 189) 118.

labour rights violations 'lies in the lack of opportunities to offset the costs involved in having higher standards'. [191]

Loss of RMG jobs might lead to an increase in modern slavery as young women have to find employment by other methods. This would run contrary to SDG 8's objectives on eliminating modern slavery in accordance with decent work. It echoes a situation in Pakistan, wherein the Commission considered the consequence of negative conditionality would be the loss of jobs for children, which was not in the EU's best interest from a development or human rights perspective.[192] The EU has made it clear that negative conditionality is restricted in its operation, stating that it would be 'careful not to penalise the population for the behaviour of its government, channelling its contributions through civil organisations'.[193] It balances these factors.

The EU has withdrawn tariff preferences on three occasions: Sri Lanka in 2010 (the GSP+); Belarus in 2006, and Myanmar in 2001. On these occasions, it has accounted for a variety of interests,[194] in the wider understanding of the GSP as a unilateral measure.[195] It is not a decision directed through a formal international process.[196] The unilateral nature of the GSP has given rise to its description as 'unfriendly',[197] 'punitive'[198] and 'coercive',[199] impacting on state sovereignty.[200] As a result, it might be considered negative conditionality is a tool of limited application.[201] The sporadic enforcement of conditionality has led observers to express dissatisfaction regarding an imbalance between positive conditionality 'which readily affords benefits to a large number of countries willing to

[191] Kaufmann (n 135) 240.
[192] Bandtner and Rosas (n 142) 717-718.
[193] Commission, 'The European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond' (Communication) COM(95) 567 final, 64.
[194] Fierro (n 70) 93.
[195] Leino (n 94) 373.
[196] Monica Hakimi, 'Unfriendly Unilateralism' (2014) 55(1) Harvard International Law Journal 105, 111.
[197] ibid, 112.
[198] Fierro (n 70) 99.
[199] Knud Erik Jørgensen, 'A multilateralist role for the EU?' in Ole Elgström and Michael Smith (eds), *The European Union's Role in International Politics: Concepts and analysis* (Routledge 2006) 39.
[200] Simma, Aschenbrenner and Schulte (n 58) 579.
[201] Fierro (n 70) 101.

commit to certain objectives and values' and negative conditionality 'which hardly even sanctions those among the beneficiaries which do not live up to their commitments'.[202] The question, therefore, is whether the provisions are really making a difference if it does not appear strings are attached.[203]

The situations in which the EU has carried out GSP withdrawal are restricted to their facts. They have taken place when the beneficiary country is far from cooperative.[204] Cooperation and dialogue instigate working together to fix a problem. In Myanmar, there was an isolated military regime in place which failed to respond to ILO recommendations addressing the issue of forced labour.[205] The Commission undertook an investigation with NGO and expert input that pointed to forced labour.[206] The EU also imposed Common Foreign Security Policy restrictions.[207] Withdrawing the GSP was unlikely to have strong economic impact as during the time, it affected only 5% of Myanmar's exports,[208] and only 31% of these exports to the EU were eligible for the GSP.[209]

In Belarus, the GSP investigation was triggered by a trade union complaint over systematic violations of freedom of association rights.[210] The unions had already submitted a complaint to the ILO's CFA, and an ILO Commission of Inquiry was established which adopted twelve recommendations.[211] Belarus did not cooperate with the ILO, giving the EU the impetus needed to withdraw the preferences.[212] GSP+ withdrawal in Sri Lanka for reason of violations of civil and political rights in the civil

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[202] Beke and Hachez (n 128) 11.
[203] ibid.
[204] Bartels (n 182) 42-43.
[205] Michael Ewing-Chow, 'First Do No Harm: Myanmar Trade Sanctions and Human Rights' (2007) 5(2) Northwestern Journal of International Human Rights 153, 160.
[206] Orbie and Portela (n 150) 67.
[207] Common Position of 28 October 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Burma/Myanmar [1996] OJ L 287/1.
[208] Ewing-Chow (n 205) 159.
[209] Stefan Collignon, 'The Burmese Economy and the Withdrawal of European Trade Preferences' (1997) EIAS Briefing Paper No 97/02 <www.stefancollignon.de/PDF/Burmeseeconomy_1997.pdf> accessed 27 November 2019.
[210] De Schutter (n 2) 117-118.
[211] Commission Decision of 17 August 2005 on the monitoring and evaluation of the labour rights situation in Belarus for temporary withdrawal of trade preferences [2005] OJ L213/16; ibid 118.
[212] De Schutter (n 2) 118.

war forms a case study, and will be assessed in great detail in Chapter Six.

Evidently, negative conditionality is no simple instrument of labour rights policy. The EU recognises its need to ensure withdrawal is far from a mere unilateral act, being parallel to ILO actions and engaging with civil society in its decision-making process. Such cooperation is permitted by the long time span of the GSP withdrawal process.

C. The GSP+: Positive Conditionality

i. Implementation and Monitoring of the GSP+ Conditions

The GSP+ is implemented on an engaging and cooperative basis. It is less of a unilateral measure as countries request to be granted it.[213] It aims to foster sustainable development in partnership with government and civil society,[214] considered by the EU a primary tool of sustainable development.[215] It has a narrow scope of coverage, only 12% of the total preferential EU imports in 2016 stemmed from the GSP+.[216] In addition, there are eight GSP+ beneficiaries as of 2019,[217] including Pakistan and Sri Lanka, both notable participants in the global RMG supply chain. Pakistan's EU exports constituted 74% of the GSP+ countries in the 2016-17 report.[218] As countries graduate to Upper MIC status they lose GSP+ preferences after three consecutive years.[219] Moreover, a GSP+ country must meet a vulnerability criteria, namely that it cannot be competitive on the EU market nor have a diversified export base.[220] The latter is controversial given that it may mean some countries are less motivated to diversify their export base.

For the purposes of sustainable development, countries must have the following points complied with: a ratified list of 27 conventions in Annex VIII of the GSP Regulation, including the fundamental ILO

[213] GSP Regulation, Preamble Recital 13.
[214] Simma, Aschenbrenner and Schulte (n 58) 582.
[215] Commission, 'Report on the GSP' (n 122) 7.
[216] ibid, 2.
[217] Commission, 'List of GSP beneficiary countries' (as of 01 January 2019) <trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157889.pdf> accessed 27 November 2019.
[218] Commission, 'Report on the GSP' (n 122) 7.
[219] ibid.
[220] Commission, 'Revised EU trade scheme' (n 129) 5.

conventions; the most recent conclusions of relevant monitoring bodies must have not identified a serious failure to effectively implement any of those conventions; must not have a reservation in relation to the conventions; must give a binding undertaking to maintain ratification and ensure effective implementation; accept without reservation the reporting requirements; finally, it must give a binding undertaking to participate in and cooperate with the monitoring procedure.[221] With the Commission's approval, the country becomes a GSP+ beneficiary.[222]

The core of sustainable development in the GSP+ is the 27 conventions, through which they are expected to show 'ownership and political commitment', continually improving compliance with the conventions.[223] Beneficiaries are expected to not merely ratify and implement, but to invest in improving standards for the long-run, in other words deep engagement. The list applies irrespective of the GSP+ beneficiary, perhaps a factor influencing their small number. It is a '27 course prix fix menu, where skipping a course or ordering a la carte is impossible'.[224]

The conventions differ from the list of conventions warranting negative conditionality, though the ILO conventions stay the same. The key difference is that the GSP+ contains environmental standards such as those in the Convention on Biological Diversity.[225] This discrepancy seems to suggest that these are less important, and it is sufficient to merely integrate them into the GSP+.[226] This contrasts to the SDCs in the new generation FTAs, wherein environmental standards are intertwined with labour rights, leading to critique that labour rights are being 'downgraded',[227] when in fact they are both part of the sustainable development agenda. It seems in this area the EU's strategy of

[221] GSP Regulation, Article 9(1).
[222] ibid, Article 10(4).
[223] Commission, 'Report on the GSP' (n 122) 8.
[224] Wardhaugh (n 147) 835.
[225] GSP Regulation, Annex VIII, Part A and B.
[226] Fierro (n 70) 367.
[227] Lore Van den Putte and Jan Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) 31(3) The International Journal of Comparative Labour Law and Industrial Relations 263, 282-283.

sustainable development is incoherent, leading to a mismatch of standards for different trading relationships.

Monitoring is a significant part of the GSP+ owing to its nature as 'positive' conditionality. The Commission keeps under review the ratification status of conventions and monitors their effective implementation through cooperation with relevant monitoring bodies.[228] The burden of proof for compliance rests with the beneficiary.[229] The Commission presents reports, usually every two years,[230] to the European Parliament and Council on the ratification status, compliance with reporting obligations and status of implementation.[231] Assessments by third parties, including the ILO, civil society, social partners, the European Parliament or Council, may be included and the Commission makes efforts to engage with them.[232] Where implementation is unsatisfactory, engagement is pursued.[233]

Monitoring is comprised of two tools: the scorecard and GSP+ dialogue. The scorecard lists the 'most salient shortcomings' identified by monitoring bodies.[234] Beneficiaries receive the scorecard annually and must respond to the shortcomings listed.[235] Scorecards have been criticised for the way they 'appear to draw entirely on the ILO for labour matters despite the ability to cast a wider net' and for the uncertainty of the outcomes of third party information.[236] The ILO is the most appropriate actor to deal with labour issues.

GSP+ dialogue takes place through monitoring missions, wherein the EU engages with the authorities and civil society.[237] Coordinating meetings have also been held with international UN and ILO organisations.[238] The benefit of such meetings is an improved understanding of the GSP+, its commitments, and the ability of civil

[228] GSP Regulation, Article 13(1).
[229] ibid, Article 15(2).
[230] ibid, Preamble Recital 14.
[231] ibid, Article 14(1).
[232] GSP Regulation, Article 14(3); Commission, 'Report on the GSP' (n 122) 8.
[233] Commission, 'Report on the GSP' (n 122) 8.
[234] ibid, 9.
[235] ibid.
[236] Vogt (n 155) 292.
[237] Commission, 'Report on the GSP' (n 122) 9.
[238] ibid.

society to pressure authorities to meet GSP+ obligations.[239] They complement EU foreign policy dialogues such as Human Rights Dialogues, creating 'mutually reinforcing leverage'.[240] The EU portrays seriousness about civil society dialogue,[241] although in practice this is not effective.[242] The EU is not the most appropriate actor to deal with international labour rights, so must cooperate with others to ensure the protection and promotion of human rights. This mirrors the theme of deep engagement in the SDGs. The EU aims to strengthen dialogue with all GSP beneficiaries where it can impact on rights, using lessons learnt from GSP+ monitoring.[243] This would tackle the issue that it appears the GSP+ has taken the place of the 'poster child' of the GSP, whilst the standard GSP and EBA has been pushed to one side.

In operation, the GSP+ has been criticised. Many GSP+ beneficiaries have questionable human rights records, such as Guatemala, a notorious labour rights violator.[244] The criticism is the EU is not promoting the ILO supervisory system or its standards if it continues to provide the GSP+ to countries that are condemned, even without a special paragraph.[245] This is increasingly changing as the EU is coupling the GSP+ with cooperative EU-ILO projects. As of 2016-2017, these projects applied to six of the ten GSP+ beneficiaries.[246] It is a way in which the EU can progress its normativity by supporting compliance with ILO reporting and implementation of ILO conventions.[247] In Pakistan, the EU funds capacity building of the government to improve ILO reporting and workshops that strengthen social dialogue and improve general understanding of ILO standards.[248] Technical support is provided

[239] ibid.
[240] ibid, 13. Human Rights Dialogues are held with non-EU countries by the EU, see Commission, 'The European Union's Role' (n 20).
[241] Commission, 'Meeting on the Generalised Scheme of Preferences Plus' (Civil Society Dialogue, 12/07/2017) 3 <trade.ec.europa.eu/doclib/docs/2017/august/tradoc_155993.07.17%20report%20for%20web%20page.pdf> accessed 27 November 2019.
[242] Kenner, Peake and Wallace (n 69).
[243] Commission, *Trade for all* (n 53) 26.
[244] Commission, 'Report on the GSP' (n 122) 8.
[245] Vogt (n 155) 303.
[246] Commission, 'Report on the GSP' (n 122) 11.
[247] ibid.
[248] ibid.

in the revising of labour laws.[249] The RMG supply chain has been impacted through EU projects on labour standards in Small and Medium Sized Enterprises.[250] Moreover, the EU is funding three projects to strengthen the role and participation of civil society and social partners in all GSP+ countries.[251]

The GSP+ has become a form of pre-emptive initiative, which might give the chance for preventative rather than reactive policies to take the forefront of EU trade. The benefit of the dialogues and the initiatives and projects that have become part and parcel of the GSP+ are numerous, namely owing to the complex mass of problems facing developing countries that are 'not easily resolved through mere finger pointing, or unilateral action'.[252] This is where the EU-ILO projects are helpful, as they provide transparency and outreach to countries struggling with capacity to meet the GSP+'s demands. What was previously unilateral has become multilateral in application.

ii. GSP+ and 'Extra' Negative Conditionality

There is an extra layer of negative conditionality for GSP+ beneficiaries. The GSP+ can be temporarily withdrawn where a beneficiary country does not respect its conditions or where there is a reservation to one of the conventions.[253] The burden of proof for compliance is on the beneficiary country.[254] The Commission only needs to have a 'reasonable doubt' that a GSP+ beneficiary is not respecting its binding undertakings,[255] a lower threshold than that of general negative conditionality. This is beneficial because it highlights the GSP+'s advanced nature as based on sustainable development. The process is

[249] ibid, 11-12.
[250] Commission, 'The EU Special Incentive Arrangement for Sustainable Development and Good Governance' (GSP+) assessment of Pakistan covering the period 2016-2017' (Staff Working Document) SWD (2018) 29 final, 13.
[251] Commission, 'Meeting on the Generalised Scheme of Preferences Plus' (Civil Society Dialogue, 12/07/2017) 3 <trade.ec.europa.eu/doclib/docs/2017/august/tradoc_155993.07.17%20report%20for%20web%20page.pdf> accessed 27 November 2019.
[252] Lisa Clay, 'The Effectiveness of the Worker Rights Provisions of the Generalised System of Preferences: The Bangladesh Case Study' (2001) 11 Transnational Law and Contemporary Problems 175, 175.
[253] GSP Regulation, Article 15(1).
[254] ibid, Article 15(2).
[255] GSP Regulation, Article 15(3).

drawn out, there is a maximum of 15 months from the initiation of the investigation, following a similar process to negative conditionality in the general GSP.

One of the GSP+ beneficiaries which has been questioned is El Salvador. There was an investigation with respect to freedom of association and the right to organise.[256] This was instigated when the Supreme Court of El Salvador in a ruling declared certain provisions of the ILO's Convention No 87 inconsistent with its constitution.[257] The inconsistency was then removed, and the EU, influenced by the nature of the GSP+ as an incentive considered that El Salvador had made sufficient progress to continue benefiting from the GSP+.[258]

VII. 'New Generation' EU Trade Policy

The EU's new generation trade policy fits well within this stronger agenda on cooperation and dialogue. It is a new outlook for the EU, and an opportunity for it to portray itself as a strong and relevant normative actor. The new generation FTAs are those negotiated after the EU's 2006 Global Europe strategy.[259] The first time a new generation FTA was concluded was the EU-Korea FTA.[260] With its bolstered competence in *Opinion 2/15,* the EU is ready to undertake a new journey in trade and sustainable development, ensuring it can serve the SDGs and fulfil global partnership under SDG 17. FTAs are bilateral or multilateral partnerships.

The new generation FTAs are 'a far-reaching policy shift'.[261] This is because of the way in which sustainable development is manifested

[256] Commission Decision of 31 March 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organise in El Salvador [2008] OJ L 108/29.
[257] ibid.
[258] Commission, 'Report on the status of ratification and recommendations by monitoring bodies concerning conventions listed in Annex III to Council Regulation (EC) EC No 732/2008 applying a scheme of generalised tariff preferences pursuant to Article 8(3) of this Regulation' (Report) COM(2011) 271 final, 5.
[259] Commission, 'Implementation of Free Trade Agreements' (Communication) COM(2017) 654 final, 7.
[260] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6.
[261] Boris Rigod, 'Global Europe: The EU's new trade policy in its legal context' (2012) 18 Columbia Journal of European Law 277, 289.

within them, through an SDC. The mere label of these chapters bolsters De Schutter's conception of trade in the service of sustainable development. The EU now perceives the establishment of its normativity within trade through the lens of partnership, in line with its consensus on development. This has resulted in a broad agenda for engagement with civil society, which aims to ensure trade policy is more transparent.[262] Connections can form between trade policy and RMG stakeholders. In accordance with the push for sustainable development, sustainability issues are featuring prominently.[263]

The SDCs ensure adherence to international labour and environmental standards and instruments.[264] Sustainable development within them holds a broad definition and flexibility in its boundaries.[265] It constitutes 'a more general strategy'.[266] The SDC is a blueprint for labour rights' clauses in EU FTAs, suggesting a 'serious and integrated approach to tackling labour issues'.[267] Most FTAs reference instruments such as the ILO 1998 Declaration and include an affirmation by the trade parties of their commitment to ensure trade fosters sustainable development.[268] The inclusion of the Declaration goes some way to confirming the universal nature of the fundamental labour standards. [269] However, given the critique of the fundamental labour standards,[270] and the Declaration's 'soft' nature, it is doubtful whether its inclusion will have any real impact. This will be assessed further in the Vietnam case study.

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[262] Commission, *Trade for all* (n 53) 18.
[263] Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (Non-Paper, 2017) 1 <trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf> accessed 27 November 2019.
[264] Commission, 'Implementation of FTAs' (n 259) 27.
[265] FRAME Report 9.1, 73.
[266] ibid, 72.
[267] Liam Campling and others, 'Can Labour Provisions Work beyond the Border: Evaluating the Effects of EU Free Trade Agreements' (2016) 155 International Labour Review 357, 377.
[268] FRAME Report 9.1, 74.
[269] Kaufmann (n 135) 198.
[270] See Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15(3) The European Journal of International Law 457; Brian A. Langille, 'Core Labour Right – The True Story (Reply to Alston)' (2005) 16(3) The European Journal of International Law 409.

The SDCs may recognise the trading partners' freedom to define their own level of social and environmental protection and not use this for protectionist purposes.[271] The aim is to use the FTAs as a vessel to promote internationally recognised labour standards. Nevertheless, the normative implications of the labour standards is not particularly clear, as they do not comprehensively detail the trade partner's obligations with regards to national labour law.[272] Labour standards within the SDCs are also treated 'on an equal footing' with the environmental standards.[273] Van den Putte and Orbie criticises this as having diminished the importance of labour standards.[274]

By contrast, labour standards should be on an equal footing as this ensures sustainable development is progressed, and that they can rightfully take their place in the broader decent work context. In a non-paper on the SDCs, the Commission noted that the new generation FTAs had 'widened the number of themes covered' including working conditions and RBC,[275] an outcome of the inclusion of broader references to ILO standards and decent work as opposed to the list of conventions in the GSP Regulation.

The Commission considers there is gradual progress in the implementation of the SDCs, and that they have enabled a basis for regular and detailed dialogue with trade partners.[276] The FTA monitoring processes are key to ensuring progress in decent work. The institutional framework of SDCs is described as the 'main innovation',[277] which varies between trade partners. The SDCs may establish a Committee on Trade and Sustainable Development, which is comprised of representatives of

[271] FRAME Report 9.1, 74.
[272] Billy Melo Araujo, 'Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality' (2018) International and Comparative Law Quarterly 233, 238.
[273] Commission, 'Trade and Sustainable Development (TSD) chapters' (n 263) 2.
[274] Van den Putte and Orbie (n 227) 282-283.
[275] Commission, 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (Non Paper, 2018) 11 <trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> accessed 27 November 2019.
[276] Commission, 'Implementation of FTAs' (n 259) 27.
[277] FRAME Report 9.1, 75.

the two parties, responsible for overseeing its implementation.[278] The EU-Korean and EU-Central American agreements have set up ministerial contact points, specialised committees/boards of senior officials to implement the chapter and dialogue facilities with civil society.[279] The latter is particularly important in ensuring good governance.[280]

Civil society dialogue is characterised by a domestic civil society mechanism for representatives of labour, environment and business of each trading partner - the Domestic Advisory Group (DAG) and a transnational civil society mechanism.[281] CSOs play an advisory role in such platforms.[282] The participation of trade unions in civil society dialogue is particularly important for labour rights, as these are the 'watchdogs for international labour standards'.[283] It ensures the EU is undertaking open and constructive dialogue facilitating synergies and ensuring complementation across bodies of dialogue.[284] As with GSP+ beneficiaries, the FTA partners are in it for the long run.

The effectiveness of the SDCs depend on long-term engagement and cooperation with relevant parties.[285] The Commission promotes cooperation with international organisations such as the ILO.[286] In some ways, the EU acts as the ILO's trade 'wingman'. While beneficial on paper, the Commission has pointed out concerns of implementation owing to capacity constraints in the partner countries or the adaptation needed for integrating civil society into high-level discussions.[287] The

[278] Campling and others (n 267) 363.
[279] FRAME Report 9.1, 75.
[280] Kamal Hossain, 'Evolving Principles of Sustainable Development and Good Governance' in Konrad Ginther, Erik Denters and Paul J.I.M. de Waart (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff Publishers 1995) 22.
[281] Jan Orbie and others, 'Promoting sustainable development or legitimising free trade? Civil society mechanisms in EU trade agreements' (2016) 1(4) Third World Thematics: A TWQ Journal 526, 528.
[282] Commission, 'Trade and Sustainable Development (TSD) chapters' (n 263) 3.
[283] Commission, 'The European Union's Role' (n 20) 8.
[284] Orbie, Vos and Taverniers (n 157) para 106.
[285] Commission, 'Implementation of FTAs' (n 259) 28.
[286] ibid, 35.
[287] Commission, 'Trade and Sustainable Development (TSD) chapters' (n 263) 5.

trade agreement has been criticised for not fully integrating civil society.[288]

Disputes are subject to a dispute settlement mechanism involving government consultations and a Panel of Experts.[289] The Panel of Experts is constituted of relevant experts on trade, labour and the environment.[290] It can issue non-binding recommendations.[291] Enforcement of the SDC commitments could be the core element of the FTAs, with the potential to instigate labour law improvements. This is key if situations arise wherein commitments are being violated, such as a lowering of labour standards even with a 'non-lowering of standards clause'.[292]

This procedure is different to the general dispute settlement procedure for the wider agreement whereby there is no role for civil society.[293] There is the issue of political will to carry out FTA commitments to improve labour standards, if enforcement is only soft then perhaps this would be lacking.[294] There is also the issue of political willingness to initiate enforcement proceedings. As the Vietnam case study in Chapter 7 will show, 'hard' enforcement may come through a connection to a PCA, a form of development cooperation agreement, which is generally concluded prior to a new generation FTA. There is 'hard' enforcement in GSP conditionality, but this has not meant that all GSP beneficiaries are adhering to human rights principles.

The EU addressed long-standing concerns on labour standards in Korea by following through with the FTA arbitration process, requesting a Panel in July 2019.[295] The Panel was requested for reasons of a failure on the side of Korea to ratify and effectively implement fundamental ILO

[288] Orbie and others (n 281) 538.
[289] Commission, 'Trade and Sustainable Development (TSD) chapters' (n 263) 3.
[290] ibid.
[291] FRAME Report 9.1, 76.
[292] ibid.
[293] Commission, 'Trade and Sustainable Development (TSD) chapters' (n 263) 4.
[294] Araujo (n 272) 245.
[295] Commission, 'EU moves ahead with dispute settlement over workers' rights in Republic of Korea' (News Release, 5 July 2019) <trade.ec.europa.eu/doclib/press/index.cfm?id=2044&title=EU-moves-ahead-with-dispute-settlement-over-workers-rights-in-Republic-of-Korea> accessed 27 November 2019.

conventions.[296] The Commissioner for Trade asserted that trade must go 'hand in hand with workers' rights' and the 'move shows the importance that the EU attaches to sustainable development' in trade.[297] The EU states certain provisions of the Korean Trade Union Act are contrary to the principles of freedom of association and the commitment described in the SDC to the ILO's 1998 Declaration and Korea's efforts towards ratifying ILO conventions fell short.[298] It shows the potential to use FTA enforcement against non-complying trade partners, even when the trade partner is being cooperative.

Much like GSP beneficiaries, the human rights record of FTA partners is questionable. The EU concluded an FTA with Peru and Colombia, signed in June 2012 and applied in August 2013.[299] This included an SDC, making commitments to, inter alia, uphold CLSs, not lower domestic labour law and promote dialogue with civil society.[300] Despite this, the Peruvian government has not promoted or effectively implemented the ILO CLSs, has even lowered various labour law standards, and has not organised an effective domestic dialogue to monitor the SDC.[301] Nevertheless, trade or financial sanctions are not foreseen.[302] There will always be hurdles in the pursuit of labour relations in trade.

The Commission has not found the FTAs effective in promoting sustainable development, mirroring arguments that the SDC is only included to guarantee 'public and political support' for FTAs.[303] A non-paper was issued in 2017 highlighting problems with implementing the

[296] ibid.
[297] ibid.
[298] EU, 'Republic of Korea-compliance with obligations under Chapter 13 of the EU-Korea Free Trade Agreement: Request for the establishment of a Panel of Experts by the European Union' (4 July 2019) <trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf> accessed 27 November 2019.
[299] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3.
[300] Jan Orbie and Lore Van Den Putte, 'Labour Rights in Peru and the EU Trade Agreement' (2016) 58 OFSE Working Paper, 5 <www.oefse.at/fileadmin/content/Downloads/Publikationen/Workingpaper/WP58_Peru_Study.pdf> accessed 27 November 2019.
[301] ibid.
[302] ibid, 14.
[303] Orbie and others (n 281) 530.

SDCs.[304] The Commission puts forward possible ways of improving implementation. These options are either a more assertive partnership on trade and sustainable development or a model with sanctions more akin to GSP withdrawal.[305] It is interesting that after so many years of the SDC being in place, the Commission has contemplated turning its back on a cooperative and dialogue-based approach to improving labour rights. The first option, partnership, would involve enhanced coordination and joint action with MSs, the European Parliament, international organisations and trade partners with more assertive use of the dispute settlement system and perhaps strengthened collaboration with the ILO.[306] The second is a model with sanctions that impact on trade or investment.[307] And so the 'new' generation FTAs might take a different turn.

After following through with the non-paper with dialogue and engagement with stakeholders, the Commission published feedback and a path for the future of implementing and enforcing SDCs in EU FTAs, with a 15-point plan under the headings of: working together, enabling civil society including the social partners to play a greater role in implementation, delivering, transparency and communication.[308] The Commission established that there was no consensus on a sanctions-based model.[309] Action points include deepening partnerships with the ILO, utilising EU funding to support civil society and DAGs, continuing to include commitments on effective OSH and labour inspections and more transparency and communication in minutes of meetings and events.[310]

VIII. Conclusion

The EU has a role as a normative, unique, international actor. Amongst its core norms are human rights, which is integrated as a value into

[304] Commission, 'Trade and Sustainable Development (TSD) chapters' (n 263) 4-5.
[305] ibid.
[306] ibid, 6.
[307] ibid, 7.
[308] Commission, 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (Non Paper, 2018) <trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> accessed 27 November 2019.
[309] ibid, 3.
[310] ibid.

internal and external policies. As core norms are dynamic, sustainable development has now shifted from being a minor norm to a core norm, and decent work should form a minor norm of itself, evident in the EU's support of the ILO in its external relations. Implementing these norms more effectively comes through experimentalist spillover, as experimentalist governance is adopted increasingly in EU external relations. Part of this shift will be the ILO's relationship with the EU, which has faced hurdles with EU autonomy and reluctance to subject itself to international law internally, but the EU shows a willingness to do so externally.

Development cooperation is a mechanism by which norms are implemented, particularly though the rights-based approach to development, which integrates decent work. Several financial instruments complement the pursuit of human rights, alongside framework development cooperation agreements which generally include human rights clauses, upheld by the CJEU in *Portugal v Council,*[311] a welcome addition to the EU's normative reflection.

The CCP is another strong tool by which human rights values can be promoted and protected. An area of exclusive competence, it has become overlapped with shared competence in some new generation FTAs requiring conclusion by the EU and its MSs, evident from *Opinion 2/15.* Sustainable development is upheld by that *Opinion* as an essential part of the EU's external relations. It is manifested within SDCs following from essential elements clauses, which are more outdated, and conditionality in the GSP. Normativity is equally about RBC, which is inherently connected to both trade and development policies. The European Parliament has been strong in calling for ambitious measures like binding legislation on due diligence for the RMG industry and wage-setting mechanisms. In theory these are excellent suggestions but in practice will have considerable hurdles.

The GSP is the dominant trading relationship with developing countries who are RMG producers in Asia. Of the three forms of EU GSP,

[311] Case C-268/94 *Portuguese Republic v Council of the European Union* [1996] EU:C:1996:461.

the EBA and GSP+ are upheld as the most ‘sustainable development’ supportive measures. Negative conditionality’s list of conventions could be criticised for cherry-picking, with a vague choice but at second glance encompasses decent work as conventions include a wide scope of labour rights, including for example gender equality. The interpretation of ‘serious and systematic’ violations may have gone too far in its emphasis on the need for an ILO special paragraph and not given enough attention to broader forms of ILO condemnation. The procedure of negative conditionality is sufficiently long to allow changes, but the EU generally avoids GSP withdrawal, pursuing instead varying forms of cooperation.

The GSP+ is based on cooperation and dialogue, with extensive monitoring procedures. It is more oriented around sustainable development, giving the EU greater flexibility to downgrade the GSP+ if one of the many conditions that must be met by a beneficiary is not complied with, a possibility that, like general GSP withdrawal, is not utilised often.

The EU’s new generation trade policy represents a shift in approach, with decent work and environmental standards in SDCs. It is a tailored approach to trade and labour rights, seemingly broader on the scope of labour rights that can be brought up at enforcement. Disputes are subject to a Panel of Experts which can issue non-binding recommendations, a fact which has been criticised although it has been used with Korea, the outcome of which will be awaited keenly. Its use in the case of Korea does not mean it will be used consistently against other FTA partners, as they also have questionable human rights records. The Commission made some efforts to revise the policy and envisage greater efforts to involve civil society in future. The changes are oriented around the way dialogue is carried out under the agreement.

Collectively, each of these instruments provides an opportunity for the EU to exercise its normative power in the promotion of labour rights for the RMG industry. A focus on labour rights in the RMG industry is a necessity given serious and systematic violations in many EU trade partner countries.

Chapter 4 The Asian RMG Industry

I. RMG Supply Chains

The RMG industry is one of the oldest and largest export industries in the world,[1] with an established global supply chain. Global supply chains are 'a key feature of contemporary globalisation'.[2] Globalisation is 'the functional integration and coordination of internationally dispersed activities'[3] which has resulted in trade expansion and new economic powers.[4] Once a lucrative business of the industrialising North, production has shifted to developing countries in Asia.[5] It contrasts to initial perceptions of outsourcing countries that gave protectionism a 'human face' through a reference to the loss of work in the West.[6] Cheap labour was seen as a menace rather than an issue requiring global attention.[7]

The industry expanded in the 'Asian Tigers',[8] playing a lead role in East Asia's swift industrialisation.[9] It then moved to countries such as Sri Lanka, Bangladesh, and Vietnam in the 1980s.[10] It followed export-led development.[11] The value of global RMG exports have rocketed, between 2005 and 2011 rising by 48%.[12] This was fed by the quota system for textiles and clothing, the MFA leveraging a place for

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[1] Gary Gereffi, 'International trade and industrial upgrading in the apparel commodity chain' (1999) 48 Journal of International Economics 37, 40.
[2] Greg Distelhorst and Diana Fu, 'Wages and working conditions in and out of global supply chains: A comparative empirical review' (ACT/EMP Research Note, 2017) 1 <www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_619715.pdf> accessed 27 November 2019.
[3] Gereffi (n 1) 41.
[4] Gilles Muller, 'The EU's Global Europe Strategy and the Liberalization of Trade in Legal Services: The Impact of the EU Free Trade Agreements in Asia' (2013) 14 Journal of World Investment & Trade 727, 727.
[5] Gereffi (n 1) 37.
[6] Naila Kabeer, *The Power to Choose: Bangladeshi Women and Labour Market Decisions in London and Dhaka* (Verso 2000) 13.
[7] ibid.
[8] These are Hong Kong, Singapore, South Korea and Taiwan. Liesbeth Sluiter, *Clean Clothes: A Global Movement to End Sweatshops* (Pluto Press 2009) 39.
[9] Gereffi (n 1) 40.
[10] Sluiter (n 8) 40.
[11] Gary Gereffi, 'Global value chains in a post-Washington Consensus world' (2013) 21(1) Review of International Political Economy 9, 11.
[12] WTO, OECD and IDE-JETRO, 'Aid for Trade and Value Chains in Textiles and Apparel' 13 <www.oecd.org/dac/aft/AidforTrade_SectorStudy_Textiles.pdf> accessed 27 November 2019.

developing countries in trade,[13] and tariff preferences which are a 'valued commodity' for garment producing countries, fostering rapid expanse of the industry.[14] The RMG global supply chain is dynamic, encompassing the whole range of activities in the design, production and marketing of RMGs.[15] Gereffi asserts that it is a 'prototypical buyer-driven commodity chain', generating aggressive patterns of global sourcing.[16] Within the chain, lead firms are the 'primary sources of material inputs, technology transfer and knowledge'.[17] The types of lead firms and their networks vary.[18]

Developing countries are typically involved in labour intensive stages such as cutting, sewing and trimming.[19] Moving higher up the supply chain, termed 'industrial upgrading',[20] would take time, requiring new technology or the rearranging of production.[21] While entry barriers are low, moving higher is progressively more difficult.[22] The industry is very competitive, with a need to meet constant new demands for 'fast fashion' characterised by rapid shipments, short lead times (the time from order to supply), higher quality garments and lowering of prices.[23]

Outsourcing is motivated by factors such as production costs.[24] Production cost benefits in developing countries include cheap labour and an absence of trade unions which could be seen as disruptive to production.[25] Export Processing Zones (EPZs) make outsourcing desirable. They are defined by the ILO as 'industrial zones with special

[13] Sluiter (n 8) 52.
[14] Yoon Seon Han and Jai S.Mah, 'Preferential trade treatment and industrial development: The case of Cambodia's garment industry' (2015) 23(1) South East Asia Research 121.
[15] Gereffi (n 1) 38.
[16] ibid, 40.
[17] ibid, 38.
[18] ibid.
[19] WTO, OECD and IDE-JETRO (n 12) 23.
[20] Gereffi (n 1) 51-52.
[21] WTO, OECD and IDE-JETRO (n 12) 23.
[22] Gereffi (n 1) 44.
[23] Shamel Azmeh and Khalid Nadvi, 'Asian firms and the restructuring of global value chains' (2014) 23 International Business Review 708, 708; WTO, OECD and IDE-JETRO (n 12) 21.
[24] Azmeh and Nadvi (n 23) 709.
[25] Sluiter (n 8) 38.

incentives set up to attract foreign investors'.[26] They are commonplace in Asia, characterised by exemptions from labour laws and taxes.[27] They attract investment often at the cost of labour rights.

The RMG industry is a useful 'starter'[28] industry for economic expansion and providing a place in global trade. It requires large populations of low-skilled, low-waged workers. The top fifteen garment exporters to the EU in 2011 included China, Bangladesh, India, Vietnam, Pakistan and Sri Lanka.[29] Asia is the RMG factory 'for the world' and in 2014 the Asia-Pacific region constituted US $601.1 billion (59.5%) of global exports of garments, textiles and footwear.[30] Outsourcing locations growing in popularity include countries in Africa, such as Ethiopia, wherein wages are extremely low and labour exploitation high,[31] particularly as Asian producing countries economically and socially develop, providing higher wages and becoming less competitive.

Within producing countries, there is an informal and a formal economy. Exporters are more likely to be established in the formal economy, but can sub-contract work to smaller, informal factories.[32] The informal industry is more inconspicuous, involving processes such as cutting, stitching, and finishes like sequin bead and embroidery work.[33] It covers work outside of government regulation and formal systems of labour and social protection.[34] Global supply chain transparency can go some way to unveiling the informal economy, allowing for publication of

[26] ILO, 'Export Processing Zones' <www.ilo.org/actrav/areas/WCMS_DOC_ATR_ARE_EPZ_EN/lang--en/index.htm> accessed 27 November 2019.
[27] International Labour Conference (105th Session) Resolution concerning decent work in global supply chains (Geneva, 10 June 2016) para 4.
[28] Gereffi (n 1) 40.
[29] WTO, OECD and IDE-JETRO (n 12) 16.
[30] Phy Huynh, 'Employment, wages and working conditions in Asia's Garment sector: Finding new drivers of competitiveness' (ILO Asia-Pacific Working Paper Series 2015) 2 <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_426563.pdf> accessed 27 November 2019.
[31] Marie Durane, 'Made in Ethiopia – The New Norm in the Garment Industry' (2015) 15 Sustainable Development Law and Policy 24, 24.
[32] Distelhorst and Fu (n 2) 11.
[33] Anti-Slavery International, 'Slavery on the high street: forced labour in the manufacture of garments for international brands' (2012) 9 <www.antislavery.org/wp-content/uploads/2017/01/slavery_on_the_high_street_june_2012_report.pdf> accessed 27 November 2019.
[34] Kaufmann (n 135) 4.

names, addresses and information about factories producing for global garment companies.[35]

II. Labour rights

Globalisation has influenced a power shift from governments and unions towards businesses. Employers have the ability to 'circumvent' or 'escape' regulation.[36] This has led to attempts at regulation both from the grassroots and the top-down, international organisations.[37] Social upgrading can be driven by increasing adoption of RBC policies, a multi-stakeholder approach, public pressure and strong labour law enforcement.[38] All of these factors are pursued in the EU's external relations. The 'Asian values' debate must be accounted for in social upgrading, challenging universal human rights based on differing cultural standards.[39] This makes it difficult to ensure workplace equality and labour rights. Actions might be culturally accepted but in the international limelight, a violation of rights. Adopting an Asian value perspective could lead to a 'significant weakening of universal standards'.[40]

Exploitation in Asia's RMG industry has been brought to the attention of European consumers. It is described as a 'sweatshop', a term associated with outsourced and subcontracted labour, long hours, unsafe working conditions and low pay.[41] Siegle describes it as involving 'oppressive temperatures', a 'relentless whirr of machines…policed by a pacing factory manager'.[42] When visiting RMG factories in Bangladesh and Sri Lanka, it was evident that Better Work factories represented the

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[35] CCC, 'Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry' (2017) 5 <cleanclothes.org/resources/publications/follow-the-thread-the-need-for-supply-chain-transparency-in-the-garment-and-footwear-industry/view> accessed 27 November 2019.
[36] Brian Bercusson and Cynthia Estlund, 'Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions' in Brian Bercusson and Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation* (Hart Publishing 2008) 1.
[37] ibid.
[38] Gary Gereffi and Joonkoo Lee, 'Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters' (2016) 133 Journal of Business Ethics 25, 35.
[39] Kaufmann (n 135) 78.
[40] ibid.
[41] Lucy Siegle, *To Die For: Is Fashion Wearing Out the World?* (Fourth Estate 2011) 41.
[42] ibid.

best of factories. Poor workplace conditions have led to prominent anti-sweatshop campaigns,[43] including by the CCC.[44] Civil society can lobby for RBC.[45]

RMG workers work at different levels, as machine operators, quality inspectors and helpers.[46] Each role requires the same long hours, often spilling into overtime, and the same task, even for machine operators. Helpers might cut thread, fold shirts or place collar inserts. Work is often piecework, and workers may be expected to meet a quota.[47]

Women make up a significant part of the workforce, a preferred gender of employment owing to the stereotype of their 'docile' nature,[48] and higher productivity.[49] The need to meet deadlines, compulsory overtime and the locking of factory gates to ensure workers do not smuggle out fabric all require a compliant labour force.[50] Gender discrimination is commonplace.[51] Allocation of roles is also class-dependent, it has been deemed that this helped to maintain discipline and reflect cultural values whilst creating a safe workplace for women,[52] although it means women rarely progress from positions as 'Sewing Machine Operators'. RMG employment is considered preferable to alternative forms of earning money, and workers may have escaped child marriage or prostitution.[53] Women suffer sexual abuse in the industry, although there is a cultural demand for discipline and propriety in factories.[54] This draws into play the relevance of 'Asian values', women's

[43] Jeroen Merk, 'Jumping Scale and Bridging Space in the Era of Corporate Social Responsibility: cross-border labour struggles in the global garment industry' (2009) 30(3) Third World Quarterly 599, 604.
[44] Jane Collins, 'The Rise of a Global Garment Industry and the Reimagination of Worker Solidarity' (2007) 27(4) Critique of Anthropology 395, 405.
[45] Merk (n 43) 604.
[46] Sadika Akhter and others, 'Work, gender roles, and health: neglected mental health issues among female workers in the ready-made garment industry in Bangladesh' (2017) 9 International Journal of Women's Health 571.
[47] ibid.
[48] Merk (n 43) 602.
[49] Kabeer (n 6) 71.
[50] ibid, 72.
[51] ibid, 73-74.
[52] ibid, 76.
[53] ibid, 93, 104-105.
[54] ibid, 73.

different roles and the locking of factory gates may be regarded positively as ensuring a protected industry.[55]

Gender divisions extend to trade unions.[56] This reinforces assumptions that men are more competent and suited to leadership, in turn weakening the labour movement.[57] Trade unions have the potential to improve compliance with legislation.[58] They can rally for improved workers' rights. Yet they are considerably restricted, hemmed in by economic and political factors from job insecurity to anti-union discrimination.[59] Some research suggests that exporting RMG factories are more likely to have trade unions.[60] Nevertheless, anti-union discrimination is widespread, involving abuse from gangs that work for factory owners or managers, carrying out acts with impunity.[61] The lack of freedom of association and collective bargaining is perhaps the most dominant issue in the Asian RMG industry.

Forced labour and child labour are more prominent in the informal economy.[62] In a study of the Indian garment industry, it was found that although there has been a reduction in child labour in the formal industry, there remained high incidences of unpaid child labour in small workshops.[63] Forced and bonded labour, where workers have to take a loan, also exists in the informal industry,[64] often hidden within global supply chains. Foreign workers can face the withholding of passports,[65] Bangladeshi workers that have migrated for RMG work have found themselves subject to torture and ill-treatment.[66]

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[55] ibid, 95.
[56] Alice Evans, 'Patriarchal unions = weaker unions? Industrial relations in the Asian garment industry' (2017) 38(7) Third World Quarterly 1619, 1627.
[57] ibid, 1630.
[58] ibid, 1622.
[59] ibid.
[60] Distelhorst and Fu (n 2) 11.
[61] Anti-Slavery International (n 33) 10.
[62] Distelhorst and Fu (n 2) 13.
[63] Nicola Phillips and Fabiola Mieres, 'The Governance of Forced Labour in the Global Economy' (2015) 12(2) Globalizations 244.
[64] Anti-Slavery International (n 33) 10.
[65] Vicki Crinis, 'Sweat or No Sweat: Foreign Workers in the Garment Industry in Malaysia' (2010) 40(4) Journal of Contemporary Asia 589.
[66] Siegle (n 41) 41.

Wages in the RMG industry across Asia are low, though in comparison to the poverty levels of many producing countries, and mean wages, they can offer an upgrade over the domestic economy.[67] The lowest wages are in Bangladesh and Sri Lanka, who had respective statutory minimum wages of £58 and £54 per month in 2015.[68] In Cambodia, India, Pakistan and Vietnam, the minimum wage varies between £97 to £118, although these can vary between men and women.[69] Low wages instigate trade union disputes, which can result in violence or the stopping of work.[70] Brands recognise the need to support wages but their commitments to address wages often fall short, evident in the case studies.

By the same token, RMG production has provided an important route for poorly educated workers to gain regular wages.[71] It can increase household incomes and improve living standards, both important aspects of the SDGs.[72] RMG jobs constitute the majority of industry occupations in many garment producing countries.[73] These are reasons why GSP withdrawal and trade sanctions can be so harmful to the population.

Major RMG industrial disasters have emphasised global awareness about factory conditions and workers' rights,[74] driving forwards RBC. Factory fires and collapsed buildings are common occurrences, caused by factors including narrow and blocked staircases, locked exits and an absence of emergency exits[75] Buildings may not be designed to house RMG factories with their hundreds, or thousands, of RMG workers.[76] Workers face health hazards,[77] and deaths are a frequent occurrence owing to lack of workplace safety. At Tazreen

[67] Distelhorst and Fu (n 2) 4.
[68] Huynh (n 30) 12.
[69] ibid.
[70] ibid, 12.
[71] ibid, 8.
[72] ibid.
[73] ibid.
[74] ibid, 20.
[75] Sluiter (n 8) 48.
[76] See Philip James and others, 'Regulating Factory Safety in the Bangladeshi garment industry' [2018] Regulation & Governance 1.
[77] CCC, 'Breathless for Blue Jeans: health hazards in China's denim factories' (2013) <cleanclothes.org/resources/publications/Breathless/view> accessed 27 November 2019.

Fashions Limited in Dhaka, Bangladesh, in November 2012, 112 workers died in a factory fire, gates were locked, there were no emergency exits, no fire systems and insufficient water.[78] From Tazreen to December 2015, in Bangladesh it is estimated 1,143 workers have died and there have been 3,531 injuries, including the Rana Plaza factory collapse.[79] Frequent deaths should be unacceptable in such a lucrative, Western-driven, industry.

Accidents can be prevented by regular audits conducted by lead firms such as brands and retailers, which could work together as in the Bangladesh Accord (described in Chapter Five). These audits need to be carried out effectively, a key problem with RBC. External audits are increasingly being certified by multi-stakeholder initiatives like Fair Wear Foundation,[80] which can help, though factories complain of 'monitoring fatigue' caused by multiple codes of conduct and monitoring requirements.[81] Their reluctance to engage with audits and perception of monitoring fatigue may lead to less violations of labour rights, but still create tension within the supply chain. As shown in the case studies, audits are insufficient to acknowledge violations.

RBC has varied in operation, even where policies are implemented by one lead firm.[82] Factors such as the strength of labour law, factory size, close relationships with buyers, might have something to do with this.[83] Its scope is mainly non-binding initiatives that may have little impact. [84] Even the ILO's Tripartite Declaration on MNEs has less formal standing than, for example, the 1998 Declaration,[85] though formally they are the same. This is where binding trade measures which

[78] CCC, 'Fatal Fashion' (2013) 40-42 <cleanclothes.org/resources/publications/fatal-fashion.pdf/view> accessed 27 November 2019.
[79] Solidarity Centre 'Bangladesh Garment and Textile Factory Safety Incidents' (December 2015) <www.solidaritycenter.org/wp-content/uploads/2015/12/Bangladesh.Garment-Factory-injury-and-death-fact-sheet12.pdf> accessed 27 November 2019.
[80] Richard Locke, Fei Qin and Alberto Brause, 'Does Monitoring Improve Labor Standards? Lessons from Nike' (2007) 61(1) Industrial and Labor Relations Review 3, 5.
[81] ibid, 6.
[82] ibid, 12.
[83] ibid.
[84] Kaufmann (n 135) 160.
[85] ibid, 166.

include labour rights can have greater impact and leeway in leveraging brands and retailers to redress issues like audits and wages.

III. Conclusion

The RMG global supply chain is lucrative, in South Asia mainly involving cutting, making and trimming under a buyer-driven supply chain in a very competitive industry. Labour rights violations span from anti-union discrimination to workplace safety issues. So-called 'Asian values' make the situation more complex, involving 'justifications' for practices like locking fire doors which cause deaths and a delicate situation for engagement by lead firms and other RMG stakeholders aiming to improve labour rights.

In cultivating labour rights in the RMG industry all stakeholders are needed.[86] The ILO considers itself 'uniquely positioned to address governance gaps in global supply chains so that they can fulfil their potential as ladders for development'.[87] As an ambitious normative player, the EU likewise has a role. The policy choices of RMG stakeholders, including the EU, ILO and buyers and brands, should be geared towards partnerships that facilitate upgrading and an improvement in labour rights for garment workers.[88] Factories need to be provided assistance in expanding the capacity to ensure workers' rights and workplace safety. This provides the backdrop to the following chapters which constitute the country case studies of Bangladesh, Sri Lanka and Vietnam.

[86] Huynh (n 30) 20.
[87] Resolution concerning decent work in global supply chains (n 27)
[88] ibid 21.

Chapter 5 Bangladesh, the GSP EBA and the Sustainability Compact

I. Introduction

Bangladesh has presented challenges to EU trade policy and its external human rights agenda. With an RMG industry employing over four million workers,[1] and a significant proportion of RMG exports destined for the EU, the EU has a strong bond with both the RMG industry, and its interconnected global supply chain dominated by European brands and retailers. Bangladesh benefits from the GSP EBA. Its RMG industry is characterised by severe labour rights violations, spanning from anti-union discrimination to inadequate occupational safety and health (OSH). It is far from 'decent work'.

Labour rights violations were thrown into the global spotlight by the Rana Plaza factory collapse in Dhaka, April 2013, which caused the deaths of over 1000 workers and injuries to over 2000.[2] Two floors had been added to the six-storey building,[3] and heavy generator vibrations stopped owing to a power cut on the day of the collapse.[4] Workers had been threatened with the stoppage of wages if they had not attended work that day notwithstanding the cracks.[5] Seabrook poignantly describes the disaster as 'a story of such appalling contempt for human life that it must rank among the most callous in the brutal history of industrialism'.[6]

The disaster instigated a global and national response. RMG workers formed a mob in anger,[7] and the government arrested people

[1] Jason Burke, 'Bangladesh garment workers suffer poor conditions two years after reform vows' *The Guardian* (22 April 2015) <www.theguardian.com/world/2015/apr/22/garment-workers-in-bangladesh-still-suffering-two-years-after-factory-collapse> accessed 27 November 2019.
[2] BBC, 'Bangladesh factory collapse toll passes 1,000' *BBC News* (10 May 2013) <www.bbc.co.uk/news/world-asia-22476774> accessed 27 November 2019..
[3] Jeremy Seabrook, *The Song of the Shirt* (Hurst & Company 2015) 66.
[4] ibid; Jason Motlagh, 'The Ghosts of Rana Plaza' (2014) 90(2) VQR: A National Journal of Literature and Discussion <www.vqronline.org/reporting-articles/2014/04/ghosts-rana-plaza> accessed 27 November 2019.
[5] Seabrook (n 3) 66.
[6] ibid 21.
[7] Motlagh (n 4).

connected with the collapse and charged them with murder.[8] International and national initiatives were formed to deal with various elements of labour rights violations:

[8] Reuters, 'Rana Plaza collapse: 38 charged with murder over garment factory disaster' *The Guardian* (18 July 2016) <www.theguardian.com/world/2016/jul/18/rana-plaza-collapse-murder-charges-garment-factory> accessed 27 November 2019.

Initiatives	Date Formed	End Date	Actors
The Bangladesh Sustainability Compact	July 2013	December 2019	Government of Bangladesh, EU, U.S., Canada, ILO, Representatives from industry, employers, trade unions and civil society organisations
The Accord	May 2013	2017; Renewed in 2018	Garment brands, retailers, importers, IndustriALL Global Union, UNI Global Union, Bangladeshi trade unions, NGOs
The Alliance	July 2013	2018	Garment brands and retailers
The Bangladesh National Tripartite Plan of Action (NTPA)	July 2013	N/A	Bangladeshi Ministries and Departments, Employers Organisations, Trade Union Organisations
ILO Project on Promoting Social Dialogue and Harmonious Industrial Relations in Bangladesh Ready-Made Garment Industry	October 2015	December 2020	ILO, Sweden, Denmark

Better Work Bangladesh Programme	April 2014	N/A	ILO, U.K., France, Netherlands, U.S., Switzerland, Canada, Australia
Improving Fire and General Safety	November 2013	January 2017	ILO, U.S. Department of Labour
Improving Working Conditions in the Ready-Made Garment Sector in Bangladesh	October 2013	June 2023	ILO, Canada, Netherlands, U.K.

The Compact is the focus of this thesis. It has three pillars: respect for labour rights, in particular freedom of association and the right to collective bargaining; structural integrity of buildings and occupational health and safety, and, RBC by all stakeholders engaged in the RMG and knitwear industry. The EU, in establishing the Compact,[9] took a route of 'deep engagement' characteristic of positive conditionality. Being based on working *with* Bangladesh, this contrasts to negative conditionality. The Compact meets Article 21(1) TEU's objectives of promoting multilateral solutions to common problems within the framework of the UN, involving the ILO, which plays the 'pivotal role as both coordinator and collaborator'.[10] It complements the EU-Bangladesh

[9] EU and others, 'Staying Engaged: A Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh' (July 2013) ("The Compact") available in FRAME Report 9.4, Annex 5.

[10] Jeff Kenner and Katrina Peake, 'The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?' (2017) 19 Cambridge Yearbook of European Legal Studies 86, 100.

CA of 2001, which has, as an essential element, respect for human rights and democratic principles.[11]

This chapter outlines the country context. It subsequently analyses the EU's GSP, development and labour rights, including an assessment of the possibility of GSP withdrawal and its potential impact. The chapter introduces the Compact's framework. It evaluates the leverage this has created for improvement of labour rights. This case study uses research data gathered from interviews with a range of RMG stakeholders conducted during a placement as a Visiting Scholar at the ILO in Bangladesh,[12] providing invaluable insight into the research question.

II. Country Context

A. The RMG Industry

Bangladesh is a UN-classified LDC which was granted independence in 1971.[13] It is democratic, with an elected government, and faces corruption, with a score of 26/100 and rank of 149/180 in the Corruption Perceptions Index.[14] The RMG industry is in urban areas, predominantly Dhaka and Chittagong. It expanded due to denationalisation, economic restructuring and an outward-oriented development strategy of the 1970s and 1980s.[15] It responded to global demand for low-cost RMGs and made use of quotas.[16]

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[11] Cooperation Agreement between the European Community and the People's Republic of Bangladesh on partnership and development [2001] OJ L 119/48, ("EU-Bangladesh Cooperation Agreement") Article 1.
[12] See Chapter 1 about the use of interviews in the research.
[13] UN, 'List of Least Developed Countries (as of December 2018)' (2018) <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf> accessed 27 November 2019.
[14] Transparency International, 'Bangladesh' <www.transparency.org/country/BGD> accessed 27 November 2019.
[15] Lamia Karim, 'Analyzing Women's Empowerment: Microfinance and Garment Labour in Bangladesh' (2014) 38(2) The Fletcher Forum of World Affairs 153, 161; Mizanur Rahman and Takrima Sayeda, 'The Effect of Integration with Global Apparel Value Chain: The Case of Bangladesh Apparel Industry' (2016) 17(2) South Asia Economic Journal 248, 252.
[16] Rahman and Sayeda (n 15) 252; Shahrukh Rafi Khan and others, *Export Success and Industrial Linkages: The Case of Readymade Garments in South Asia* (Palgrave Macmillan 2009) 34.

Bangladesh quickly became part of the RMG global supply chain.[17] In 2016, the top five exporting destinations for its RMGs were: the EU, the U.S., India, Canada and Japan.[18] The EU constitutes 48.7% of overall exports, of these 91.9% were clothing in 2018,[19] second to this the U.S. exports were valued at 12.4% and Canada 2.5%.[20] The EU not only has global clout as the world's largest trading block,[21] but also as the largest export market.

Bangladesh's large population provided a necessary ingredient to the RMG industry. Women make up between 50-80% of its workforce.[22] They are described as part of a newly feminised working class,[23] having gained autonomy in work.[24] The industry has even been 'hailed as the liberator of women'[25] because it enables women to earn wages, in place of early marriage and lack of job opportunities in rural villages.

The RMG industry is comprised of both country-wide factories and those in EPZs. There are eight EPZs employing roughly 400,000 workers.[26] A total of 16.9% of Bangladeshi exports were sourced from

[17] Commission, 'Sustainable Garment Value Chains through EU Development Action' (Staff Working Document) SWD (2017) 147 final, 5.
[18] Commission, 'Trade in goods with Bangladesh' (2019) 8 <webgate.ec.europa.eu/isdb_results/factsheets/country/details_bangladesh_en.pdf> accessed 27 November 2019.
[19] ibid, 4 and 8.
[20] ibid, 8.
[21] Jan Erik Wetzel, 'Introduction' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 1.
[22] In a Bangladesh Sustainability Compact technical status report, 55% of workers were deemed women, see Commission, 'Bangladesh Sustainability Compact: Technical Status Report' (July 2016) 5 <trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154841.pdf> accessed 27 November 2019 ("Technical Status Report 2016"); In one study covering 5 factories, 67% of workers were women, see Kaniz Farhana, Md. Syduzzaman and Md.Shayekh Munir, 'Present Status of Workers in Ready-Made Garments Industries in Bangladesh' (2015) 11(7) European Scientific Journal 564.
[23] Gowrie Ponniah and Geraldine Reardon, 'Women's Labor in Bangladesh and Sri Lanka: The Trade-Off with Technology' (1999) 3(1) Gender, Technology and Development 85, 90.
[24] Karim (n 15) 153.
[25] Fauzia Erfan Ahmen, 'The Rise of the Bangladesh Garment Industry: Globalisation, Women Workers, and Voice' (2004) 16(2) NWSA Journal 34, 35.
[26] Commission, 'Implementation of the Bangladesh Compact: Technical Status Report' (October 2017) 8 <trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf> accessed 27 November 2019 ("Technical Status Report 2017")

EPZs in 2012.[27] Factories in EPZs are governed by the Bangladesh Economic Zones Act 2010 ("BEZ Act"),[28] whereas those outside EPZs are governed by the Bangladesh Labour Act ("BLA").[29] This means workers' rights differ within and outside the zones. Factories may be part of the informal economy, where enterprises and workers are not regulated by the law.[30] In 2010, 87% of the workforce was held to exist in the informal economy (see Chapter Four).[31] Transparency in the RMG global supply chain is important to ensure this sector is regulated.

Spanning both the formal and informal sectors, the EPZs and country-based factories, labour rights' violations are widespread. Is the law incomplete, or is it merely not enforced correctly?

B. Workers' Rights in Bangladesh

The two main labour laws are the BEZ Act and the BLA. The BLA was amended in 2013 and implementing rules were adopted in 2015.[32] The Constitution states that it is a fundamental responsibility of the state to protect workers from 'all forms of exploitation',[33] and that Bangladesh shall be a democracy in which fundamental human rights are guaranteed.[34] There is a section dedicated to fundamental rights,[35] protecting against discrimination,[36] and allowing for freedom of association.[37] This contradicts the BLA and the BEZ Act which restrict labour rights.

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[27] Md. Iftekhalrul Islam Bhuiya, Emran Ahmed and Shabuz Mahmud, 'Relative Performance of Bangladesh Export Processing Zones (BEPZs) and the Reasons for the Difference in their Performance' (2014) 14(3) Global Journal of Management and Business Research: Economics and Commerce 29, 32.
[28] The Bangladesh Economic Zones Act [1st August 2010] Act No.42 ("BEZ Act 2010")
[29] The Bangladesh Labour Act [2006] Act XLII ("BLA 2006")
[30] ICF International, 'Child Labor in the Informal Garment Production in Bangladesh' (2012) 10 <digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2745&context=key_workplace> accessed 27 November 2019.
[31] ILO, 'Informal economy in Bangladesh' <www.ilo.org/dhaka/Areasofwork/informal-economy/lang--en/index.htm> accessed 27 November 2019.
[32] Commission, 'Implementation of the Bangladesh Compact: Technical Status Report' (2018) 2 <trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157426.pdf> accessed 4 December 2019 ("Technical Status Report 2018")2.
[33] The Constitution of the People's Republic of Bangladesh, Article 14.
[34] ibid, Article 11.
[35] ibid, Part III.
[36] ibid, Article 28.
[37] ibid, Article 38.

Internationally Bangladesh has a wealth of obligations. It is a member of the ILO, and has ratified 35 ILO Conventions, 31 of which are in force.[38] This includes seven of the eight fundamental conventions. Bangladesh has yet to ratify the Minimum Age Convention 1973 (No 138). It has ratified numerous other international conventions including the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR. Governments are responsible for protecting workers through law and enforcement.

i. Trade Unions

a. Trade union rights

Providing a voice to workers is key to decent work. Unions are not widespread, an estimated 4% of RMG workers are union members.[39] The Constitution ensures that workers have the right to form unions, subject to 'any reasonable restrictions imposed by law in the interests of morality or public order'.[40] Ratification of Conventions 87 and 98 likewise suggests the ability to form a union unhindered. The former sets out the right to establish and join organisations without prior authorisation,[41] and to elect representatives in full freedom and be free from any acts that would restrict their right to form a union.[42] The latter establishes the right of protection against anti-union discrimination.[43]

Workers face significant procedural and substantive limitations to forming unions. There is a minimum registration requirement, which obliges union organisers to have 30% of workers in a factory sign up to the prospective union.[44] Case law at the ILO's CFA has highlighted the unnecessary nature of this requirement,[45] the government's opinion that

[38] See ILO, 'Bangladesh, ILO Ratifications' <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103500> accessed 27 November 2019.
[39] Ibrahim Hossain Ovi, 'We need greater social dialogue' *Dhaka Tribune* (23 April 2017) <www.dhakatribune.com/tribune-supplements/business-tribune/2017/04/23/need-greater-social-dialogue/> accessed 27 November 2019.
[40] The Constitution of the People's Republic of Bangladesh, Article 38.
[41] ILO Convention No.87, Article 2.
[42] ibid, Article 3.
[43] ILO Convention No 98, Article 1.
[44] BLA 2006, section 179(2).
[45] *Bangladesh (Case No 2371)* (June 2005) Report of the Committee on Freedom of Association No 337 (Vol LXXXVIII 2005 Series B, No 2), para 240.

it is necessary due to the 'national context',[46] an ambiguous reason. Interviewees asserted that it is excessive, pointing to factories employing thousands of workers, thus unions lack capacity to organise.[47] This is made more complex by the existence of restrictions on the definition of 'worker'.[48]

The Ministry of Labour and Employment then examines the list of the 30%, pedantically verifying names, comparing signatures on the application and the employer's list of workers and even interviewing workers as to the authenticity of their signatures.[49] As a CSO interviewee pointed out, it is often found that the signature is not the same, as workers are illiterate or lack knowledge in perfecting signatures.[50] Additional requirements are for parent's names and an identity card number.[51] The government has discretion to register or reject an application.[52] A CSO interviewee made it clear that it is more or less common knowledge from whom union registration will be accepted and rejected.[53] In this way, the trade union 'world' in Bangladesh is a small one, which makes it more difficult for unions to form.

Operating without registration risks penalty of imprisonment.[54] The legal alternative to the trade union is a Worker Participation Committee (WPC), which can be employer-driven and inactive.[55] They are a poor alternative to independent trade unions. Where unions exist,

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[46] *Bangladesh (Case No 2371)* (March 2006) Report of the Committee on Freedom of Association No 340 (Vol LXXXIX 2006 Series B, No.1), para 39.
[47] Research Participant 8; Research Participant 9, Trade Union.
[48] BLA 2006, section 2(65), 175, 193, 300.
[49] ILO, 'Report of the High-Level Mission to Bangladesh' (17-20 April 2016) 14, <www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_488339.pdf> accessed 27 November 2019.
[50] Research Participant 4, CSO.
[51] ILO High-Level Mission Report 2016 (n 49) 14.
[52] ibid, 14; *Bangladesh (Case No 3203)* (June 2017) Report of the Committee on Freedom of Association No 382 (Vol GB.330/INS.4 2017, June 2017) para 172.
[53] Research Participant 4, CSO.
[54] BLA 2006, section 299.
[55] HRW, 'Bangladesh: Stop Persecuting Unions, Garment Workers' (2017) <www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers> accessed 27 November 2019; Md. Manirul Islam, 'Workers Rights and Gender Based Violence in the RMG and TU capacity to Deal with these' (BILS 2018) 25 <bilsbd.org/wp-content/uploads/2018/01/Workers-Rights-Gender-Based-Violence-in-the-RMG-and-TU-Capacity-to-Deal-with-These-Final-Draft.pdf> accessed 27 November 2019.

the law outlaws various 'unfair labour practices' on the part of workers, including restrictions on the ability to obtain trade union members.[56] Unions can be cancelled for engaging in these practices.[57] Restrictions on the right to strike can lead to imprisonment.[58]

Factories based inside EPZs are subject to similar restrictions. Trade unions are forbidden,[59] and in their place Worker's Welfare Associations (WWAs) permitted. They retain the 30% registration requirement and specific workers are excluded from joining.[60] Of the 400,000 workers in EPZs, there were only 232 WWAs in September 2017.[61] If they are able to form, their rights are limited and workers face dismissal if they attempt to exercise them.[62] Inspections are curtailed, notwithstanding ratification of the ILO's Labour Inspection Convention.[63] The situation is propounded by a broad definition of unfair labour practices, including participation in any WWA activities without permission from the employer, imposition of penal sanctions if violated, and excessive requirements for striking.[64] Trade union rights are suppressed, contrasting to Bangladesh's international 'social face' presented by the ratifications of UN and ILO conventions.

b. The operation of trade unions in Bangladesh

Interviewees highlighted a situation of vertical distrust between unions and the government/managers/owners, and horizontal distrust between

[56] BLA 2006, sections 196(2)(a)(b).
[57] ibid, section 190.
[58] ibid, sections 211, section 227, sections 196(2)(e), 291(2-3) and 294-296.
[59] See International Labour Conference (105th Session) Individual Case (CAS) Bangladesh, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Geneva, 2016).
[60] Sections 2(49), Chapter IX, 94(2) and 97(5) BEZ Act as cited in International Labour Conference (107th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2018) 49.
[61] Technical Status Report 2017, 11.
[62] *Bangladesh (Case No 3203)* (June 2017) Report of the Committee on Freedom of Association No 382 (Vol GB.330/INS.4 2017, June 2017) para 160.
[63] Convention (No.81) concerning labour inspection in industry and commerce (adopted 11 July 1947, entered into force 7 April 1950) 54 UNTS 3.
[64] BEZ Act, sections 115, 126(2), 130(9), 154 and 155 as cited in International Labour Conference (107th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2018) 49.

the unions, causing a key obstacle to workers' rights in the garment industry.[65]

Vertical distrust prevents effective dialogue and industrial relations,[66] which then hinders the Compact's effectiveness. There is an ingrained negative attitude of the government towards workers.[67] It is alleged that union pressures caused the sudden demise of the jute industry.[68] It was considered in an interview that unions have done themselves no favours,[69] harbouring hatred against management.[70] Male unionists are prone to vandalism or attacking of the police.[71] This circulates vertical distrust and means factory management is unwilling to give unions more power for fear of loss of control and disruption to production.[72] Management may also have a bond with government, leading to a lack of political will to address labour rights.

As a result, workers face anti-union discrimination, including being fired,[73] meaning they are reluctant to form unions. This is notwithstanding the outlawing of 'unfair labour practices' in the BLA,[74] and its contravention of ILO Convention 98.[75] The police have even dispersed ILO funded union training events.[76] A paradox is created as without effective unions, workers will continue to face discriminatory practices.[77]

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[65] Research Participants 1 and 2; Research Participant 9, Trade Union.
[66] ibid.
[67] Research Participant 8.
[68] Research Participants 1, 2 and 11.
[69] Research Participants 1 and 11.
[70] Research Participant 11.
[71] Soma Dey and Palash Basak, 'Out of the shadows: Women and wage struggle in the RMG industry of Bangladesh' (2017) 23(2) Asian Journal of Women's Studies 163, 171.
[72] Khondaker Golam Moazzem and Abeer Khandker, *Post-Rana Plaza Developments in Bangladesh: Towards Building a Responsible Supply Chain in the Apparel Sector* (Pathak Shamabesh Book 2016) 27.
[73] Research Participant 9, Trade Union.
[74] BLA 2006, section 195.
[75] ILO Convention No. 98, Article 1.
[76] See IndustriALL and others, 'Bangladesh Sustainability Compact @4: Situation worsening, time for action is now' (May 2017) <www.industriall-union.org/sites/default/files/uploads/documents/2017/BANGLADESH/the_failure_of_the_bangladesh_sustainability_compact_2017.pdf> accessed 27 November 2019.
[77] Fair Wear Foundation, 'Minimum Wage Implementation in Bangladesh's Garment Sector' (2012) 12 <www.fairwear.org/wp-content/uploads/2016/06/MinimumWageImplementationBangladesh.pdf> accessed 27 November 2019.

Behavioural changes are needed to ensure management is sensitised to unions,[78] and in turn unions understand their role in social dialogue.

Horizontal distrust originates from a lack of knowledge about union obligations.[79] They lack capacity,[80] and are hindered by a contestation for power and influence, in part, as stated by an interviewee, due to a heavy reliance on global umbrella unions.[81] Political affiliations are a status which disembodies union relationships, unions becoming more political 'outposts' than worker representative bodies.[82] Unions are not cooperative with each other in tripartite meetings.[83] Uniting unions is key to improving labour rights.[84]

Internal issues similarly negate opportunities to improve labour rights. Union leaders may be less educated, from the factory floor, or have university degrees without factory experience.[85] Often they are male, not representative of the largely female workforce, without checks and balances.[86] Workers need more training and education to understand issues tackled by union leaders, who may take roles as overseers as opposed to educators.[87] A disconnectedness results.[88]

Trade unions and workers clearly face significant challenges in Bangladesh's RMG industry. Bangladesh is violating international labour standards with impunity, notably ILO Conventions Nos 98 and 87 on freedom of association and collective bargaining, both contained within the list of conditions for EU GSP withdrawal, putting on the line its favourable EU GSP preferences.

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[78] Moazzem and Khandker (n 72) 46.
[79] Research Participants 11 and 4.
[80] Seabrook (n 3) 60.
[81] Research Participant 1.
[82] Jean-Paul Azam and Claire Salmon, 'Strikes and Political Activism of Trade Unions: Theory and Application to Bangladesh' (2004) 119(3/4) Public Choice 311, 312.
[83] ibid.
[84] ibid.
[85] Mohd Raisul Islam Khan and Christa Wichterich, 'Safety and Labour conditions: the accord and the national tripartite plan of action for the garment industry of Bangladesh' (2015) Global Labour University Working Paper No. 38, 10 <www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No.38.pdf> accessed 27 November 2019.
[86] Research Participant 2.
[87] Research Participant 4, CSO and Research Participant 11.
[88] Research Participant 2.

ii. Wages

Raising the minimum wage is a priority for trade unions. From December 2018, the minimum wage is 8,000 taka (£72), increasing from 5,300 taka (£47.98), the second lowest minimum wage for RMG workers.[89] This is regarded by a unionist as very little for living purposes,[90] leaving families below the UN poverty line.[91] Average nominal wage is at $163 (£125) in the garment and footwear industry,[92] suggesting many workers receive wages above the minimum wage. There is a wage disparity between men and women.[93] A low minimum wage contributes to Bangladesh's 'comparative advantage'.[94] A trade unionist states that employers see an increase in minimum wage as loss of this comparative advantage and thus business.[95] There is no obligation to increase minimum wage, although ratification of the ILO's Minimum Wage Fixing Convention, 1970 (No 131)[96] could mainstream a more holistic approach to setting the minimum wage.

Trade unions exert continual pressure to increase the minimum wage. In December 2016, RMG workers demonstrated for a minimum wage of between 15,000 and 16,000 taka (£136-145),[97] which led to a union crackdown and prosecutions of those involved.[98] It was another globally visible incident of labour rights violations, condemned by RMG stakeholders. One interviewee described it as a 'big step backwards for

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[89] ILO, 'Wages and productivity in the garment sector in Asia and the Pacific and the Arab States' (2016) <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_534289.pdf> accessed 27 November 2019.
[90] Research Participant 9, Trade Union.
[91] Fair Wear Foundation (n 77) 5.
[92] Phu Huynh, 'Developing Asia's garment and footwear industry: Recent employment and wage trends' (2017) 3 <www.ilo.org/asia/publications/issue-briefs/WCMS_581466/lang--en/index.htm> accessed 27 November 2019.
[93] World Economic Forum, 'Global Gender Gap Report 2016: Bangladesh' (2016) <reports.weforum.org/global-gender-gap-report-2016/economies/#economy=BGD> accessed 27 November 2019.
[94] Khan and others (n 16) 48.
[95] Research Participant 12, Trade Union.
[96] Convention (No.131) concerning minimum wage fixing, with special reference to developing countries (adopted 22 June 1970, entered into force 29 April 1972) 825 UNTS 77, Article 3.
[97] CCC, 'Bangladeshi garment workers face mass firings and criminal charges' (05 January 2017) <cleanclothes.org/news/2017/01/05/bangladeshi-garment-workers-face-mass-firings-and-criminal-charges> accessed 27 November 2019.
[98] ITUC, 'Global Rights Index 2017' (2017) 30 <www.ituc-csi.org/IMG/pdf/survey_ra_2017_eng-1.pdf> accessed 27 November 2019.

the industry'.[99] GSP negative conditionality was emphasised.[100] The Compact Partners issued a renewed call to bring the law into line with ILO standards.[101] The government was thus forced to reopen union offices and reinstate wrongfully dismissed workers.[102] Without a voice, workers resort to large scale protests which influences the EU to either bolster the Compact or proceed with GSP withdrawal.

iii. Structural integrity of buildings and OSH

Structural integrity of buildings and OSH is key to decent work. Bangladesh has not ratified key international labour standards on OSH, including the OSH Convention.[103] It has ratified various technical conventions, including on working days and hours.[104] Domestic legislation covers safety.[105] The amendment of the BLA in 2013 introduced Safety Committees in factories with over 50 workers.[106] OSH warrants a great deal of attention.

Safety standards are often unenforced or unimplemented.[107] At one end of the spectrum are modern, purpose-built RMG factories which are a minority, at the other are unregistered and unregulated workshops.[108] Factory safety is not even considered by most factory

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[99] Research Participant 11.
[100] CCC, 'European Union and the Bangladesh Garment Industry: The Case for a Trade Investigation' (2017) 2 <cleanclothes.org/resources/publications/european-union-and-the-bangladesh-garment-industry-the-case-for-a-trade-investigation> accessed 27 November 2019.
[101] Commission, 'Joint Conclusions: Third follow-up meeting on the Sustainability Compact' (Dhaka, May 18 2017) <trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155599.pdf> accessed 27 November 2019.
[102] CCC (n 100) 2.
[103] Convention (No.155) concerning occupational safety and health and the working environment (adopted 22 June 1981, entered into force 11 August 1983) 1331 UNTS 279.
[104] For example Convention (No.1) limiting the hours of work in industrial undertakings to eight in the day and forty-eight in the week, as modified by the Final Articles Revision Convention, 1946 (adopted 28 November 1919, entered into force 13 June 1921) 38 UNTS 17.
[105] Legislation related to OSH can be found in, for example, BLA 2006; Bangladesh National Building Code.
[106] BLA, Article 90(a).
[107] Md. Rizwanul Islam and Naimul Muquim, 'The Scope for Trade Restrictions to Address the Lack of Compliance with Fire Safety Standards in Garment Factories of Bangladesh' (2015) 49(1) Journal of World Trade 153, 154.
[108] HRW, "Whoever Raises their Head Suffers the Most" (2015) <www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment> accessed 27 November 2019.

management.[109] Factories can be located in multi-storey, high rise buildings that are built for residential purposes, lacking safety necessities such as a fire barrier between areas with flammable materials, fire-protected stairs or a fire exit.[110] The fire risk is high, increased by the existence of light machinery heavily concentrated with large amounts of flammable garments.[111] It is accentuated by factory management who sometimes lock factory doors to prevent theft or unauthorised absence from work.[112]

OSH requires an ergonomic analysis covering the entirety of a workers' working environment, including working hours. Workers face long hours, often more than eight hours a day, not including overtime.[113] Risks to health are posed by dust of fibre and pieces of cloth,[114] and workers are often required to do the same task sitting or standing for the entirety of their working day, resulting in injury such as back pain.[115] Structural integrity of buildings is more often an area of policy focus than OSH.

iv. Child Labour

Child labour in the RMG industry grew parallel to its expansion.[116] It was estimated in 1992 that between 50,000 and 100,000 children were employed in it, reduced by a 1992 U.S. Bill which proposed to ban trade in goods produced by child labour.[117] The threat of this forced children into more injurious occupations such as prostitution.[118] A Memorandum of Understanding was concluded between the Bangladesh Garment

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[109] ibid.
[110] Bradley Bowden, 'Commentary – Bangladesh Clothing Factory Fires: The Way Forward' (2014) 1(2) South Asian Journal of Human Resources Management 283, 286-287.
[111] ibid, 285.
[112] Seabrook (n 3) 24.
[113] Kallol Kumar Samaddar, 'Occupational Health and Safety Management in RMG sector of Bangladesh' (2016) 5(12) International Journal of Scientific & Technology Research Volume 175.
[114] ibid.
[115] ibid.
[116] Haradhan Kumar Mohajan, 'Child Rights in Bangladesh' (2014) 2 Journal of Social Welfare and Human Rights 207, 213.
[117] Michael E. Nielsen, 'The politics of corporate responsibility and child labour in the Bangladeshi garment industry' (2005) 81(3) International Affairs 559, 565.
[118] UNICEF, 'The State of the World's Children' (1997) 23 <www.unicef.org/sowc97/> accessed 24 July 2019; ibid.

Manufacturers and Exporters Association (BGMEA), UNICEF and the ILO in 1995 with the objective of ending child labour, which helped to identify child workers, monitor the situation and educate workers.[119] The National Child Labour Survey found of children engaged in hazardous work, 39% did so in manufacturing.[120] Child labour is propelled by poverty, sometimes of parents who are also RMG workers.[121] Bangladesh has not ratified Convention No.138, leaving it devoid of ILO supervision. This convention, alongside others relevant to child labour, including the UN Convention on the Rights of the Child, are all listed as conditions in the EU's GSP Regulation.

v. Women's Rights

Women make up between 50-80% of the workforce. Decent work ensures women's rights, such as maternity, which are little focused upon by RMG stakeholders. Bangladesh has not ratified the ILO Convention on Maternity Protection (No. 183).[122] A unionist stated that women are often sacked when they come to take their maternity leave.[123] Employers encourage pregnant women to resign, paying them a lump sum and assuring them that they can re-join work after the child is born, a false promise.[124] In addition, sexual harassment is common even with limited protection in the BLA banning indecent behaviour towards female workers.[125] Management sexually harass workers, threatening women.[126] A backlog of cases at labour courts mean complaints mechanisms are not often used and take a long time to process.[127]

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[119] Nielsen (n 117) 560-561.
[120] As cited in International Labour Conference (107th Session) Report of the Committee of Experts on the Application of conventions and Recommendations (Geneva, 2018) 240-241.
[121] UNICEF, 'The Ready-Made Garment Sector and Children in Bangladesh' (2015) 10 <www.unicef.org/csr/files/CSR_BANGLADESH_RMG_REPORT.PDF> accessed 27 November 2019.
[122] Convention (No.183) concerning the revision of the Maternity Protection Convention (revised), 1952 (adopted 13 June 2000, entered into force 7 February 2002) 2181 UNTS 253.
[123] Research Participant 9, Trade Union.
[124] Islam (n 55) 24.
[125] Maliha Khan, 'How well are female workers protected by the law?' *The Daily Star* (2 February 2018) <www.thedailystar.net/star-weekend/how-well-are-female-workers-protected-the-law-1528474> accessed 27 November 2019.
[126] Research Participant 9, Trade Union; Islam (n 55) 28-29.
[127] ibid.

III. The EU's Trade, Development and Labour Rights in Bangladesh

A. The Development Role of the EU's GSP EBA

The context of the RMG industry shows that the EBA, the 'showpiece' of the development friendly nature of EU trade policy,[128] and the EU's broader foreign policy agenda, is integrally linked to labour rights violations, and social and economic development.

Bangladesh is one of 49 LDCs qualifying for the EBA and is overwhelmingly the main beneficiary of it, accounting for 66% of all the scheme's preferential imports in 2016.[129] Its considerable ease of access to trade preferences explains its high ranking in the Enabling Trade Index 2016 for foreign market access, despite its overall lack of global competitiveness,[130] and persistent corruption.[131] The EBA is extraordinarily important, and acts as an incentive for manufacturers to produce RMGs.[132] It has undoubtedly been a form of development aid,[133] accelerating annual growth in exports, on an average between 2012 - 2016 of 13.3%,[134] and an annual GDP growth rate of around 6%.[135]

When the EU changed the rules of origin criteria for the GSP in 2011, exports to the EU rocketed as Bangladesh was able to take greater advantage of the preferences.[136] It also benefited from the renewed focus on LDCs when the number of GSP beneficiaries was reduced in 2012. An employer interviewee stated that the EBA has ensured Bangladesh

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[128] Gerrit Faber and Jan Orbie, 'Everything But Arms: Much More than Appears at First Sight' (2009) 47(4) Journal of Common Market Studies 767, 768.
[129] European Commission, 'Report on the Generalised Scheme of Preferences covering the period 2016-2017' (Communication) COM(2018) 36 final, 5.
[130] World Economic Forum, 'The Global Competitiveness Report 2016-2017' 110 <www.weforum.org/reports/the-global-competitiveness-report-2016-2017-1> accessed 27 November 2019.
[131] Transparency International, 'Corruption Perception Index 2016' <www.transparency.org/news/feature/corruption_perceptions_index_2016> accessed 27 November 2019.
[132] Khan and Wichterich (n 85) 7.
[133] Gene M. Grossman and Alan O.Sykes, 'A preference for development: the law and economics of GSP' (2005) 4(1) World Trade Review 41, 60.
[134] Commission, 'Trade in goods with Bangladesh' (n 18) 2.
[135] World Bank, 'Data: Bangladesh' <data.worldbank.org/country/bangladesh> accessed 27 November 2019.
[136] Louise Curran and Khalid Nadvi, 'Shifting Trade Preferences and Value Chain Impacts in the Bangladesh Textiles and Garment Industry' (2015) 8 Cambridge Journal of Regions, Economy and Society 459, 465.

has become competitive in the RMG industry and to an extent economically sound, pushing it out of poverty; and it is still playing this role.[137] It is deemed to have promoted good governance and sustainable development.[138] All the interviewees were aware of the EBA and its significance, including the prospect of GSP withdrawal. It was made clear that the EBA is extremely important and highly regarded.[139] This contrasts to the Compact, which sometimes generated uncertainty and a lack of knowledge.

In 2018, Bangladesh fulfilled the eligibility criteria for graduation from the UN list of LDCs.[140] Its goal is to become a MIC in 2021.[141] Three years pass after the point of graduation from an LDC, which acts as a form of transition. After this, it will benefit from the standard GSP. Discussions are underway with the objective of obtaining the GSP+,[142] which will provide more favourable tariff preferences than the standard GSP. One CSO interviewee stated that the GSP+ is a necessity.[143] Ratification of the required 27 ILO and UN conventions will be no small feat.[144] An employer interviewee highlighted that if labour rights standards are already under question then obtaining the GSP+ will be difficult.[145] It will create an opportunity for more EU leverage.

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[137] Research Participant 6, Employer organisation.
[138] Commission, 'Report on the Generalised Scheme of Preferences covering the period 2014-2015' (Report) COM(2016) 29 final, 2.
[139] Research Participant 11.
[140] UN, 'Least Developed Country Category: Bangladesh Profile' <www.un.org/development/desa/dpad/least-developed-country-category-bangladesh.html> accessed 27 November 2019.
[141] See Government of Bangladesh, 'Perspective Plan of Bangladesh 2010-2021: Making Vision 2021 A Reality' (2012) <bangladesh.gov.bd/sites/default/files/files/bangladesh.gov.bd/page/6dca6a2a_9857_4656_bce6_139584b7f160/Perspective-Plan-of-Bangladesh.pdf> accessed 27 November 2019; Daily Star, 'Bangladesh Must Improve Labour Rights to Qualify for GSP Plus: Expert' *The Daily Star* (08 February 2017) <www.thedailystar.net/business/bangladesh-must-improve-labour-rights-qualify-gsp-plus-expert-1357522> accessed 27 November 2019; Daily Star, 'Bangladesh on the path to GSP Plus with EU' (16 November 2016) *The Daily Star* <www.thedailystar.net/business/bangladesh-the-path-gsp-plus-eu-1315237> accessed 27 November 2019.
[142] European Parliament, 'Mission Report following the ad-hoc delegation to Bangladesh (Dhaka) from 15 to 17 November 2016' (23 January 2017) 7 <www.europarl.europa.eu/cmsdata/114462/mission-report-bangladesh.pdf> accessed 27 November 2019.
[143] Research Participant 4, CSO.
[144] GSP Regulation, Article 9(1); Annex VIII, part A and B.
[145] Research Participant 6, employer organisation.

The development role of the EBA has had positive effects on Bangladesh's economic standing, and to some extent its social development. The trade scheme acts in parallel to EU development cooperation policies, overlapping in human rights and development objectives.

B. EU Development Cooperation

The EU has been a long-standing development partner since 1973.[146] The SDGs lay the foundation for a fruitful development strategy, and the EU-Bangladesh CA of 2001 sets out key features of the development relationship.[147] It establishes that both parties are desirous of creating favourable conditions for development and trade and that human rights form an essential element to the agreement.[148] The human rights clause is bolstered by a power to take 'appropriate measures' if violated.[149] It also acknowledges the necessity to safeguard the basic rights of workers in light of ILO instruments.[150]

This includes women's rights. The EU's Charter of Fundamental Rights centralises gender into a rights dimension.[151] Its position in the external agenda is unclear. In the CA, one of the objectives of the parties is to support the sustainable economic and social development of Bangladesh with a special emphasis on women.[152] The CEDAW convention is one of the GSP conditions but has never been brought up as an issue for withdrawal. Gender is not included in the Compact. As the SDG agenda pushes for gender equality (SDG 5) and decent work (SDG 8), it should hold weight in EU external relations with Bangladesh. In Article 8 TFEU, the EU is mandated to 'aim to eliminate inequalities, and to promote equality between men and women' in 'all its activities'. It must act consistently in this regard (Article 21(3) TEU).

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[146] Commission and EEAS, 'Development Cooperation Instrument Multi-Annual Indicative Programme (MIP) 2014-2020' (2014) 4 <eeas.europa.eu/delegations/bangladesh/10945/2014-2020-multiannual-indicative-programme-bangladesh_en> accessed 27 November 2019.
[147] EU-Bangladesh Cooperation Agreement
[148] ibid.
[149] ibid, Article 16.
[150] ibid 10.
[151] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Chapter 3.
[152] EU-Bangladesh Cooperation Agreement, Preamble.

This includes using development funding. The 2014-2020 Multi-Annual Indicative Programme (MIP) sets out EU funding objectives. It states that aid will include cross-cutting issues such as gender equality, human and labour rights.[153] The MIP points towards the Compact and the need to ensure social partners can have space in which to exercise their rights.[154] The MIP focuses on three sectors for change: first, strengthening democratic governance; second, food and nutrition security and third, education and skills development.[155] These objectives facilitate a sustainable RMG supply chain by building a democratic basis on which an educated workforce can be achieved. The MIP aligns with the EU's development policy priority of gender equality and women's empowerment.[156] Improving workers' rights and conditions in the industry, therefore, becomes not merely about decent work related to SDG 8 but also other SDGs such as eradicating poverty in SDG 1. The development cooperation policies complement the economic development spun by the EBA, enabling wider sustainable development objectives to be achieved through external relations. As development cooperation is an area of shared competence, MSs play a role in supporting labour rights abroad, spurred forwards by EU normativity.

An example of this is through the ILO's Better Work programme, a small, in-depth project improving decent work in the garment industry. Supporting development partners include France, the UK and the Netherlands. The programme involves 19 brands and retailers, including Marks and Spencer, Tesco and Primark, and covers 141 factories.[157] It takes a two-fold approach: first, encouraging factories to improve working conditions, such as through practice assistance; second, integrating national stakeholders into the labour market to ensure a positive

[153] Commission and EEAS (n 146) 5.
[154] ibid 5.
[155] ibid 6.
[156] Commission, 'Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016-2020' (Staff Working document) SWD (2015) 182 final.
[157] Better Work Bangladesh <betterwork.org/where-we-work/bangladesh/> accessed 27 November 2019.

business attitude for compliance.[158] The brands and retailers pressure factories to engage in the programme.[159] Enterprise Advisors (EAs) create factory improvement plans, identify compliant deficits and assist with Worker Participation Committees.[160] It promotes gender issues, training women interested in supervisory roles.[161] Better Work encounters some difficulty encouraging factory engagement,[162] hence its small scope.

C. The GSP and 'Serious and Systematic Violations' of Labour Rights

The EU's trade and development instruments aim to improve labour rights. The GSP does this through the prospect of negative conditionality (see Chapter 3), where if Bangladesh is shown to seriously and systematically violate labour rights contained in conventions listed in the GSP Regulation, including the eight ILO fundamental conventions, it could have the GSP withdrawn. Conditionality is generally thought to imply conflict not cooperation.[163] Albeit punitive, an interviewee considered the GSP to offer support for workers' rights in an inclusive and holistic way.[164] Whilst the labour rights context in Bangladesh indicates that there are violations, the prospect of GSP withdrawal must be assessed in order to understand the EU's leverage. It sets the context for the Compact as an instrument of positive conditionality.

Bangladesh has provided 'a key test case for the EU, with the levers at its disposal, including both soft law and normative power, to demonstrate that its human rights response is both purposeful and

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[158] Better Work, 'Our Approach' <betterwork.org/our-work/our-approach/#1474820075302-bc399c51-3092> accessed 27 November 2019.
[159] Research Participant 7.
[160] ILO, 'Strengthening Workplace Safety and Labour Rights in the Bangladesh Ready-Made Garment Sector' (2016) 20 <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_474048.pdf> accessed 27 November 2019.
[161] Better Work Bangladesh, '2017 Newsletter' <betterwork.org/blog/portfolio/better-work-bangladesh-2017-newsletter/> accessed 27 November 2019.
[162] Research Participant 7.
[163] Pearson Nherere, 'Conditionality, Human Rights and Good Governance: A Dialogue of Unequal Partners' in Konrad Ginther, Erik Denters and Paul J.I.M. de Waart (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff Publishers 1995) 295.
[164] Research Participant 6, Employer Organisation.

efficacious'.[165] Incidences such as Rana Plaza in isolation are not reasons for GSP withdrawal, though the U.S., with much broader, more ambiguous, grounds for GSP withdrawal, withdrew the GSP very soon after the disaster.[166] An interviewee perceived this resulted in a damaged image only, as garment exports was excluded from the U.S. GSP.[167] U.S. withdrawal would have had negligible impact on exports. By contrast, the EU undertakes an extended process of weighing political and economic factors, the ILO's assessments and the interests and demands of RMG stakeholders, including global NGOs like the CCC. Whilst a definitive answer cannot be given as to whether the EU *should* withdraw the GSP or not, as the EU has considerable discretion on the matter, the factors that come into play must be analysed.

First, the EU considers political circumstances. One interviewee stated that the act of GSP withdrawal would be a 'nightmare' for bilateral relations as the EU has always had a good relationship with Bangladesh.[168] General elections in 2018 enhanced the sensitivity of the issue,[169] as political parties needed to hold on to the GSP to ensure favour with electors. The political situation can be compared to that in other countries where the EU has withdrawn the GSP, such as Myanmar, Belarus and Sri Lanka. Whilst it is inevitable that many GSP beneficiaries will have problematic human rights situations,[170] the countries that had preferences withdrawn or downgraded had extreme political isolated regimes.[171] They expressed no willingness to work with the EU or the ILO, whereas Bangladesh has shown readiness to address ILO recommendations and to translate them into 'firm, concrete and time

[165] FRAME Report 9.4, 68.
[166] Research Participant 12, Trade Union.
[167] ibid.
[168] Research Participant 11.
[169] Research Participant 1 and 11.
[170] European Parliament, 'Human Rights in EU Trade Policy' (January 2017) 8 <www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)595878> accessed 27 November 2019.
[171] Zadi Laïdi, 'European Preferences and their Reception' in Zadi Laïdi, EU Foreign *Policy in a Globalized World: Normative Power and Social Preferences* (Routledge 2008) 7.

bound actions'.[172] This is significant from the point of view of consistency and coherency in EU external actions.[173]

Second, economic factors are pertinent. The degree of a country's dependency on the GSP will determine its susceptibility to conditionality.[174] When the EU withdrew the GSP against Myanmar, EU exports were only 5% of Myanmar's total exports (see Chapter 3.VI.B).[175] This is significantly less than Bangladesh's 48.7% of exports destined for the EU.[176] Without the preferences, an employer noted Bangladesh would be exposed to competition and on a considerable scale subjected to high clothing tariffs pushing up RMG prices, which may lead to buyers withdrawing.[177] It mirrors general perceptions that conditionality is a device to undermine the comparative advantage of developing countries.[178] Because of this, the role of negative conditionality is questionable, in turn considered little more than an 'unfriendly' unilateral measure.[179]

GSP withdrawal would cause a loss of jobs and factory closures,[180] with a resulting knock on effect on economic and social development and the population.[181] Job security is put further at risk. A

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[172] EEAS, 'ILO – ILC 106 – EU Statement – Committee on the Application of Standards: Bangladesh (Convention No.87)' <eeas.europa.eu/headquarters/headquarters-homepage/28118/ilo-ifc-106-eu-statement-committee-application-standards-bangladesh-convention-n%C2%B0-87_en> accessed 27 November 2019.

[173] Article 21(3); Astrid Boening, Jan-Frederik Kremer and Aukje van Loon (eds), *Global Power Europe – Vol. 1: Theoretical and Institutional Approaches to the EU's External Relations* (Springer 2013) vi; Andrew Clapham, 'Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 638.

[174] Nherere (n 163) 303.

[175] Michael Ewing-Chow, 'First Do No Harm: Myanmar Trade Sanctions and Human Rights' (2007) 5(2) Northwestern Journal of International Human Rights 153, 159.

[176] Commission, 'Trade in goods with Bangladesh' (n 18) 8.

[177] Research Participant 6, Employer Organisation.

[178] Jeff Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance' in Bart Van Vooren, Steven Blockmans and Jan Wouters, *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013) 308.

[179] Monica Hakimi, 'Unfriendly Unilateralism' (2014) 55(1) Harvard International Law Journal 105.

[180] Research Participant 12, Trade Union, Research Participant 9, Trade Union; Ruma Paul and Serajul Quadir, 'Bangladesh urges no harsh EU measures over factory deaths' *Reuters* (4 May 2013) <www.reuters.com/article/us-bangladesh-factory/bangladesh-urges-no-harsh-eu-measures-over-factory-deaths-idUSBRE94304420130504> accessed 27 November 2019.

[181] Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003) 261.

point raised by an employer interviewee was that the loss of GSP would mean that employers and managers would be free to do as they wish; in other words, they would refuse to participate in CSR or factory safety or workers' rights programmes and would have the ability to exploit workers on a new level, creating a 'new form of sweatshop'.[182] The GSP may become linked to workers turning to more dangerous careers like working in brick kilns, or an increase in modern slavery, such as bonded labour or forced labour. In 2004, upon fears regarding the phase-out of quotas, a trade union interviewee asserted that factory closures resulted in workers turning to prostitution.[183]

Taking these points into account, it could be said that GSP withdrawal would be unjust in this context. The progress of the country in meeting the SDGs would be threatened,[184] and, as recognised by scholars, the 'stick' would be counterproductive.[185] If anything, not withdrawing the GSP would be putting labour rights and sustainable development first. The decision on GSP withdrawal does not mute labour rights considerations,[186] but rather moulds trade into sustainable development and wider concerns of loss of jobs and factory closures.

Third, the EU will consider ILO assessments. Its relationship with the ILO is the centrifuge to GSP withdrawal. In 2016, there was an ILO High-Level Tripartite Mission.[187] In the same year, the ILO's CAS inserted a special paragraph for Bangladesh with goals pertaining to freedom of association and collective bargaining.[188] This, combined with recurrent CFA 'serious' concerns,[189] gives reason for GSP withdrawal. The GSP has become a matter for ILO members, a shift from the gap created in the 1990s between trade and labour rights. Trade policies

[182] Research Participant 6, Employer Organisation.
[183] Research Participant 12, Trade Union.
[184] Research Participant 6, Employer Organisation.
[185] Tilahun Weldie Hindeya, 'Unilateral Trade Sanctions as a Means to Combat Human Rights Abuses: Legal and Factual Appraisal' (2013) 7(1) Mizan Law Review 101, 118.
[186] Clapham (n 173) 646.
[187] ILO High-Level Mission Report 2016 (n 49).
[188] International Labour Conference (105th Session) Conference Committee on the Application of Standards (Geneva, 2016) 16, Part 1/33.
[189] *Bangladesh (Case No 3203)* (June 2017) Report of the Committee on Freedom of Association No 382 (Vol GB.330/INS.4 2017, June 2017) para 171.

have become intertwined with the ILO. In the 2017 ILC, for example, ILO members, including the government member of Malta and the worker members of Germany and Argentina, referred to the EU's GSP for the first time since Rana Plaza, stressing its importance and the prospect of GSP withdrawal if the situation did not improve.[190] This puts more pressure on the EU to act.

The ILO's recommendations in its special paragraph have been mirrored by civil society.[191] Global trade unions and NGOs have pushed for a GSP investigation.[192] The CCC and the ITUC brought a complaint to the EU Ombudsman over the EU's failure to initiate a GSP investigation.[193] CCC considers that the situation warrants a GSP investigation owing to the ILO's special paragraph, which they consider the trigger.[194] It is noteworthy that the global unions only want the pressure that comes from the GSP investigation, not actually GSP withdrawal.[195] They assert that concerns that it would in fact lead to GSP withdrawal are misplaced owing to the considerable length of time the process would take, providing opportunities for Bangladesh to improve the situation.[196] They propagate the view that the EU needs to initiate GSP withdrawal to obtain a status as a normative, human rights actor that takes abuses of labour rights seriously. At the same time, it is a very confident proposition that Bangladesh has the ability to register unions, investigate anti-union discrimination and extend the BLA to EPZs within the space of a year or so (see Chapter Three for an analysis of the GSP

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[190] International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15, Part II/56, 58.
[191] European Parliament resolution on the state of play of implementation of the Bangladesh Sustainability Compact (2017/2636(RSP)) para 2; HRW (n 108); Tamanna Rubya, 'The Ready-Made Garment Industry: An Analysis of Bangladesh's Labor Law Provisions after the Savar Tragedy' (2015) 40 Brookland Journal of International Law 685, 699-700.
[192] IndustriALL and others (n 76) 1; CCC (n 100) 2.
[193] I acted as Clinical Fellow on this project with the HEC-NYU Public Interest Clinic. See CCC, 'Complaint lodged against the European Commission for failing to uphold fundamental human rights in trade policy' (June 2018) <cleanclothes.org/news/2018/06/11/complaint-lodged-against-the-european-commission-for-failing-to-uphold-fundamental-human-rights-in-trade-policy> accessed 27 November 2019.
[194] CCC (n 100) 6.
[195] Research Participant 12, Trade Union; ibid.
[196] IndustriALL and others (n 76) 1.

withdrawal procedure). Regarding the progress made since Rana Plaza and taking into account the shrinking space for civil society,[197] this is even more doubtful.

The EU has stepped up its game. It sent a letter to the government threatening removal of GSP preferences in May 2017.[198] Continually, the EU's Trade Commissioner has held fast to the fact that another tragedy or continuation of labour rights violations could force the EU to withdraw the GSP,[199] and the European Parliament has called upon the Commission to assess whether Bangladesh is adhering to the GSP conditions.[200] The Parliament's Committee on International Trade undertook a fact-finding mission in 2016,[201] adopting certain resolutions on the state of play.[202] The EU relies on technical status reports published by the Commission for the Compact.[203] This is happening in parallel to the launch of the procedure to suspend the GSP EBA in Cambodia over human and labour rights violations.[204]

As the Compact ends in December 2019, then perhaps it is time to revert to negative conditionality, which would clash with EU objectives of deep engagement. It has been argued that the EU's commitment to human rights through conditionality is little more than window dressing.[205] Alternatively, does the EU continue to play out the Compact in a new form, and come to the decision that withdrawing the GSP is just too harmful for the population? This may render the GSP conditionality defunct. Given the prospective negative impact of GSP withdrawal on

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[197] European Parliament (n 142) 2.
[198] Daily Star, 'Retaining EU GSP Facilities' *The Daily Star* (8 June 2017) <www.thedailystar.net/editorial/retaining-eu-gsp-facilities-1416979> accessed 27 November 2019.
[199] Commission, 'Cecilia Malmström: Remembering Rana Plaza: What Next?' (2015) <trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153350.pdf?> accessed 27 November 2019.
[200] European Parliament Resolution of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (2015/2589(RSP)) para 26.
[201] European Parliament (n 142).
[202] European Parliament Resolution (n 191) para 9.
[203] See Technical Status Report 2018.
[204] Commission, 'Cambodia: EU launches procedure to temporarily suspend trade preferences' (Press release, 11 February 2019) <europa.eu/rapid/press-release_IP-19-882_en.htm> accessed 27 November 2019.
[205] Barbara Brandtner and Allan Rosas, 'Trade Preferences and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 702.

Bangladesh's economic and social development, after Rana Plaza the EU had to act in a way that would ensure development in the context of *sustainability* is upheld. The Compact acts as a bridge between trade and sustainable development.

IV. The Sustainability Compact: A Bridge between Trade and Sustainable Development

The EU was 'duty bound, morally, legally and normatively', to act after Rana Plaza.[206] The Compact was, according to a CSO interviewee, a 'modest, generous and benign action'.[207] It mirrored ILO efforts to encourage buyers to 'stay with Bangladesh' as any rush for exit would have negative consequences for the RMG workers.[208] The Compact took the place of negative conditionality in an action of 'deep engagement',[209] though not entirely. GSP withdrawal remains as a 'penalty default', an option if the Compact is not followed through or commitments are not met.[210] As the Compact was a reactive strategy to Rana Plaza, it jumps the hurdle of getting governments to accept its intrusiveness.[211] For the interim, it fills the gap which the non-application of conditionality has created. One interviewee described the Compact as no 'zero-sum game' but a 'win-win scenario'.[212]

The Compact is a sector-specific example of an EU trade and sustainable development instrument, though interviewees had differing perspectives on its nature, understanding it to be a 'political declaration',[213] a 'diplomacy tool',[214] or a 'political understanding'.[215] Politics and law have become intertwined as a result of bringing together

[206] Kenner and Peake (n 10) 87.
[207] Research Participant 5, CSO and Research Participant 11.
[208] ILO (n 160) 6.
[209] Commission, 'Joint Statement by EU Trade Commissioner Karel de Gucht and Bangladesh Foreign Minister Dr Dipu Moni following recent disasters in the Bangladeshi garment industry' (28 May 2013) <europa.eu/rapid/press-release_MEMO-13-469_en.htm> accessed 27 November 2019.
[210] Kenner and Peake (n 10).
[211] The intrusive nature of the Compact was highlighted in interviews, Research Participant 7.
[212] Research Participant 11.
[213] Research Participant 6, Employer Organisation.
[214] Research Participant 10.
[215] Research Participant 6, Employer Organisation.

high-level RMG actors.[216] Notwithstanding its supposed nature as a *Sustainability* Compact, the MDGs are not mentioned within the Compact document, nor SDGs in follow up monitoring reports. This is despite the fact one interviewee mentioned the Compact put a flashlight on the SDGs,[217] perhaps influenced by the participant information sheet outlining the proposed study of EU and sustainable development instruments. The EU took multilateral action to improving labour rights (Article 21(1) TEU) but could have been stronger on its aspects of sustainable development.

The Compact is a broad framework agreement,[218] a 'mega-mission' to improve labour rights and working conditions.[219] It is a set of principles which could form the premise for use in other countries, as stated by an employer.[220] For the first pillar, government commitments include the adoption of amendments to the labour law to improve protection of rights of freedom of association and collective bargaining, and of labour rights in EPZs. On the part of the EU's commitments, the Compact falls short. These are not clear and have not been followed up,[221] suggesting that the Compact is an arm's length instrument. It does not integrate wages, child labour or women's rights, despite being serious issues. The Compact would have gone a long way to ensuring women's rights in the workplace if it had, for example, included a commitment to ratify the ILO's Convention on maternity leave.

The second pillar commitments do not address working hours or the health of workers, areas that again are of importance. The EU has side-stepped an opportunity to advance its normative principles in OSH in its external relations. The third pillar is about Bangladesh and the EU remaining engaged to support and promote socially responsible supply chains, through the involvement of brands and retailers in initiatives like

[216] Research Participant 10.
[217] Research Participant 3.
[218] Research Participant 4, CSO.
[219] FRAME Report 9.4, 94.
[220] Research Participant 6, Employer Organisation.
[221] FRAME Report 9.4, 94.

the Accord, and the promotion of CSR standards in the form of codes of conducts.

The Compact Partners are key to its operation, and cooperation between them is vital.[222] All the stakeholders have been brought to the same table, understood as a rarity in Bangladesh.[223] This partnership embodies the SDG emphasis on global partnership for sustainable development.[224] The range of Compact Partners reveal the Compact as an instrument of experimentalist governance, a form of EU governance that differs from the traditional, top-down policy making.[225] They support the government and factory owners and managers to carry out its commitments.[226] Effective commitments are necessitated by political will. At first, the government was considered to have such willingness.[227] This would have been due to the near prospect of GSP withdrawal. The situation has since deteriorated. An interviewee opined that the government has often taken a defensive position as opposed to a positive one in Compact meetings,[228] viewing it as an imposition, not at all 'positive conditionality'. This is despite assertions by another interviewee that the government gives a lot of importance to the meetings.[229]

The external Compact Partners are thought to provide the necessary 'political bite'[230] to pressure the Government to adopt and implement Compact commitments.[231] The EU, U.S. and Canada, account for almost 85% of Bangladesh's global exports.[232] The latter two joined the Compact owing to common human rights goals.[233] These state partners were considered to have different roles by one interviewee; the

[222] ibid, 82.
[223] Research Participant 8.
[224] Kenner and Peake (n 10) 96; Commission, 'A Global Partnership for Poverty Eradication and Sustainable Development after 2015' (Communication) COM(2015) 44 final, 3.
[225] ibid.
[226] Research Participant 6, Employer Organisation; Research Participant 8.
[227] Research Participant 11.
[228] Research Participant 2.
[229] Research Participant 10.
[230] Research Participant 3.
[231] Research Participant 6, Employer Organisation, Research Participant 10.
[232] Technical Status Report 2018, 5.
[233] Research Participant 10.

U.S. stronger on the trade union angle, and Canada on the health and safety angle.[234] The ILO plays a coordinating role.[235] Its neutrality is viewed as significant in this regard.[236] Closer EU-ILO relations have been forged as a result of the Compact and the decision against negative conditionality.[237] Trade unions and CSOs such as the Centre for Policy Dialogue (CPD), a leading research organisation in Bangladesh, also have a role within the Compact, representing a bottom-up approach to the commitments.[238] They track and monitor its progress and are involved in annual Compact meetings. Akin to the state partners, they put pressure on Compact partners to act.[239] In part, they oblige the state partners to ensure the Compact creates outcomes whether through a renewed look at negative conditionality or through tying together development funding.

Regular meetings bring together all partners and there is a '3+5+1' group made up of ambassadors of the EU, U.S. Canada, UK and one other EU Member State on a rotating basis, three secretaries of Commerce, Labour and Employment and Foreign Affairs, and the ILO.[240] An interviewee viewed the meetings as platforms within which to highlight concrete achievements.[241] Global trade unions such as IndustriALL have a role in providing data and analysis to them.[242] One interviewee asserted that the trouble is with following up to the meetings and arranging next step actions.[243] It is difficult to perceive that these meetings would work effectively given the inherent distrust on issues surrounding industrial relations.

The Compact is a form of bridging tool between trade and sustainable development. As positive conditionality, it has a role in

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[234] ibid.
[235] ibid; Bangladesh Sustainability Compact.
[236] Research Participant 8.
[237] Kenner (n 178) 308.
[238] Fabienne Zwagemakers, 'The EU's Conditionality Policy: A New Strategy to Achieve Compliance' (2012) IAI Working Papers 12/03, 15 <www.iai.it/sites/default/files/iaiwp1203.pdf> accessed 27 November 2019.
[239] Research Participant 11.
[240] ILO (n 160) 6.
[241] Research Participant 8.
[242] IndustriALL and others (n 76) 1.
[243] Research Participant 2.

producing change in Bangladesh. Whether it has met that role will be discussed in the following section.

V. Producing Change: The GSP, Compact and ILO Special Paragraph

The GSP, Compact and the ILO's special paragraph are all pressures on Bangladesh to improve labour rights, workplace safety, and on global brands and retailers to take another look at RBC. They flit between positive conditionality in the Compact, and negative conditionality in the form of GSP withdrawal or ILO condemnation. As a unionist puts it, now the EU and ILO are 'breaking the ice' in the RMG industry.[244]

The following analysis is divided into labour rights, workplace safety and RBC. A separation is made between 'labour rights' and workplace safety, this does not, however, mean that workplace safety does not form a part of labour rights.

A. Labour Rights: Some Sensitive Steps Forward

Ensuring decent work means tackling issues such as horizontal and vertical distrust and wages. There have been some sensitive steps forward. Achievements are split into changes in the time between Rana Plaza and the special paragraph, and after the special paragraph and the EU's bolstered threat of GSP withdrawal.

Attitudes have changed. Employer organisations such as the BGMEA have been more active in engaging with trade unions, and were spoken about positively by a unionist.[245] A CSO takes note that they are recognising the need to comply with the Compact's commitments and are creating opportunities to meet with trade unions to discuss minimum wages and working conditions, paying greater attention to the care of workers.[246] The government has shown recognition and acceptance that there are serious shortcomings in labour rights,[247] an important primary step to ensuring strong political will. In this regard, the Compact, and the

[244] Research Participant 12, Trade Union.
[245] ibid.
[246] Research Participant 4, CSO.
[247] Research Participant 5, Trade Union

GSP, have brought about a focus on labour rights and safety issues that was previously non-existent.[248]

Awareness of the ILO and EU's roles has been raised. Prior to the special paragraph, nobody knew what it meant in practice, according to an interviewee.[249] It was further stated that the 3+5+1 Compact group popularised the concept, wherein the EU ambassador reminded the BGMEA about its implication alongside the ILO Country Director, mentioning the special paragraph at platforms.[250] In turn, stakeholders applied pressure on the government to respond.[251] This is what a strong EU-ILO bond entails, and it is something that has arisen out of the Compact, GSP and special paragraph.

i. The 'First Phase'

Visible changes can be noted in the first phase of the Compact after Rana Plaza in response to the international outcry: an increase in minimum wage, changes to the labour law, and increasing trade union registrations. It was a short-term strategy on the part of the government, acting quickly to avoid EU GSP repercussions and prior to the EU's strategy of 'deep engagement' taking hold. A CSO pointed out it was about cost-mitigating rather than a rights-based approach,[252] a rather cynical perspective given the fact the government was engaging on human rights.

First, the minimum wage increased in 2013.[253] It is the second lowest in the region and still a key labour rights issue.[254] This is notwithstanding the fact the minimum wage has increased substantially over the last decade. Basic salaries may have been increased but in parallel bonuses taken away, production targets and work pressure increased which risks health, a point raised by a unionist and reflected in

[248] Research Participant 1.
[249] Research Participant 11.
[250] ibid.
[251] Research Participant 1.
[252] Research Participant 5, CSO.
[253] Daily Star, 'Tk 8,000 a month' *The Daily Star* (14 September 2018) <www.thedailystar.net/business/news/bangladesh-rmg-garment-workers-minimum-salary-8000-taka-announced-1633342> accessed 27 November 2019.
[254] Research Participant 12, Trade Union.

wider research.[255] Buyer audits miss this as workers are told to say certain things.[256] Increased production creates a demand for modern machines and skilled workers, neither of which are available owing to cost and a lack of educated workforce.[257] Wages are not in the Compact, limiting its effectiveness.

Second, in 2013, amendments were adopted to the BLA after consultations.[258] These included the simplification of trade union registrations, for example there is no longer a requirement to submit to employers the names of union members.[259] Implementing rules were adopted in 2015.[260] Prima facie, these changes to the law are a key advancement for labour rights.[261] However, there remains a 'huge gap' between ILO standards and the labour law.[262] The changes do not meet repeated steps called for by the ILO to bring the law into conformity with ratified international labour standards.[263] Missed opportunities include the tackling of discrimination and debt bondage by children.[264] As a unionist indicated, when the government adopts labour law, it seems they exclude everything that is the problem.[265] There is no proper implementation of the law.[266] Anti-union violence, threats of murder and armed 'mastan'[267] groups in the RMG industry remain a reality.[268] Compact Partners underline the importance of upgrading the DoL with

[255] ibid; Fair Wear Foundation (n 77) 8, 12.
[256] Research Participant 12, Trade Union.
[257] ibid.
[258] Technical Status Report 2017, 6.
[259] Labour Amendment Act 2013, para 50.
[260] Technical Status Report 2016.
[261] Aamanur Rahman and Nuzhat Jabin, 'Unforgettable and Unforgivable Rana Plaza' (ActionAid Bangladesh, 2017) 13 <actionaidbd.org/unforgettable-unforgivable-rana-plaza/> accessed 27 November 2019.
[262] Research Participant 2.
[263] ILO, 'Statement on reform of Bangladesh Labour Law' (22 July 2013) <www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_218067/lang--en/index.htm> accessed 27 November 2019.
[264] ibid.
[265] Research Participant 12, Trade Union.
[266] Research Participant 9, Trade Union.
[267] This is the term used to describe a gang; Research Participant 9, Trade Union.
[268] Jennifer Hurley, 'Unravelling the Web: Supply Chains and Workers' Rights in the Garment Industry' in Angela Hale and Jane Wills (eds), *Threads of Labour* (Blackwell Publishing 2005) 126, 130.

staff and resources in order to investigate cases of anti-union discrimination.[269]

Improving the EPZ labour law has faced shortcomings. A new law, 'Bangladesh EPZ Labour Act 2014', was approved in July 2014 regulating industrial relations, yet it needs revising and adopting.[270] An outright ban on strike action by WWAs in EPZs was removed as of January 2014.[271] A ILO CFA case confirms that the law is not in conformity with ILO standards.[272] WWAs still do not have the same rights as trade unions,[273] the scope of the EPZ law is narrow, the excessive minimum membership requirement for unions remains, and there is a broad definition of unfair labour practices and excessive penalties for illegal strikes.[274] The revised law was brought to the Bangladeshi Parliament, but, owing to the concerns of the EU and ILO, amongst others, it was bounced back.[275] This is uncommon, considered by one interviewee as 'commendable'.[276] It is not enough to make 'window dressing' changes when subject to international scrutiny.

Finally, the rate of trade union registrations has grown significantly. The total number of unions has increased from 136 in December 2012 to 659 in 2018.[277] Whilst positive, it has led to an increase in discrimination as employers push back against the new unionisation instigated by the Compact.[278] The situation seems to be worsening in some respects. During 2015 only 71 unions were registered compared to 187 in 2014.[279] The rejection rate remains high,[280] which

[269] ILO, 'Joint Conclusions: Third Follow-Up Meeting on Bangladesh Sustainability Compact' (18 May 2017) <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/briefingnote/wcms_554840.pdf> accessed 27 November 2019.
[270] Technical Status Report 2016, 12; Technical Status Report 2018, 12-13.
[271] Technical Status Report 2017, 5.
[272] *Bangladesh (Case No 3203)* (June 2017) Report of the Committee on Freedom of Association No 382 (Vol GB.330/INS.4 2017, June 2017) para 160.
[273] Technical Status Report 2017, 11; Technical Status Report 2018, 12-13.
[274] International Labour Conference (107th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference (Geneva, 2018) 49.
[275] Research Participant 8.
[276] Research Participant 8.
[277] Technical Status Report 2018, 3.
[278] HRW (n 108).
[279] Technical Status Report 2016, 15.
[280] Technical Status Report 2017, 13; Technical Status Report 2018, 3.

could be explained by the vertical distrust issues. In 2015, 63% of union applications were rejected.[281] As a CSO interviewee stated, the DoL needs to understand their role as promoting unions, not as hard-lined task masters.[282] A culture of social dialogue cannot be facilitated without this change, and the EU needs to do more to ensure this happening.

A suggestion might be bringing together and educating the tripartite partners as to their rights, roles and responsibilities. It is also about improving the limited trade union registration capacity of the government,[283] which could be through an independent body dealing with registrations, and the capacity of unions to meet and engage with the tripartite partners.[284] To this end, online registrations were launched by the DoL in 2015 with a view to promoting transparency and accountability, but this has not brought about revolutionary change, primarily owing to low IT usage and availability in prospective unions and government ministries.[285] Capacity building of unions could be facilitated through EU funding.

As these changes seem primarily superficial, Bangladesh has remained a country with 'no guarantee of rights' in the ITUC Global Rights Index since 2014,[286] and in 2017 was listed as one of the world's ten worst countries for workers, a result heavily influenced by Ashulia.[287] Bangladesh's freedom rating likewise sees no improvement.[288] Since the establishment of the ILO's CFA, 17 cases have been brought concerning Bangladesh, 15 pre-Rana Plaza, and 2 remain active in 2018.[289] Annually since 2010, the CFA has noted a 'no change' scenario.[290] At

[281] Technical Status Report 2017, 17
[282] Research Participant 4, CSO.
[283] Research Participant 1.
[284] Research Participant 12, Trade Union.
[285] Technical Status Report 2017, 17; Technical Status Report 2018, 17.
[286] See ITUC Global Rights Indexes from 2014.
[287] ITUC (n 98).
[288] Freedom House, 'Freedom in the World 2017 – Bangladesh' <freedomhouse.org/report/freedom-world/2017/bangladesh> accessed 27 November 2019.
[289] See *Bangladesh (Case No 3203)* (June 2017) Report of the Committee on Freedom of Association No 382 (Vol GB.330/INS.4 2017, June 2017).
[290] *Bangladesh (Case No 2371)* (March 2008) Report of the Committee on Freedom of Association No. 349 (Vol XCI 2008 Series B, No.1); *Bangladesh (Case No 2371)* (March 2009) Report of the Committee on Freedom of Association No. 353 (Vol XCII

the same time the government acts with impunity. It has provided no information in respect of the violence and criminal charges in Ashulia and the alleged police intervention in the ILO training session in 2017.[291] This is strongly becoming an issue of a lack of civil liberties.[292]

This paints a bleak picture, although the situation is changing in light of the Compact, the special paragraph and GSP withdrawal, orientating around the ILO's struggles to both promote standards and show teeth.[293] Whilst the influence of the threat of GSP withdrawal on Compact commitments cannot be quantitatively measured, they can be connected by events in time and considerations of the powerful economic consequences it would have, leveraging the government to improve labour rights.[294] Years have passed with little change, and suddenly the government has outlined steps it will take and timelines to do so, all with the objective of averting GSP withdrawal and the special paragraph.[295]

There is a very real fear of GSP withdrawal, or of not being awarded the GSP+. The Compact has come to be seen an important list of conditions for the government to follow to warrant maintenance of the GSP, even though neither the Compact nor its follow up meetings or reports mention the GSP, which is of note given the Compact's nature as a 'trade and sustainable development instrument'. Commitments by the government meant there has been no special paragraph since 2016. In the ILC of 2017, the ILO Member States refer to the Compact's commitments.[296] The Compact has become positive conditionality – what must be done to maintain the GSP.

2009 Series B, No.1); *Bangladesh (Case No 2371)* (March 2010) Report of the Committee on Freedom of Association No.356 (Vol XCIII 2010, Series B No.1)

[291] International Labour Conference (107th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2018) 45.

[292] ibid.

[293] Steve Charnovitz, *Trade Law and Global Governance* (Cameron May 2002) 289.

[294] See CCC (n 100) 7.

[295] Research Participants 11, 12.

[296] For example, the Government member of Canada at the 2017 ILC: International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15 Part II/57.

ii. The 'Second phase': Post-Special Paragraph

Concrete achievements and further commitments have been made post the special paragraph. First, the government adopted Standard Operating Practices (SOPs) for union registration and anti-union discrimination in May 2017,[297] one of the Compact's commitments, 'to much fanfare'.[298] They were adopted under the ILO's industrial relations and social dialogue project.[299] They are intended to provide a uniform approach to addressing trade union registration applications in the DoL, and stages to follow in the event of unfair labour practices or anti-union discrimination, with fixed, time-bound steps.[300] Nevertheless, they fail to address many issues that have created obstacles for workers,[301] and their implementation in practice may fall short of expectations, being met with pessimism in an interview.[302] The ILO has been a strong player in educating workers about SOPs.

Secondly, a renewed labour law and EPZ labour law have been proposed. Under the former, the ILO supervisory machinery requested various changes to bring the BLA up to ILO standards, including review of the 30% union registration requirement.[303] The government did respond to this in its proposed amendment, albeit in a limited manner. It has proposed a minimum registration requirement that depends on the number of workers employed in an establishment; if there are less than 2000 workers, it would be 30%, if between 2001 and 5000 workers, 27% decreasing to 20% if over 7501 workers.[304] Understandably, the CEACR responded with regret to the fact that these suggestions are unlikely to

[297] International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15 Part II/53.
[298] CCC and others, 'The European Union and the Bangladesh Garment Industry: The Failure of the Sustainability Compact' (2017) 5 <cleanclothes.org/resources/publications/the-european-union-and-the-bangladesh-garment-industry-the-failure-of-the-sustainability-compact> accessed 27 November 2019.
[299] Research Participant 1.
[300] Technical Status Report 2017, 16-19; Technical Status Report 2018, 16-18.
[301] CCC and others (n 298) 5.
[302] Research Participant 1.
[303] International Labour Conference (107th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva 2018) 46.
[304] ibid 46-47.

have an impact on most factories.[305] The government bypassed other ILO suggestions, such as the need to eliminate criminal penalties on workers for participation in unregistered trade unions.[306] The most recent update on this is a report that the draft Bangladesh Labour (Amendment) Act 2018 has proposed to reduce the 30% to 20% for unions.[307] Funding under the EU's EIDHR could support union human rights advocates.

The draft EPZ labour law has been pushed forward as a priority. It has been subject to a thorough review to ensure it meets ILO standards, the date given for the draft was November 2017, after which it was to be shared with the ILO.[308] The question is, however, very much one of content.[309] The CEACR observes that it is not compatible with the ILO principles on freedom of association and collective bargaining, and needs to be reviewed to bring it into line with ILO standards.[310] It is reported that the EPZ Labour Act has now received approval to progress with amendments, such as to lower the 30% threshold for forming a WWA to 20% owing to pressure from international actors including the EU.[311] The government is not discussing amalgamating the two laws. The conclusion may be reached that the commitments have been lifeless, the EU as much to blame as the government.

Thirdly, the government has formed two bodies: a Tripartite Consultative Council (TCC) for the RMG sector to monitor worker rights, safety and relevant RMG issues; and, a tripartite technical committee (TTC) to review the BLA 2006. The former is designed to advise the government on the creation of fruitful employer-worker relationships.[312]

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[305] ibid 47.
[306] ibid 48.
[307] Md Azhar Uddin Bhuiyan, 'Analysing the draft Bangladesh Labour (Amendment) Act 2018' *The Daily Star* (25 September 2018) <www.thedailystar.net/law-our-rights/law-analysis/news/analysing-the-draft-bangladesh-labour-amendment-act-2018-1638034> accessed 27 November 2019.
[308] International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15, Part II/51.
[309] Research Participant 11.
[310] International Labour Conference (107th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva 2018) 50.
[311] Daily Star, 'EPZ labour law gets final nod from cabinet' *The Daily Star* (29 January 2019) <www.thedailystar.net/business/news/epz-labour-law-gets-final-nod-cabinet-1694398> accessed 27 November 2019.
[312] International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15 Part II/53.

It is a platform that can engage stakeholders as part of the Compact,[313] and has the potential to contribute to improving dialogue on labour rights in the RMG industry. It may assist with changing the culture of the industry to bring in a functioning industrial relations system.[314] This would need to tackle the distrust blocking the smooth functioning of unions, which the Compact does not go far enough in dealing with. One interviewee makes the assertion that the formation of the TCC was heavily influenced by Ashulia, the GSP and special paragraph.[315] The TTC is tasked with accommodating the observations of the ILO's supervisory bodies in reviewing the BLA, with a view to sharing a concept draft in December 2017 of these amendments.[316] Political willingness is low, but change is happening slowly – perhaps too slowly. An interviewee stated these amendments were not something the government ever wanted to consider, so there has been a gradual process of evolution.[317]

One thing that has not come through in either the first or second phases of changes is a renewed focus on child labour and women's rights. The law has not been improved, though some studies show that more workers are now entitled to maternity leave and benefits and gender violence and discrimination is 'comparatively silent and less visible than in the past'.[318] The ILO has asserted that the Compact has reduced child labour and child marriage,[319] a rather bold claim given that it does not take a holistic approach to sustainable development. Bangladesh has the fourth highest child marriage rates worldwide and the highest rate in Asia.[320] The major difference between the treatment of these aspects than that of freedom of association and collective bargaining seems to be, first, an attitude that child labour is much less of an issue in the RMG industry, and second, an attitude that women's

[313] Research Participant 11.
[314] Research Participant 5, CSO
[315] Research Participant 1.
[316] International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15 Part II/51.
[317] Research Participant 1.
[318] Islam (n 55) 19.
[319] European Parliament (n 142) 3.
[320] Girls Not Brides, 'Ending Child Marriage in Bangladesh' (2017) <www.girlsnotbrides.org/resource-centre/ending-child-marriage-bangladesh/> accessed 27 November 2019.

rights are not as important as freedom of association and collective bargaining. The EU has shown a limitation to its normative power.

The government has made only negligible changes even with renewed commitments. Commitments equal maintenance of the GSP and changes should be necessary. It was the threat of GSP withdrawal in parallel to the special paragraph that created these changes and the Compact that provided the structure for maintenance of the GSP. However, it is one thing adopting SOPs, proposing new laws and establishing new bodies, it is another ensuring that these work well in practice and meet ILO standards. Worker members in the 2017 ILC had the opinion that notwithstanding the technical assistance and donor assistance, RMG workers were worse off.[321] CCC issued a document illustrating the 'failure' of the Compact,[322] and the lack of EU action to enforce commitments or push forward ILO recommendations.[323] The GSP is too connected with political cooperation than it is with hard changes. Changes are not impressive. Six years on from Rana Plaza, years of funding, the government has not made strong improvements to labour rights.

B. Structural integrity of buildings and OSH: Towards Solid Foundations?

Structural integrity of buildings and OSH (hereafter 'workplace safety') is only indirectly integrated into the GSP through the ICESCR. It is an important Compact pillar largely arising from building concerns generated by Rana Plaza's structural weakness common to garment factories. Workplace safety has progressed significantly, at a greater rate than labour rights. It is a less politically sensitive area. Changes are not directly connected to the special paragraph and GSP. One interviewee considered Bangladesh as an example for workplace safety worldwide.[324] It may be a test case for strategies on safety

[321] International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15 Part II/54. A feeling mirrored in some interviews: Research Participants 11, 5.
[322] CCC and others (n 298); IndustriALL and others (n 76) 1.
[323] CCC (n 100) 2.
[324] Research Participant 3.

improvements, but it is not a lead on workplace safety in the RMG industry.

The Compact has acted as a coordinating instrument over the workplace safety initiatives concluded (see Introduction for an overview of these). There are harmonised inspection standards and common reporting templates.[325] Yet, the expanse of workplace safety initiatives has resulted in some employers and managers complaining about the multiple audits they have to undergo.[326] The parameters used are considered too harsh.[327] One CSO interviewee noted that there is a general feeling of a lack of control owing to the expanse of initiatives.[328] Enabling ownership on the part of factory owners will go some way to ensuring a sustainable Compact. The national initiative, the NTPA, is the result of pressure, not a voluntary decision.[329] The Compact has strengthened the NTPA's capacity to inspect factories by increased budget allocations, number of inspectors and the adoption of a labour inspection management reform roadmap and strategy.[330]

Amendments in 2013 improved workplace safety by, inter alia, requiring employers to provide personal safety equipment and offer training.[331] In addition, factory inspectors are directed to report serious accidents to competent authorities.[332] They also introduced the need for safety committees, a team composed of management and union/worker representatives that assists the employer in creating and maintaining a safe workplace.[333] There has been a notable reduction in the number of casualties and accidents, as pointed out by a CSO interviewee, though

[325] Technical Status Report 2016, 22; Technical Status Report 2018, 28.
[326] AETS, 'Study on the responsible management of the supply chain in the garment sector' (2016) 29 <ec.europa.eu/europeaid/study-responsible-management-supply-chain-garment-sector_en> accessed 27 November 2019; Research Participant 6, Employer organisation.
[327] Moazzem and Khandker (n 72) 25.
[328] Research Participant 5, CSO.
[329] Khan and Wichterich (n 85) 28.
[330] Technical Status Report 2016, 3; Technical Status Report 2018, 19-22.
[331] 2013 Labour (Amendment) Art 25.
[332] ibid, Article 26.
[333] DIFE, 'Safety Committee' 1 <dife.portal.gov.bd/sites/default/files/files/dife.portal.gov.bd/publications/006ad2dc_dd7b_46e3_a865_671a1d508b1e/4%20Safty%20Community_English%20V8.pdf> accessed 27 November 2019.

it was also noted that there is not necessarily a direct correlation with the Compact.[334] It may have rather been the shockwaves of Rana Plaza that influenced these changes and need to avert another factory disaster.

Factory inspections have taken place at an accelerated rate. At the 2017 ILC, Bangladesh's employer member noted that inspections on such a scale had never been undertaken in such a short space of time.[335] This has resulted in both workers and employers being more safety conscious.[336] According to the Compact monitoring report, virtually all of the 3780 export oriented RMG factories were inspected by December 2015.[337] By April 2017, all factories under the National Initiative had developed the first version of a Corrective Action Plan (CAP), a plan to address safety issues in each factory inspected, 4,413 CAPs were developed for 1,549 factories.[338] These cover structural integrity, fire safety and electrical integrity. One can only imagine if CAPs were developed for 'decent work' in these export-oriented factories, objectifying issues like women's rights, wages and working hours. What if they could be closed due to modern slavery found in connection with global brands? This would require an in-depth analysis of workers' rights in each factory. Owing to the inspections under the NTPA, Accord and Alliance, 39 factories have been closed owing to the risks they posed of an immediate danger to workers.[339]

The government has established a publicly accessible database to report on inspections.[340] An employer interviewee stated that this increased transparency of factories has empowered the factory owners,[341] by default it will empower trade unions and wider civil society. One report is said to have noted that the majority of RMG workers have

[334] Research Participant 4, CSO
[335] International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva, 2017) 15 Part II/56.
[336] ILO (n 160) 18.
[337] Technical Status Report 2017, 26.
[338] ibid, 29.
[339] ibid, 28.
[340] DIFE, 'Database' <database.dife.gov.bd/> accessed 27 November 2019.
[341] Research Participant 6, Employer organisation.

never seen a monitoring team in their factories.[342] In the words of a trade union interviewee, 'they appoint a lot of inspectors, but this is not enough'.[343] It can be said there would never be enough, the Better Work programme illustrating the positive changes that can be brought about owing to close and regular contact with EAs.

Factory remediation is now under way to tackle the issues found in the CAPs. Some remediation issues are fast and cheap to resolve, such as electrical safety.[344] At the other end of the scale, other remediation issues will require new purpose built factories, which would necessitate a geographical shift.[345] Some of the remediation reports have been overly ambitious with very short time frames for fixing serious faults.[346] This follows the Compact's ambition of remediation 'without delay'.[347] Nevertheless, delay has occurred and is inevitable. Remediation is the most intrusive factor of improving workplace safety.[348] It is both a sensitive hurdle and a costly one. It is one thing the EU promoting remediation, another practising it. Remediation costs vary between USD $20,000 to USD $900,000 (£15,500-700,000) and most factories need between $100,000 and $250,000 (£77,500-200,000) to correct all identified faults.[349] Total cost of remediation in the RMG sector is estimated at USD $929 million (£720 million).[350]

The question then comes who should bear the cost. Global retailers would take on relatively minor losses if they were the actors responsible.[351] However, this brings its own complexity as subcontracted

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[342] Afrose Jahan Chaity, 'Study: Safety Inspection teams at RMG factories not properly performing duties' *Dhaka Tribune* (21 March 2018) <www.dhakatribune.com/bangladesh/law-rights/2018/03/21/study-safety-inspection-teams-rmg-factories-not-performing-duties> accessed 27 November 2019.
[343] Research Participant 12, Trade Union.
[344] Moazzem and Khandker (n 72) 24.
[345] AETS (n 326) 56; FRAME Report 9.4, 45.
[346] Bowden (n 110) 286-287.
[347] Technical Status Report 2016, 22.
[348] Research Participant 3.
[349] ILO, 'Remediation Financing in Bangladesh's Ready Made Garment Sector' (2016) <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_492345.pdf> accessed 27 November 2019.
[350] ibid 2.
[351] Benjamin A.Evans, 'Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labour Conditions' (2015) 40 North Carolina Journal of International Law and Commercial Regulation 597, 621.

factories have many connected brands and retailers, all of which may be sourcing different quantities and values of garments. Brands and retailers are unwilling to fund changes when factory owners and managers are viewed as 'obscenely, extravagantly rich'.[352] Much of the funding burden hence lies on factory owners and managers.

The Compact has enabled discussion on the best way to ensure funding is available for remediation, calling for the dispatch of available remediation funds.[353] The range of financing measures has been increased, including back to back loans.[354] Organisations such as the International Finance Corporation provide loans to local banks that then disseminate these to factory owners.[355] Although the Compact has promoted financing mechanisms, it has not done enough. High interest rates are attached to many forms of finance,[356] which would leave many factories at a loss.[357]

Owing to the financial inability to remediate, according to an employer, hundreds of factories have closed.[358] Factory owners may already be insolvent but have to show they are willing to remediate.[359] This leads to a situation where the feared consequences of GSP withdrawal are happening on a smaller scale. Employers and trade unions seem united against such consequences. As one unionist asserted, businesses are not prepared to be closed in this manner.[360] Likewise, a CSO interviewee drew upon the issue that such closure would deter people from taking up production roles.[361] Funding is a

[352] Seabrook (n 3) 50.
[353] Technical Status Report 2016, 22.
[354] ILO, 'Remediation Financing' (n 349) 10.
[355] Uttama Barua and Mehedi Ahmed Ansary, 'Workplace safety in Bangladesh ready-made garment sector: 3 years after the Rana Plaza collapse' (2017) 23(4) International Journal of Occupational Safety and Ergonomics 578, 581.
[356] Research Participant 4, CSO.
[357] Moazzem and Khandker (n 72) 25.
[358] According to the Employer Member of Bangladesh, see International Labour Conference (106th Session) Conference Committee on the Application of Standards (Geneva 2017) 15, Part II/55.
[359] Barua and Ansary (n 355) 581.
[360] Research Participant 5, Trade union.
[361] Research Participant 4, CSO.

delicate issue, and concerns were raised in an interview regarding the situation when the Accord ends.[362]

The EU has an opportunity to integrate remediation funding into its development cooperation. It would form part of the EU's 'rights-based approach' to development and ensure it facilitates and strengthens decent work. Remediation is a necessary stage in workplace safety. Investment in workplace safety will increase production cost and so the cost of RMGs. This may increase competitive pressure, as pointed out by a CSO interviewee.[363] When coupled with increasing pressure on brands to decrease prices,[364] however, it would result in an inevitable loss of business on some scale. There is an expectation that the EU will act on this, though pricing issues were not included in the Compact. This is despite the EU's role in influencing brands to consider fair pricing.[365]

As the Compact ends, the next step is to ensure that the government takes full ownership of remediation and inspections.[366] The point seems to have been reached where RMG stakeholders want autonomy. The initiatives, it was stated, cannot go on forever.[367] In replacement, there needs to be an impartial mechanism that is governed by those within Bangladesh, as opposed to those outside it. As part of this and a key Compact achievement, the ILO has worked with RMG stakeholders to form a Remediation Coordination Cell (RCC) launched in 2017 staffed by key regulators and private sector engineers.[368] The importance of having an impartial mechanism including civil society and/or engineering bodies, owners and trade unions was emphasised by a trade union interviewee.[369] It will oversee the remediation of 1,500 non-Accord and Alliance factories.[370] Ultimately, the RCC aims to endow full

[362] Research Participant 12.
[363] Research Participant 4, CSO.
[364] Research Participant 1.
[365] ibid.
[366] Technical Status Report 2018, 26; Technical Status Report 2016, 22.
[367] Research Participant 5, CSO.
[368] ILO (n 160) 10; Technical Status Report 2017, 26; Technical Status Report 2018, 26.
[369] Research Participant 12, Trade Union.
[370] ILO (n 160) 10.

responsibility for the remediation process on the government. It will provide a 'one stop shop' for licences to establish a factory.[371]

Another outcome of the Compact's workplace safety pillar is a domino effect for workplace safety in other areas and industries.[372] Concerns have begun to be raised for those non-exporting factories wherein safety issues are widespread,[373] an area entirely excluded by the Compact. In addition, workplace safety issues have moved beyond fire and structural issues into seismic activity and boiler safety.[374] It is likely that there will be spill-over from this into other industries.

Notwithstanding these changes, there has been a lack of focus on OSH, namely issues such as working time, the provision of healthcare facilities and health issues of RMG workers.[375] Concerns were reflected by a unionist, who pointed out the dire need for health services owing to health issues stemming from work in the RMG industry and the lack of health facilities.[376] A study conducted by the Bangladesh Institute for Labour Studies, a CSO, pointed out that OSH had been underemphasised by both buyers and national actors, from lighting and space, primary health care, maternal and child healthcare to drinking water and sanitation hygiene practices.[377] They consider that these are the issues that are more connected to the day to day physical wellbeing of workers than structural integrity of buildings, in the long run also impacting worker income and economic security.[378] From this perspective, the Compact does not seem to be very sustainable after all as it is not improving living and working conditions. ILO projects fill in the gaps.

The Compact has provided the framework for the necessary workplace safety changes, yet the EU has not played a strong role. The

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[371] ILO, 'Remediation Coordination Cell (RCC) for Bangladesh RMG Industry' <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_566382.pdf> accessed 27 November 2019.
[372] Research Participant 3.
[373] Moazzem and Khandker (n 72) 10.
[374] Research Participant 3.
[375] Research Participant 5, CSO.
[376] Research Participant 12, Trade Union.
[377] Islam (n 55) 23.
[378] ibid.

GSP has been absent from the discussion. The external spill-over of its normativity appears restricted to fundamental labour rights, as opposed to the taking of a decent work perspective. At the same time, workplace safety has warranted most change since Rana Plaza, diverting attention from labour rights.

C. RBC: What role for the EU?

The RBC pillar is about the EU stepping back and supporting the work of global brands and retailers in their efforts to improve workers' rights and workplace safety in the RMG supply chain.[379] It is an arm's length approach. An employer organisation interviewee expressed distaste at this, stating that the Compact needs to be more vocal on the responsibility of buyers.[380] It reflects the dichotomy between the roles of buyers and retailers in the supply chain and those engaged in production. The driving force behind CSR is multi-stakeholder engagement,[381] a key objective of the EU in its external actions.[382] RBC actions are not directly the result of the Compact, though the EU's actions through the Compact have influenced them. The Alliance will not be assessed, as it had only negligible impact and involved largely North American brands and retailers.

The Accord is a primarily European initiative, concluded soon after Rana Plaza. Its formation was heavily influenced by civil society.[383] It is, by nature, an 'independent, legally binding agreement'.[384] Uniquely, it overlaps with governmental regulations and covers areas that are not regulated.[385] Notwithstanding this, interviewees asserted that support for the legal framework is lacking.[386] It is considered imposing, not self-

[379] FRAME Report 9.4, Kenner and Peake (n 10); Bangladesh Sustainability Compact, 7.
[380] Research Participant 6, Employer Organisation.
[381] Monowar Mahmood and Shaista E.Khilji, 'Globalisation and corporate social responsibility perspectives from South Asia' in Shaista Khilji and Chris Rowley (eds), *Globalization, Change and Learning in South Asia* (Woodhead Publishing 2013) 121.
[382] Article 21(1) TEU.
[383] Khan and Wichterich (n 85) 11.
[384] Accord, 'Accord' <bangladeshaccord.org/> accessed 27 November 2019.
[385] Beryl ter Haar and Maarten Keune, 'One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh' (2014) 30(1) The International Journal of Comparative Labour Law and Industrial Relations 5, 7.
[386] Interview Research Participants 5 and 6.

adopted.[387] As an example of this, one employer interviewee pointed out that when the factory closes for an unforeseen reason, in law they receive two months' salary, in the Accord, it is four months.[388]

This has had a negative impact on owners, disengaging them from workplace safety concerns, and placing them under the Accord's remit of punishment.[389] There is an aversion to those at the higher tier of the supply chain becoming involved in the lowest tiers, likely due to extraterritoriality and the contradictory nature of the garment supply chain being oriented on low cost garments and now ethical garments. In a situation of such disconnect, the EU has a window of acting as a mediator. Compact Partners recognise and promote the need for appropriate involvement of all stakeholders within it for its effective implementation.[390] Support of the initiatives gives the EU a role, if just as an interested bystander.

The Accord has been described as an 'industrial relations breakthrough' that could set a precedent for the future.[391] It has been suggested that the government should mandate all major corporate retailers to sign the Accord by an amendment to the BLA.[392] Given the above, this is an unrealistic prospect. The government has taken the opposite path, attempting to strike down its renewal in 2018.[393] Some interviewees expressed strong feelings that there was a general contention suppliers and businesses were being dictated to by brands and retailers and there was no reciprocity.[394] BGMEA has made its disapproval clear through the formation of a separate platform, in 2017, to look at post-2018 RMG safety activities, envisaged to act as the Bangladeshi 'Accord/Alliance'.[395] As the Accord looks to extend, its

[387] Interview Research Participants 5, CSO.
[388] Research Participant 6, Employer Organisation.
[389] Interview Research Participants 5 and 6.
[390] Bangladesh Sustainability Compact, 8.
[391] Md Zillur Rahman, 'Accord on "Fire and Building Safety in Bangladesh": A Breakthrough Agreement?' (2014) 4(1) Nordic Journal of Working Life Studies 69, 72.
[392] Rubya (n 191) 709.
[393] See CCC, 'Five years after Rana Plaza, the need for the Bangladesh Accord persists' (18 April 2018) <cleanclothes.org/news/2018/04/18/five-years-after-rana-plaza-the-need-for-the-bangladesh-accord-persists> accessed 27 November 2019.
[394] Research Participants 4, 6 and 11.
[395] Technical Status Report 2018, 35; Technical Status Report 2017, 32-33.

scope could go wider, addressing low wages, gender discrimination and union discrimination.[396] The government has been hostile to the Accord's extension, in December 2018 deciding to use the Supreme Court to stop its operation.[397] As of 2019, there is a Transition Accord which sets out a limited time span for its further operation of 281 working days from May.[398]

There has been a renewed focus on business codes of conduct in the supply chain, encouraged by the Compact.[399] Retailers align with different global standards such as the Business Social Compliance Initiative (BSCI), Worldwide Responsible Accredited Production (WRAP), Sedex or Social Accountability (SA) 8000.[400] These differ with regard to process, application and methodologies, and a uniform standard of compliance audit and safety inspections is called for by the Compact 'to reduce disruption, cost and time'.[401] The Better Work programme takes this a step further, ensuring that factories subscribe to a consolidation of standards.[402] This is a major challenge owing to the numerous buyers, many of whom are not partners of Better Work.[403] The recent partnership with Fairwear Foundation and joining of the Sustainable Apparel Coalition's, Labour and Social Convergence Project aims to consolidate and align the audit tools and methodologies.[404]

Codes of conduct concluded by the European social partners in the textiles and clothing sector are promoted by the Compact. They have facilitated a 'CSR Risk assessment model development, implementation and dissemination'.[405] The EU provides the platform for discussion but

[396] Haar and Keune (n 385) 25.
[397] UNI Global Union, 'Bangladesh Government attempts to paralyze Accord and strip its independence' (10 December 2018) <www.uniglobalunion.org/news/bangladesh-government-attempts-paralyze-accord-and-strip-its-independence> accessed 27 November 2019.
[398] CCC, 'Questions raised after agreement reached on Bangladesh Accord' (21 May 2019) <cleanclothes.org/news/2019/questions-raised-after-agreement-reached-on-bangladesh-accord> accessed 27 November 2019.
[399] Bangladesh Sustainability Compact, 8.
[400] Technical Status Report 2017, 34.
[401] ibid.
[402] ibid.
[403] ibid.
[404] ibid.
[405] ibid.

cannot impose its values. This gives businesses scope to lead on decent work in global supply chains. CSR is inevitably a brand-driven area. This does not prevent Compact partners from having a role. A CSO interviewee pointed out that the EU could draw upon global sustainability standards, social and physical standards more evidently to form a common benchmark for the RMG industry.[406] This would inevitably involve promoting internationally recognised guidelines and principles such as the OECD Guidelines on MNEs,[407] ISO 26000 Guidance Standard on Social Responsibility,[408] the ILO Tripartite Declaration of Principles concerning MNEs,[409] UN Global Compact[410] and UN Guiding Principles on Business and Human Rights.[411] However, it would involve the EU dictating to brands and retailers, a step outside its normative boundaries.

Finally, brands and retailers powerfully showed their hand at the Dhaka Apparel Summit 2017, refusing to participate owing to concerns around the crackdown on trade unionists, such as at Ashulia. This was pushed by CSOs such as the Ethical Trade Initiative (ETI) and CCC. The boycott is connected to global campaigns, including IndustriALL and UNI Global Union's '#EveryDayCounts' calling for freedom of jailed trade unionists and garment workers,[412] and Labour Start Campaigns for their release.[413] Initially ETI members such as C&A, H&M and Next confirmed

[406] Research Participant 4, CSO.
[407] OECD, 'OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment' (2011) <www.oecd.org/daf/inv/mne/48004323.pdf> accessed 27 November 2019.
[408] ISO, 'ISO 26000' (2010) <www.iso.org/iso/socialresponsibility.pdf> accessed 27 November 2019.
[409] International Labour Office (204th Session) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Geneva, 1997).
[410] UN, 'United Nations Global Compact' (1999) <www.unglobalcompact.org/> accessed 27 November 2019.
[411] UN, 'Guiding Principles on Business and Human Rights' (2011) <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 27 November 2019.
[412] IndustriALL, 'Bangladesh: Free jailed unionists and workers' (6 February 2017) <www.industriall-union.org/bangladesh-free-jailed-unionists-and-workers-0> accessed 27 November 2019.
[413] Labour Start Campaigns, 'Bangladesh: Release arrested garment union leaders now' <www.labourstartcampaigns.net/show_campaign.cgi?c=3310> accessed 27 November 2019.

they would not attend.[414] Facing a major loss of image that could have led to buyers withdrawing from Bangladesh, this was followed by the release of 35 unionists and garment workers.[415] IndustriALL has since described this as a breakthrough owing to international pressure.[416]

An area of contention which brands, retailers and Compact partners, including the EU, have missed the boat on is pricing. As one interviewee considered, brands and retailers cannot push for lower prices and improved working conditions.[417] While some brands, like H&M, are promoting pricing issues, there needs to be consistency across the board.[418] At the same time, RBC needs to be pushed by employers, who are not considered vocal enough.[419]

RBC has had a strong role to play after Rana Plaza. The Compact, and by default the EU, has provided impetus behind the organisation of brands and retailers, and promotion for the Accord. Yet the laissez faire approach of the EU and other Compact Partners has led to a situation whereby RBC in the Accord has become a unilateral imposition of corporate laws leading to dissatisfaction of government and employers. Perhaps the EU should have greater influence. Codes of conduct for factories remain at a stalemate. Supply chain codes of conduct can continue to be promoted by the EU through the sectoral social dialogue committees, and pricing is an issue that needs to be addressed to gain any meaningful change and show buyer and retailer sincerity in workplace safety.

To address this, it could be possible that the Compact be expanded to the international level beyond its expiry. This was a point

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[414] ETI, 'Revision – Given the release of jailed trade unionists ETI will now attend Dhaka Apparel Summit 2017' (20 February 2017) <www.ethicaltrade.org/blog/revision-given-release-jailed-trade-unionists-eti-will-now-attend-dhaka-apparel-summit-2017> accessed 27 November 2019.
[415] ibid.
[416] IndustriALL, 'Breakthrough in Bangladesh as unionists and garment workers are freed following international pressure' (23 February 2017) <www.industriall-union.org/bangladeshi-unionists-and-garment-workers-freed-following-international-pressure> accessed 27 November 2019.
[417] Research Participant 1.
[418] Research Participant 1.
[419] ibid.

expressed by a civil society interviewee.[420] This could be formed at the EU's sectoral social dialogue committee on the textiles and clothing industry, and address labour rights and workplace safety in the RMG industry for social partners. This would complement the EU flagship initiative on the RMG industry, adopted by the European Parliament, calling for due diligence based on OECD guidelines, enforcement of labour rights, supply chain transparency and traceability and promotion of gender equality.[421] ILO standards should take a prime position within such initiatives.

VI. Conclusion

The RMG industry has paved the way for Bangladesh's graduation from the GSP EBA and its category as an LDC. Pushed forward by the GSP EBA, it has seen economic and social development with increasing export revenue and providing much needed employment to men and women, the latter having been empowered through this employment. EU development cooperation policies are channelled into areas of human rights and education, ensuring that the EU has had a role as a *sustainable* development actor.

By the same token, workers face hurdles in forming trade unions, and when a union is formed, cannot exercise their rights effectively owing to the expanse of anti-union discrimination in the form of violence. Distrust has led to a lack of positive industrial relations. Workplace safety remains poor, and employers and managers unwilling to take steps to improve factory structural integrity or OSH. Workers face numerous health challenges connected to their work in the industry. Child labour remains, though the season for focus upon it seems to have passed. In turn, women's rights are pitifully promoted or protected, and remains an area of little attention.

The GSP's prospect for withdrawal upon serious and systematic violations of labour rights seems ever closer. Workers' rights are being violated daily, and Ashulia has shown that even when global attention is

[420] Research Participant 5, CSO.
[421] European Parliament, 'Resolution of 27 April 2017 on the EU flagship initiative on the garment sector (2017) (2016/2140(INI)).

on Bangladesh, the government is still able to lash out aggressively on unions and workers. Negative conditionality holds the prospect of severely impacting on Bangladesh's economic and social development and may in fact push back its progress under the SDGs, a view that seems to have been expressed in many interviews and shared by civil society, employers, trade unions, and for the time being, the EU.

The Compact has acted as a new form of positive conditionality, presenting a unique amalgamation of human rights conditionality with so-called deep engagement in the broader context and language of 'universality'.[422] It has uniquely and effectively brought together different stakeholders, a rarity. The Compact's pillars, focused on the RMG industry, labour rights, workplace safety and RBC, show a holistic approach to workers' rights. Yet a deeper level analysis reveals gaps in the Compact's coverage, excluding consideration of wages, child labour, women's rights and an ergonomic understanding of OSH. The EU's normative influence has been limited to freedom of association and collective bargaining, workplace safety and an arm's length promotion of RBC, rather in opposition to the EU's obligation to promote the 'universality and *indivisibility*' of human rights and fundamental freedoms.[423] On the other hand, it has shown its hand in forming a strong tie with the ILO. The Compact itself seems to have led to an intertwining of EU trade within the ILO, an unexpected but welcomed outcome.

The Compact commitments, the GSP EBA conditionality and the ILO's special paragraph have all had influence over labour rights in Bangladesh. Under the first pillar, labour rights, the threat of GSP withdrawal combined with the special paragraph have had leverage. Bangladesh committed to turning a new leaf, notwithstanding a long, drawn out history of labour rights violations. Whilst many changes have a positive aura, such as the increase in trade union registrations, updated labour law, adoption of SOPs and re-addressed labour law, they also fall short of expectations. Space for workers to organise and collectively

[422] See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 1989) 234.
[423] TEU, Article 21(1).

bargain is small, the labour law, even the 2018 draft law, does not meet ILO standards. The 30% trade union registration requirement, for example, was audaciously slotted into a revised draft despite continual recommendations to the contrary by the EU, ILO and other Compact Partners. Women's rights and child labour have not been addressed in the post-Rana Plaza climate, and the EU could have used more leverage to progress these issues at Compact level.

The influence of the GSP EBA and the ILO's special paragraph has been limited in terms of workplace safety, somewhat inevitable given that the GSP is connected to predominantly the fundamental ILO conventions. Workplace safety has been improved to an extent. 'Export-oriented' factories have been inspected, CAPs drawn up and remediation under way. Nevertheless, the remediation stage is the most challenging of the three, and as the Compact withdraws from Bangladesh, there will be some impact on the exercise of remediation. There is a role for developing access to further remediation funds, something recognised by the ILO, but conflict over 'who pays the bill' between the wealthy factory owners and managers and brands and retailers needs to be resolved.

The EU has not promoted an ergonomic approach to OSH, despite its support for this, which has meant that the Compact does not address issues such as health facilities or working hours. RBC has clearly been touched upon by the EU, yet again only to an extent. The EU promotes the Accord, Alliance, codes of conduct, and has provided a platform for brands and retailers in the sectoral social dialogue committee to take the issues a step further across the entire RMG industry.

There are continual advances of the Compact as a model for future EU trade policy.[424] Its reactive nature has been limiting for the EU and has resulted in a semi-tailored approach to labour rights that does

[424] See European Parliament 'Human rights in EU trade policy: unilateral measures' (Briefing, 2017) 9 <www.europarl.europa.eu/RegData/etudes/BRIE/2017/595878/EPRS_BRI(2017)595878_EN.pdf> accessed 27 November 2019; Research Participants 10, 11, 6.

not fully consider the Bangladeshi context. Replicating the Compact should then come with a preventative rather than reactive strategy. As RMG sourcing begins to shift to Economic Partnership Agreement partners such as Ethiopia,[425] the EU's trade and labour rights concerns should also. This leads to opportunities for the EU to develop different industry Compacts not oriented on the RMG industry in Bangladesh to ensure the fostering of other industries, that address not merely freedom of association and collective bargaining but wages, women's rights and broader workplace safety concerns.[426] The EU's partnership with the ILO will be key to this.

The Bangladesh case study, based on extensive interviews and country research, shows a unique, country-specific response to labour rights in the RMG industry. The Compact differs from the conventional positive conditionality of the GSP+ whereby countries undertake steps to obtain the trade instrument in the first place. This is the case in Sri Lanka, another garment producing country which will be discussed in the next chapter.

[425] Aaron Maasho, 'Ethiopia bets on clothes to fashion industrial future' *Reuters* (November 2017) <uk.reuters.com/article/us-ethiopia-textiles/ethiopia-bets-on-clothes-to-fashion-industrial-future-idUKKBN1DL1VU> accessed 27 November 2019.
[426] Research Participant 11.

Chapter 6 Sri Lanka and the GSP+

I. Introduction

Sri Lanka is a MIC.[1] It has been a beneficiary of the EU's GSP+ since 2017,[2] having had preferences withdrawn in 2010 as a result of human rights violations in the civil war between a minority Tamil group, the Liberation Tigers of Tamil Eelam (LTTE), and the government, which lasted from 1983-2009.[3] During this time, the RMG industry blossomed, exporting goods predominantly destined for the U.S. and the EU.

Negative conditionality, withdrawal of the EU's GSP+, was used in condemnation of human rights abuses carried out in the civil war. It had some impact on exports to the EU, but was not greatly detrimental to the RMG industry, which found other ways to ease losses. The re-grant of the GSP+ in 2017 was influenced by a change of government in 2015. This has provided a new opportunity for the EU to engage with Sri Lanka on decent work. This research shows an interesting side to the GSP+'s conditionality, that the human rights commitments mandated have been perceived by unions and factory owners as demanding factory-level implementation, for example in the form of higher wages for workers in factories using GSP+ preferences. It introduces the idea of 'enhanced implementation', calling for GSP+ commitments beyond implementation and ratification of conventions.

This chapter first gives a contextual picture to the RMG industry. It then assesses RMG workers' rights, highlighting violations of freedom of association and collective bargaining rights. The EU's developmental role is subsequently drawn upon, delineating its pursuit of decent work. It then analyses the withdrawal of the GSP+, including the procedure and governmental opposition to it. It assesses the impact of GSP+ withdrawal on the RMG industry, showing consequences as more a loss of

[1] UN Sri Lanka, 'United Nations Sustainable Development Framework 2018-2022' (2017) 10 <lk.one.un.org/wp-content/uploads/2017/08/Final_UNSDF_2018-2022.pdf> accessed 27 November 2019.
[2] GSP Regulation.
[3] Commission, 'The EU Special Incentive Arrangement for Sustainable Development and Good Governance (GSP+) assessment of Sri Lanka covering the period 2016-2017' (Staff Working Document) SWD(2018) 31 final, 1.

opportunity rather than symbolising the industry's end. Contrasting to GSP+ withdrawal is the assessment of its re-grant, including ILO assessments of labour rights. This research shows the GSP+ has only brought about limited positive changes in practice to workers' rights. The analysis draws upon interviews conducting during time spent as a Visiting Scholar at the ILO Country Office in Sri Lanka.[4]

II. Country Context

A. The RMG Industry

Sri Lanka gained independence in 1948.[5] It is an MIC[6] with a population of 21 million.[7] There are 8.3 million economically active persons and a labour market participation rate of just over 50%.[8] Of those engaged in work, 66% work in the informal economy,[9] including both those working in unregulated enterprises and those in informal employment in formal enterprises, such as agency workers.[10] Sri Lanka met the MDG target of halving poverty seven years before the 2015 deadline and achieved MIC status in 2010, reducing its access to development aid.[11] This is reflected in a high human development indicator placing Sri Lanka at 73 of 188 countries.[12]

These development successes occurred despite the civil war,[13] which intensified in 2008.[14] There were extensive human rights violations from unlawful killings, enforced disappearances to torture and other forms of cruel, inhuman or degrading treatment.[15] The ending of the civil

[4] See Chapter 1 for methodology.
[5] See A. Jeyaratnam Wilson, 'Ceylon's (Sri Lanka's) passage to independence' (1999) 88(349) The Round Table 97.
[6] UN Sri Lanka (n 1) 10.
[7] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3), 1.
[8] ibid, 10.
[9] ibid.
[10] ILO Recommendation R2014: Recommendation Concerning the Transition from the Informal to the Formal Economy) (104th Conference Session Geneva 12 June 2015).
[11] UN Sri Lanka, 'Millennium Development Goals: Sri Lanka's Progress and Key Achievements' (2016) <lk.one.un.org/wp-content/uploads/2016/05/Millennium-Development-Goals-Sri-Lankas-Progress-and-Key-Achievements.pdf> accessed 27 November 2019.
[12] UN Sri Lanka (n 1) 10.
[13] Philip Alston and William Abresch, 'Can Human Rights Monitoring Halt Abuses in Sri Lanka?' (2007) 31(2) The Fletcher Forum of World Affairs 21, 22.
[14] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3)1.
[15] UNGA, 'Comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (28 September 2015) A/HRC/30/6.

war and the presidential election in 2015 brought forward commitments to human rights and UN engagement. It marked a change from authoritarian rule to addressing longstanding human rights problems.[16] The UN High Commissioner for Human Rights on Sri Lanka regarded this as a 'watershed' in the political environment.[17]

Sri Lanka has pursued economic development with vigour. Its main export industries are garments and tea. The RMG industry is the largest contributor to the country's export revenue,[18] though forms the second largest source of foreign exchange earnings after migrant worker remittances.[19] In 2018, the EU was its top trading partner, with a proportion of 30.1% of exports, followed closely by the U.S. at 26%.[20] Of exports to the EU, 58.2% consist of clothing.[21]

Export industries were established in the 1970s, increasing rapidly owing to an import substitution policy and export-oriented industrial policy which were characterised by incentives and EPZs.[22] Of the 13 EPZs under the remit of the Board of Investment (BOI),[23] none are located in the north of Sri Lanka, most impacted by the war.[24] The Katunayake EPZ, established in 1978, located near the capital, Colombo, is the oldest.[25] EPZs offer tax holidays, concessions and exemptions from customs

[16] Jason Burke and Amantha Perera, 'Sri Lanka's new president promises 'no more abductions, no more censorship'' *The Guardian* (10 January 2015) <www.theguardian.com/world/2015/jan/10/sri-lanka-president-maithripala-sirisena-promise-change> accessed 27 November 2019; HRW, 'Sri Lanka: New Government Makes Significant Progress' (2016) <www.hrw.org/news/2016/01/27/sri-lanka-new-government-makes-significant-progress-0> accessed 27 November 2019.
[17] UNGA (n 15) para 11-14.
[18] J G Sri Ranjith and Benjamin Widner, 'Sri Lanka's Garment Industry: Prospects for Agglomeration, Challenges and Implications for Regional Development' (2011) 18(4) South Asian Journal of Management 7, 8.
[19] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3) 10.
[20] Commission, 'European Union, Trade in goods with Sri Lanka' (2019) 8 <webgate.ec.europa.eu/isdb_results/factsheets/country/details_sri-lanka_en.pdf> accessed 27 November 2019
[21] ibid, 4.
[22] Ranjith and Widner (n 18) 7-8.
[23] The BOI is a semi-governmental body that facilitates investment.
[24] BOI, 'Locations of EPZs in Sri Lanka' <investsrilanka.com/where/> accessed 27 November 2019.
[25] Hege M.Knutsen, 'Globalisation and the garment industry in Sri Lanka' (2003) 33(2) Journal of Contemporary Asia 225, 235.

duties.[26] There are factories established outside the zones, although there is no available statistics on their number. Factories increased in the 1990s due to a '200 Garment Factory Programme' set up by the government to invest in rural areas, alleviate poverty and provide better infrastructure.[27]

Sri Lanka's RMG industry is predominantly orientated around making up garments. It does not have a domestic cotton production base. Materials for garment production are imported, mainly from India.[28] Thus, its' RMGs are less competitive, with longer lead times, around 90 to 120 days compared to competitors with 30-60 days.[29] Sub-contracting of work helps maintain competitiveness by keeping prices low.[30]

To maintain competitiveness, businesses adopted ethical agendas. The project Garments without Guilt was established in 2006 by the Joint Apparel Association Forum (JAAF)[31] with the objective of promoting the industry as reputable, ethical and sustainable.[32] It aimed to uphold the RMG industry within the context of ATC quota expiry,[33]

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[26] See BOI, 'Investment Guide' (2019) <investsrilanka.com/wp-content/uploads/2019/03/BOI-Investment-Guide-2019-Feb_2.pdf> accessed 27 November 2019.

[27] Caitrin Lynch, 'The Politics of White Women's Underwear in Sri Lanka's Open Economy' (2002) 9(1) Social Politics: International Studies in Gender, State and Society 87, 87; Jayatilleke S.Bandara and Athula Naranpanawa, 'Garment Industry in Sri Lanka and the Removal of GSP Plus by EU' [2015] The World Economy 1438, 1440.

[28] Umair Hafeez Ghori, 'Rising to the Challenge: Asian Survivors of the Quota Expiry in Global Textiles and clothing Trade' (2009) 6 Manchester Journal of International Economic Law 95, 125; Commission, 'Trade in goods with Sri Lanka' (n 20).

[29] SP Premaratna, S. Weerawansa and PWC Wijegunawardana, 'A Model to Develop Small and Medium Enterprise Sector in Sri Lanka: Subcontracting Linkages in the Sri Lankan Garment Industry' (2013) 3(1) Sri Lanka Journal of Advanced Social Studies 54, 67.

[30] ibid, 68.

[31] JAAF was established in 2002 as a body for textile and apparel associations, initially to collaborate over the phase out of MFA quotas, see Janaka Wijayasiri and Jagath Dissanayake, 'The Ending of the Multi-Fibre Agreement and Innovation in the Sri Lankan Textile and Clothing Industry' (2008) OECD Trade Policy Papers No.75, 172 <www.oecd-ilibrary.org/economics/the-ending-of-the-multi-fibre-agreement-and-innovation-in-the-sri-lankan-textile-and-clothing-industry_gen_papers-v2008-art27-en> accessed 27 November 2019.

[32] Bandara and Naranpanawa (n 27) 1440.

[33] Kanchana N.Ruwanpura, 'Garments Without guilt? Uneven Labour Geographies and ethical trading – Sri Lankan labour perspectives' (2016) 16 Journal of Economic geography 423, 424.

acting as 'insulation' from lower labour cost countries.[34] It has five guiding principles: RBC, no child labour, no forced labour, no discrimination and no sweatshop practices.[35] Businesses meeting these receive certification through an independent third-party.[36] Ethical compliance drove higher prices, thus higher-end RMGs.[37] Higher-end brands such as Abercrombie & Fitch and Lands End source clothing from Sri Lanka.[38] The initiative does not have the transparency of the Bangladeshi Accord, and it is difficult to trace its role.

Workers are the primary, and anticipated, beneficiaries, of projects like Garments without Guilt, but are sceptical of their effect.[39] The initiative failed to adequately integrate or promote ILO standards,[40] a mask that drew in trade but did not have meaningful effects on workers' lives. One EPZ factory manager interviewed was keen to point out their factory as a 'happy' workplace, implementing an ethical agenda through worker benefits including subsidised meals, transport and medical facilities.[41] RBC is more oriented around worker benefits than addressing fundamental ILO conventions.[42]

As in Bangladesh, the RMG industry provides largely unskilled work, attractive to workers that have migrated from rural to urban areas.[43] Women are preferred for work, being perceived as more subdued with a higher propensity for repetitive work.[44] In 2015, 56.73% of workers in all

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[34] Patsy Perry, Steve Wood, John Fernie, 'Corporate Social Responsibility in Garment Sourcing Networks: Factory Management Perspectives on Ethical Trade in Sri Lanka' (2015) 130 Journal of Business Ethics 737, 741.
[35] SGS, 'Garments without guilt' <www.sgs.com/en/sustainability/social-sustainability/social-responsibility-sr/garments-without-guilt> accessed 27 November 2019.
[36] ibid.
[37] Kanchana N.Ruwanpura and Neil Wrigley, 'The Costs of Compliance? Views of Sri Lankan apparel manufacturers in times of global economic crisis' (2011) 11 Journal of Economic Geography 1031, 1043.
[38] See Wijayasiri and Dissanayake (n 31) 160.
[39] Kanchana N.Ruwanpura, 'Ethical Trading and Sri Lankan Labour Practices in the Apparel Sector' (2014) Asia Research Institute Working Paper Series No. 222, 17 <www.ari.nus.edu.sg/wps/wps14_222.pdf> accessed 27 November 2019.
[40] Kanchana N.Ruwanpura, 'The weakest link? Unions, freedom of association and ethical codes: A case study from a factory setting in Sri Lanka' (2015) 16(1) Ethnography 118, 118-119.
[41] Research Participant 18, EPZ Factory Manager.
[42] Perry, Wood, Fernie (n 34) 743.
[43] Bandara and Naranpanawa (n 27) 1445.
[44] Ranjith and Widner (n 18) 11.

EPZs were female.[45] As the country progresses and women obtain higher educational qualifications, they are less attracted to unskilled work.[46] Many Sri Lankans migrate for work abroad, and an estimated 1.8 million work in the Middle East,[47] where they are vulnerable to trafficking and modern slavery.[48] Mass migration has influenced a significant labour shortage and high labour turnover. In 2017, 20.3% of total recorded vacancies were for sewing machine operators.[49] According to the BOI, there were no applicants for around 30,000 vacancies.[50] Prospective workers are deterred by harsh conditions and 'staggering production quotas' alongside poor wages and long working hours.[51]

B. Workers' Rights

Workers' rights do not live up to Garments without Guilt and its resulting presumption of decent work. Employers point towards the influential nature of labour legislation in leading to strict implementation of ethical codes of conduct.[52] There exists, in both law and practice, restrictions on trade unions, low wages, deficiencies in structural integrity of buildings and OSH, a degree of child labour and poor enforcement of women's rights. Sri Lanka has ratified 43 ILO conventions, including all eight of the fundamental conventions.[53]

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[45] WHO, 'Report on Situational Analysis on Occupational Health and Safety in Sri Lanka' (2016) 12 <www.searo.who.int/srilanka/documents/situational_analysis_in_occupational_health_and_safety_in_sri_lanka.pdf> accessed 27 November 2019.
[46] Manori Wijesekera, 'Sri Lankan Garment Factories Boost wages and benefits as Labor Shortage Looms' *Global Press Journal* (17 September 2017) <globalpressjournal.com/asia/sri_lanka/sri-lankan-garment-factories-boost-wages-benefits-labor-shortage-looms/> accessed 27 November 2019.
[47] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3) 10.
[48] ILO, 'EQUIP: Equipping Sri Lanka to counter trafficking in persons' (2017) <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-colombo/documents/publication/wcms_631486.pdf> accessed 27 November 2019.
[49] Government of Sri Lanka, 'Sri Lanka Labour Demand Survey 2017' (2017) 26 <www.statistics.gov.lk/industry/Labour_Demand_Survey_2017_Report.pdf> accessed 27 November 2019.
[50] ILO, 'Factors affecting Women's Labour Force Participation in Sri Lanka' (2016) 29 <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-colombo/documents/publication/wcms_551675.pdf> accessed 27 November 2019.
[51] Wijesekera (n 46).
[52] Ruwanpura, 'Ethical Trading' (n 39) 10.
[53] ILO, 'Ratifications for Sri Lanka' <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103172> accessed 27 November 2019.

i. Freedom of Association and Collective Bargaining

Sri Lanka has ratified ILO Conventions Nos. 87 and 98, on freedom of association and collective bargaining, and others including the Tripartite Consultation Convention[54] and the Workers Representatives Convention.[55] The Constitution and the legislation protect the fundamental right and freedom of citizens to form associations and join trade unions.[56] There is a history of worker participation in law and policy,[57] with over 2500 unions and a union density rate in 2016 of 15.3%.[58] Owing to historical union engagement, one interviewee considered the union movement quite strong.[59] This presents a positive picture contrasting to Bangladesh's suppression of union rights.

Nevertheless, unions are restricted in practice. A trade union interviewee identified problems like blockages of union registration.[60] Employees can join a union from the age of 16 but can start work at 14.[61] This has been found to violate freedom of association by the ILO's supervisory machinery.[62] There exists some union rivalry in competing to obtain members,[63] although this is not as embedded as in Bangladesh. This is reflective of Sri Lanka's development status affording union's greater capacity to organise through education and appropriate

[54] Convention (No.144) concerning tripartite consultations to promote the implementation of international labour standards (adopted 21 June 1976, entered into force 16 May 1978) 1089 UNTS 354.
[55] Convention (No.135) concerning protection and facilities to be afforded to workers' representatives in the undertaking (adopted 23 June 1971, entered into force 30 June 1976) 883 UNTS 111.
[56] Constitution of Sri Lanka 1978, Article 14(1)(c) and (d) respectively; The Trade Unions Ordinance (No.14 of 1935) (Cap.138)
[57] Nisha Arynatilake, 'Precarious Work in Sri Lanka' (2012) 57(4) American Behavioural Scientist 488, 493.
[58] ILOSTAT Sri Lanka.
[59] Research Participant 21.
[60] Research Participant 13, Trade Union.
[61] Trade Unions Ordinance (No.14 of 1935) (Cap.138) section 31 and 32.
[62] International Labour Conference (100th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2011) III(Part IA) 161; International Labour Conference (101st Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2012) III(Part IA) 429; International Labour Conference (102nd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2013) III(Part IA) 169; International Labour Conference (103rd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2014) III(Part A) 239.
[63] Research Participant 14; Research Participant 20, Employer Organisation.

facilities.[64] Political affiliations are likewise not akin to that in Bangladesh. There are still discrepancies between male union leaders and a largely female workforce.[65]

If a union is registered, it has the ability to exercise its rights, including the right to strike and collectively bargain.[66] ILOSTAT data suggests a collective bargaining coverage rate of only 4.8% in 2016 across workplaces.[67] A 2017 study found that there was only one company covering five factories in EPZs that had a collective agreement.[68]

The law prevents the refusal of employers to collectively bargain with a union that represents over 40% of workers.[69] In practice, this means that if unions do not have the 40%, they cannot collectively bargain. The diversity of the trade union movement adds to the difficulty.[70] A union interviewee asserted that the legal provision has been interpreted as 40% of all companies under the remit of the employer owing to the ambiguous definition of 'workplace' in the legislation and employers challenge it on the basis that bargaining has to be voluntary and should not be forced.[71] Another interviewee spoke of a recommendation in EPZs that if a union has 40% of the workforce or less, they should still have the opportunity to collectively bargain.[72] It is not an issue that is likely to be solved any time soon, the government has

[64] Research Participant 20, Employer Organisation.
[65] Research Participant 14.
[66] Trade Unions Ordinance (No.14 of 1935) (Cap.138) section 18(b)).
[67] ILOSTAT Sri Lanka.
[68] Benjamin Richardson, James Harrison and Liam Campling, 'Labour rights in Export Processing Zones with a focus on GSP+ beneficiary countries' (European Parliament 2017) 30 <www.tepsa.eu/download/studies_for_the_european_parliament/droi_report_on_labour_rights_in_epzs/Labour-Rights-In-Export-Processing-Zones.pdf> accessed 27 November 2019.
[69] Industrial Disputes Act (No.43 of 1950) (Cap.131) Article 32A(g).
[70] International Labour Conference (105th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2016) III(Part IA) 135.
[71] Research Participant 13, Trade Union.
[72] Research Participant 19.

asserted that there is no support to eliminate the threshold in CFA case law,[73] despite ILO supervisory bodies requesting its review.[74]

Issues are bolstered by anti-union discrimination. Polls might be conducted to check the representativeness of the union and workers are unlikely to identify themselves owing to fears of anti-union discrimination.[75] Excessive violence has been used to control demonstrations and arrests,[76] whilst union members have been physically assaulted by employers.[77] A union interviewee described questioning, resignation pressures, and management threats.[78] In June 2016, more than 3000 workers protested against anti-union discrimination in EPZs.[79] The CEACR has emphasised the need for free and independent unions free from 'violence, pressure and threats'.[80]

Free and independent unions are contrasted to Employees' Councils. These may be led by employers.[81] Factory managers argue they promote a harmonious workplace,[82] whilst workers perceive them as company-led.[83] In 2008, a survey found there were 26.5% of such councils in factories, compared to only 2.5% of trade unions.[84] The BOI

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[73] *Sri Lanka (Case No 2380)* (March 2009) Report of the Committee on Freedom of Association No 353 (Vol LXCII 2009 Series B, No. 1)
[74] *Sri Lanka (Case No 2380)* (March 2006) Report of the Committee on Freedom of Association No.340 (Vol LXXXIX 2006 Series B, No.1); *Sri Lanka (Case No. 2255)* Report of the Committee on Freedom of Association No.332 (Vol LXXXVI 2003 Series B, No.3).
[75] ITUC, 'Benchmarks for Sri Lanka to achieve compliance with international legislation on core labour standards' in CPA and FES, *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (2008) 40 <library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf> accessed 27 November 2019.
[76] International Labour Conference (105th Session) Report of the Committee on the Application of Conventions and Recommendations (Geneva, 2016) III(Part IA) 132-133.
[77] ITUC (n 75) 40.
[78] Research Participant 13, Trade Union.
[79] IndustriALL, 'Sri Lanka: thousands protest against anti-union discrimination at FTZs' (7 July 2016) < www.industriall-union.org/sri-lanka-trade-unions-protest-against-anti-union-discrimination-at-ftzs> accessed 27 November 2019.
[80] International Labour Conference (105th Session) Report of the Committee on the Application of Conventions and Recommendations (Geneva, 2016) III(Part IA) 132-133..
[81] Ruwanpura, 'Ethical Trading' (n 39) 15.
[82] Perry, Wood, Fernie (n 34) 743.
[83] Research Participant 14.
[84] Muttukrishna Sarvananthan and H.M.P.Sanjeewanie, 'Has GSP+ contributed to poverty reduction and fostered 'sustainable development' in Sri Lanka?' in CPA and FES, *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (2008) 24 <library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf> accessed 27 November 2019.

encourages these councils within its enterprises which can exist within and outside EPZs, the aim being to promote employee participation in decision-making with elected employees.[85] Under the same guidelines, employers may not interfere with their activities.[86]

In EPZs, the status of both these Councils and unions has been strongly criticised. Difficulties unionising in EPZs was pointed out by an interviewee.[87] Unlike in Bangladesh, labour laws do not distinguish between EPZs and factories outside them. This has not meant rights are enjoyed to the same level. Union rights are more impaired within EPZs,[88] generally quite secretive zones difficult to access. A 2017 CEACR observation noted under Convention No.98 that labour inspectors are not allowed to carry out unannounced visits to factories in EPZs, although the government has insisted they have the authority to enter any factory without employer or BOI permission.[89] Inspections are an essential component of factory safety and workers' rights. Access is an issue for trade unions, with activists stating that they are not permitted to enter the EPZs without approval from employers,[90] which can be time-consuming and laborious.

This is closely related to the failure of access to justice, allowing workers recourse to the justice system where they have been unable to access rights, or had rights violated. The CEACR noted that the government does not provide accurate information on access to justice, and workers are unwilling to give evidence before courts over labour rights violations.[91] The responsibility of victims to lodge complaints

[85] BOI, 'Labour Standard and Employment Relation Manual' section 10 <investsrilanka.com/wp-content/uploads/2019/03/manual.pdf> accessed 27 November 2019.
[86] ibid.
[87] Research Participant 14.
[88] Richardson, Harrison and Campling (n 68) 7.
[89] International Labour Conference (106th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2017) III(Part IA) 171-173.
[90] Vittorio Longhi, 'Sri Lanka needs to regain its trade concessions but workers must benefit' *The Guardian* (20 January 2011) <www.theguardian.com/global-development/poverty-matters/2011/jan/20/sri-lanka-free-trade-zones> accessed 27 November 2019.
[91] International Labour Conference (106th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2017) III(Part IA) 171-173.

makes these difficulties worse.[92] Prosecution of employers carrying out anti-union discrimination is negligible.[93] Enforcement agencies are unwilling to investigate complaints.[94] These concerns were reflected by an interviewee who pointed to hundreds of complaints being abandoned as unions do not have the opportunity to file cases on unfair labour practices.[95] Even where prosecution occurs, fines are inadequate to be either deterrent or punishment.[96]

ii. Wages

Wages are very low in the RMG industry, acting as a pull for investors. In 2014, Sri Lanka was found to have the lowest minimum wage of garment producers in the Asia-Pacific region at approximately £50 per month, lower than Bangladesh.[97] This is surprising given its comparative status as an MIC. The loss of the GSP+ in 2010 may have kept wages at a stalemate. In 2016, a bill was passed to have the minimum wage set at LKR 10,000 per month, approximately £48, for all industries.[98] In 2017, it was reported that the minimum wage for garment workers was set at 13,500 LKR (£60.76) per month, which goes only slightly above the minimum wage set in 2016.[99]

Legislating for minimum wages was not widely welcomed, it is argued that it has 'compromised the bargaining power of workers', at the same time being a relief to the most vulnerable as it provides a floor for those that would receive lower wages.[100] The minimum wage is far below the living wage for garment workers, estimated in 2016 at 25,000 LKR

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[92] ibid, 171-173.
[93] Richardson, Harrison and Campling (n 68) 30.
[94] ITUC (n 75) 43.
[95] Research Participant 13, Trade Union.
[96] International Labour Conference (100th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2011) III(Part IA) 162; International Labour Conference (102nd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2013) III(Part IA) 171.
[97] Malte Luebker, 'Minimum wages in the global garment industry' (2014) 1 <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_317002.pdf> accessed 27 November 2019.
[98] The National Minimum Wage of Workers Act, No 3 of 2016.
[99] Wijesekera (n 46).
[100] Wage Indicator, 'Wages in Context in the Garment Industry in Asia' (2016) 74 <wageindicator.org/documents/publicationslist/publications-2016/van-klaveren-m-2016-wages-in-context-in-the-garment-industry-in-asia-amsterdam-wageindicator-foundation-april-28-2016> accessed 27 November 2019.

(£119).[101] Minimum wages do not necessarily reflect actual wages, and there are other mechanisms by which wages may be set. Wage Boards can be established for any trade which can consider cost of living, the economic cycle, wage differentials and minimum wages in other countries.[102] This reflects the ILO's Minimum Wage Convention, which has been ratified by Sri Lanka.[103]

Yet wages are often opaque because of overtime and incentives, which, when not included in the salary, may result in far lower wages than expected.[104] Overtime might not be paid owing to the provision of other facilities, like meals or transport.[105] At slower periods of production, workers can be paid 'holidays', days that it is expected will have to be replaced later in the year.[106] Low wages result in poor living conditions, which might be dormitories for workers that have come from rural areas.[107] One interviewee asserted that once living expenditure had been deducted, there is hardly any income left, which means workers prefer to go abroad,[108] leading to concerns over trafficking and modern slavery. Wages are not adequately addressed within the supply chain, despite Sri Lanka's promotion of ethical initiatives.[109] Wages in the informal economy, which operates behind the scenes, especially in RMGs, are approximately 40% lower than in the formal sector.[110]

There is a pattern of wage increases due to labour shortages.[111] EPZs are considered to offer higher wages and benefits.[112] However, this has been compromised by increasing informal work in formal enterprises,

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[101] ibid, 78.
[102] ibid, 73.
[103] Convention (No.131) concerning minimum wage fixing, with special reference to developing countries (adopted 22 June 1970, entered into force 29 April 1972) 825 UNTS 77.
[104] Ruwanpura, 'Ethical Trading' (n 39) 12.
[105] Research Participant 13, Trade Union.
[106] Ruwanpura, 'Ethical Trading' (n 39) 13.
[107] Research Participant 14.
[108] ibid.
[109] Ranjith and Widner (n 18) 11.
[110] CCC, 'Garment Report' (2004) 16 <cleanclothes.org/resources/national-cccs/garment-report-www.pdf> accessed 27 November 2019.
[111] Ruwanpura, 'Ethical Trading' (n 39) 12; Research Participant 18, EPZ Factory Manager.
[112] Richardson, Harrison and Campling (n 68) 7.

such as the practice of recruiting agency workers,[113] as employers attempt to improve flexibility and profit.[114] It was even asserted in an interview that employers are directing workers to agencies when they apply for jobs at a factory.[115] Hiring agency workers was even perceived on the same level as human trafficking.[116] These workers are not entitled to social security benefits, can have agency fees deducted from their wages and are unlikely to engage with unions.[117] This mirrors trends of increasing informal modes of work globally, ways to avoid being tied down with 'employees'.

iii. Structural Integrity of Buildings and OSH

Structural integrity of buildings and OSH is not a major concern in the industry. EPZs were set up with purpose-built buildings and the industry has invested in infrastructure, resulting in a 'promising workplace scenario' ensuring better welfare for workers.[118] Interviewees were relatively silent on the topic, one asserting that by and large the industry is 'maintained at a high level'[119] and another that factories are 'very organised'.[120] Workers are trained in fire safety and there is first aid and medical assistance.[121] This is generally applicable to the formal industry, whilst in the informal economy there can exist long working hours, cramped conditions and an absence of facilities.[122] Long hours are common when there is a shipment deadline.[123]

Notwithstanding positivity surrounding workplace safety, Sri Lanka's international commitments to structural integrity and OSH are poor. Notable OSH conventions are unratified, such as the OSH

[113] Research Participant 13, Trade Union.
[114] Arynatilake (n 57) 489.
[115] Research Participant 13, Trade Union.
[116] Arynatilake (n 57) 489.
[117] Richardson, Harrison and Campling (n 68) 32-33.
[118] Ruwanpura, 'Ethical Trading' (n 39) 22.
[119] Research Participant 20, Employer Organisation.
[120] Research Participant 14.
[121] Ruwanpura, 'Garments Without guilt?' (n 33) 433.
[122] Ranjith and Widner (n 18) 12.
[123] Ruwanpura, 'Ethical Trading' (n 39) 11.

Convention.[124] National regulation includes the Factories Ordinance[125] wherein a factory must be registered and comply with certain conditions such as the need to prevent overcrowding. Difficulties arise in gaining access to factories in EPZs for inspections and in identifying and inspecting informal factories. The CEACR has regularly pointed to this as an area of concern, and the lack of suitable OSH inspectors.[126] The ILO supports the Department of Labour in developing new legislation on OSH and in raising awareness of necessary issues.[127] If labour inspectors are not sufficiently educated, lack access to factories and are not trained in inspections, it is likely that there are numerous failures of OSH even with prima facie safe workplaces.

iv. Women's Rights

As with Bangladesh, women's rights are an issue, and it was asserted by one interviewee that there is not enough focus on the largely young, female, workforce,[128] a problem typical in the Asian RMG industry. Women work primarily in the production line or as machine operators.[129] Gender discrimination exists on several levels. In 2011, the Commission observed 'salient' shortcomings on effective implementation of CEDAW.[130]

The 2017 labour force demand survey found that 45% of women were recruited as sewing machine operators.[131] The highest number of

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[124] Convention (No.45) concerning the employment of women on underground work in mines of all kinds, as modified by the Final Articles Revision Convention, 1946 (adopted 21 June 1935, entered into force 30 May 1937) 40 UNTS 63; Convention (No.115) concerning the protection of workers against ionising radiations (adopted 22 June 1960, entered into force 17 June 1962) 431 UNTS 41; Convention (No.155) concerning occupational safety and health and the working environment (adopted 22 June 1981, entered into force 11 August 1983) 1331 UNTS 279.
[125] Sri Lanka Factories Ordinance (No. 45 of 1942) (Cap 128).
[126] International Labour Conference (100th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2011) III(Part IA) 163; International Labour Conference (102nd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2013) III(Part 1A) 511; International Labour Conference (103rd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2014) III(Part A) 403.
[127] WHO (n 45) 32.
[128] Research Participant 21.
[129] ILO, 'Factors affecting Women's Labour Force Participation' (n 50) 22.
[130] Commission, 'Report on assessment of the application for GSP+ by Sri Lanka' (Staff Working Document) SWD (2016) 474 final, 6.
[131] Government of Sri Lanka (n 49) 17.

resignations (44.4%) from 2015 to 2017 were in this occupation,[132] showing an extremely high labour turnover. Women are deterred by low wages, bad living conditions and negative images of garment workers.[133] First, they face a historic stigma surrounding garment work, associated with the term 'Juki girls', an insult connected to perceptions of negative western influences on Sri Lanka.[134] This results in the reluctance of women to seek work in the garment industry, despite the benefits it might bring.

Second, social protection remains precarious. Women face difficulties obtaining maternity leave and childcare, notwithstanding a provision in the law for paid maternity leave.[135] In turn, social protection laws have meant it is common for women to work for a certain amount of years to obtain social protection, and leave after obtaining the threshold.[136] This prevents their progression into supervisory roles. Third, there is a gender wage gap,[137] an absence of equal remuneration for men and women for work of equal value highlighted by the CEACR.[138] Currently, the legislation allows for equal wages for the 'same' or 'substantially' the same work.[139] Fourth, workers may face verbal abuse and harassment. One study found that although the majority of those researched did not experience mistreatment, there was a greater likelihood of negativity if working in a garment factory.[140] It is starkly different to the situation in Bangladesh, where harassment in factories seemed rife. Nevertheless, the situation does not point to decent work

[132] ibid, 22.
[133] Research Participant 13, Trade Union.
[134] Wijesekera (n 46).
[135] Maternity Benefits Ordinance (No. 32 of 1939) (Cap. 140).
[136] ILO, 'Factors affecting Women's Labour Force Participation' (n 50) 30.
[137] Richardson, Harrison and Campling (n 68) 7.
[138] International Labour Conference (102nd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2013) III(Part IA) 511.
[139] International Labour Conference (104th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2015) III(Part IA) 297.
[140] Peter Hancock and others, 'Female workers in textile and garment sectors in Sri Lankan Export Processing Zones (EPZs): gender dimensions and working conditions' (2015) 38(1) Sri Lanka Journal of Social Sciences 63.

for women and these factors influence the labour shortage and unwillingness of women to work.

On the other hand, efforts are being made to push against these practices. Women are mentored to hold higher positions at work.[141] Childcare has been established in some businesses and the Katunayake EPZ and transport improved alongside law enforcement to tackle sexual harassment.[142] Women are increasingly able to grasp their rights, though much more remains to be done. CEDAW and gender equality in Sri Lanka are issues that form part of EU trade and development ambitions and EU normativity.

III. The EU's GSP+, Development and Labour Rights

A. Normativity in Trade and Development

The EU's GSP+ was granted after the 2004 Boxing Day tsunami, Sri Lanka having submitted a request entailing its meeting of the GSP+ human rights conditions.[143] The grant was a trade decision, influenced by the need to provide development aid and an acknowledgement of Sri Lanka's adequate human rights record. GSP+ beneficiaries need not be exceptional. One interviewee worded this as the EU offering the scheme on 'sympathetic grounds'.[144] The scheme instigated some change in RBC. It is argued the Garments without Guilt project was established to 'convince the EU not to take away its tariff privileges'.[145]

Sri Lanka was one of 15 countries that benefited from the GSP+ from 2005 to 2010.[146] The U.S. had been the largest single market for RMG exports from Sri Lanka,[147] but the EU's GSP+ became vital for the

[141] ILO, 'Factors affecting Women's Labour Force Participation' (n 50) 29.
[142] ibid, 33-34.
[143] Commission Decision of 21 December 2005 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for by Article 26(e) of Council Regulation (EC) No 980/2005 applying a scheme of generalised tariff preferences [2005] OJ L 337; Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences [2005] OJ L 169/1 ("Council Regulation No.980/2005")
[144] Research Participant 13, Trade Union.
[145] Nira Wickramasinghe, 'Sri Lanka in 2008: Waging War for Peace' (2009) 49(1) Asian Survey 59, 63.
[146] Ashani Abayasekara, 'GSP+ Removal and the Apparel Industry in Sri Lanka: Implications and Way Forward' (2013) 14(2) South Asia Economic Journal 293, 298.
[147] Bandara and Naranpanawa (n 27) 1448.

economy.[148] Stringent rules of origin considered a 'bottleneck'[149] for exports were tackled through a loophole for South Asian Association for Regional Cooperation (SAARC) members.[150] The GSP+ also provided a trade structure upon expiry of textiles quotas, and during the global financial crisis.[151]

The GSP+ facilitated economic and social development, meeting the EU's ambitions of sustainable development. Nevertheless, few research participants were aware of it, unlike the GSP in Bangladesh. Of those that were, one interviewee viewed it as a 'total solution',[152] another saw the EU's role as contributing to development by creating better jobs for garment workers.[153] The EU is thus perceived as a sustainable development actor, promoting labour rights and development hand-in-hand. This illustrates the operation of the Article 21 TEU objectives of promoting human rights through trade and development policy.[154]

Through EU development cooperation, the EU continues to promote multilateral solutions to common problems, supporting international organisations such as the ILO.[155] As with Bangladesh, in the EU's 1995 CA with Sri Lanka, parties reaffirm the importance of human rights as an essential element of the agreement.[156] The EU's 2014-2020 MIP sets out to bring Sri Lanka into a position of a strong democracy which facilitates human rights.[157] The EU's development policy plays a 'central role' in the implementation of the SDGs with a

[148] Kristine Höglund and Camilla Orjuela, 'Winning the peace: conflict prevention after a victor's peace in Sri Lanka' (2011) 6(1) Contemporary Social Science 19, 32.
[149] Rupa Dheerasinghe, 'Garment Industry in Sri Lanka Challenges, prospects and strategies' (2009) 33(1) Staff Studies 33, 58.
[150] ibid.
[151] Democracy Reporting International, 'GSP+ and Sri Lanka' (2016) 6 <democracy-reporting.org/wp-content/uploads/2016/06/GSP-and-Sri-Lanka_ENG-1.pdf> accessed 27 November 2019; Ghori (n 28) 127.
[152] Research Participant 15.
[153] Research Participant 20, Employer Organisation.
[154] TFEU, Article 209(2), 207(1).
[155] Research Participant 21.
[156] Cooperation Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on Partnership and Development [1995] OJ L 85/33, Preamble.
[157] Commission, 'Multiannual Indicative Programme (MIP) 2014-2020 for Sri Lanka' (2014) 2 <eeas.europa.eu/sites/eeas/files/mip-20142020-programming-sri-lanka-20140812_en.pdf> accessed 27 November 2019.

'rights-based approach' to development cooperation reflected in its rights focus in the MIPs.[158]

The CA is bolstered through dialogue and partnership, including with the ILO. The EU aims to integrate civil society in policy making, in accordance with the recognition that sustainable development is a 'joint agenda of citizens, civil society, organisations and businesses' and promoting corporate social responsibility in the interest of the 'European economy and society'.[159] Civil society ensures legitimacy of EU actions, especially where human rights are involved.[160] A Joint Commission, which acted as a forum for dialogue was brought to a halt in 2008, and has resumed meeting in 2013, after the civil war, to discuss, inter alia, future priorities of EU assistance,[161] leading up to the re-grant of the GSP+.

The EU has a positive development role in relationship with the ILO, funding projects aimed at decent work for migrant workers,[162] or supporting reconstruction projects.[163] It brings about a recognition that it is not the GSP+ alone that can support social and economic development. Development cooperation is both separate to and complementary with the GSP+, enabling improvements to livelihoods of workers whilst pushing for the full employment characteristic of decent work in accordance with RBC in global supply chains. This helps to prevent instances where GSP+ withdrawal is necessary.

B. GSP+ Withdrawal and the Civil War

[158] Commission, 'Next steps for a sustainable European future: European action for sustainability' (Communication) COM(2016) 739 final, 13.
[159] ibid, 17.
[160] See Jeff Kenner, Katrina Peake and Stuart Wallace, 'The EU's Engagement with Civil Society' in Jan Wouters and others (eds), *The European Union and Human Rights: Law and Policy* (OUP 2020) (in press).
[161] Commission, 'Multiannual Indicative Programme (MIP) 2014-2020 for Sri Lanka' (n 157) 2.
[162] See ILO, 'Global Action to Improve the Recruitment Framework of Labour Migration (REFRAME) in Sri Lanka' <www.ilo.org/colombo/whatwedo/projects/WCMS_630095/lang--en/index.htm> accessed 27 November 2019.
[163] ILO, 'Skills to support Local Economic Development (SKILLED) – EU Support to Reconstruction and Development in Selected Districts in Sri Lanka (EU-SDDP)' <www.ilo.org/colombo/whatwedo/projects/WCMS_415190/lang--en/index.htm> accessed 27 November 2019.

i. Withdrawing the GSP+

The EU's GSP+ was withdrawn in 2010 as a rare example of such a measure.[164] Violations of the ICCPR, the Convention Against Torture (CAT) and the Convention on the Rights of the Child (CRC), all three part of the GSP+ conditionality, were found to have taken place during the civil war.[165] The investigation was initiated in October 2008 under the former GSP Regulation, the provision entitling the EU to withdraw preferences if the national legislation incorporating conditions is not 'effectively implemented', a criterion which is specific to the GSP+.[166] It focused on actions and measures taken by the government and authorities as opposed to groups beyond governmental control.[167] The withdrawal followed EU MS actions sanctioning Sri Lanka, including through freezing development aid.[168]

The government was far from cooperative in the GSP+ investigation, reacting defensively to the EU's calls for cooperation and refusing to be subject to an investigation.[169] It acted in large part as if the investigation was not taking place. It did not request access to the file of investigation, agree to be subjected to a visit by the European Commission, or make any submission towards it.[170] They were 'frosty at best'.[171] News articles pointed to the GSP's punitive nature and intrusion

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[164] See Chapter 3.
[165] Commission, 'Statement on Sri Lanka GSP+ report' (19 October 2009) 1 <trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145141.pdf> accessed 11 February 2019.
[166] ibid; Council Regulation No.980/2005, Article 18(2); Commission Decision of 14 October 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the effective implementation of certain human rights conventions in Sri Lanka [2008] OJ L 277/34.
[167] Commission, 'Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka' C(2009) 7999, 7.
[168] Clare Castillejo, 'Sri Lanka: the failure of EU human rights sanctions' (2011) FRIDE Policy Brief No 63, 2 <css.ethz.ch/en/services/digital-library/publications/publication.html/130606> accessed 27 November 2019.
[169] Commission, 'Report on the findings of the investigation' (n 167) 3.
[170] ibid, 4-5.
[171] James Yap, 'Beyond 'Don't Be Evil': The European Union GSP+ Trade Preference Scheme and the Incentivisation of the Sri Lankan Garment Industry to Foster Human Rights' (2013) 19(2) European Law Journal 283, 293.

on Sri Lanka's national sovereignty.[172] These feelings were reiterated in interviews, a trade unionist emphasising the point that the government felt the EU was trying to invade Sri Lanka's sovereignty through the GSP+'s conditions and cooperating would have meant accepting the human rights violations.[173]

Another pointed towards negative conditionality as having caused fall out between the government and the EU on other issues: 'it wasn't just a trade concession…they took it personally. They were very angry about it'.[174] However, Sri Lanka would have been aware of the GSP+'s conditions when it first requested to benefit from the scheme and of its monitoring commitments, dampening the extent to which GSP+ withdrawal can be considered an intrusion on national sovereignty. This is despite the weight of the tsunami in its decision to apply.

According to the Commission, the GSP+ is about providing 'strong support to sustainable development' through trade.[175] The GSP+ investigation engaged multiple actors. The EU relied upon reports and statements by, inter alia, UN Special Rapporteurs and Representatives, UN bodies and NGOs.[176] Engaging civil society, as in Bangladesh, helps to build an effective response to human rights violations, whether this may be dealing with large scale factory collapses that warrant the attention of the global supply chain, to the violations occurring in a brutal civil war. The EU's response to such incidents shows that it can be both dynamic and responsive when human rights violations take place, particularly where they grasp international attention. It echoes the Article 21(1) TEU's commitment to the universality and indivisibility of human rights.

The EU continually attempted to engage in dialogue with Sri Lanka on the human rights issues despite its frosty reception,[177] allowed

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[172] C.A.Chandraprema, 'GSP+: An open letter to the European Commission' *Sunday Island* (08 February 2009) <www.island.lk/2009/08/02/politics1.html> accessed 27 November 2019.
[173] Research Participant 13, Trade Union
[174] Research Participant 15.
[175] Commission, 'Next steps for a sustainable European future' (n 158) 14.
[176] Commission, 'Statement on Sri Lanka GSP+ report' (n 165) 1.
[177] ibid.

for 6 months between the decision for withdrawal and withdrawal itself for Sri Lanka to address its problems and even offered to delay this further in return for tangible and sustainable progress on a number of issues.[178] Moreover, withdrawal merely subjected Sri Lanka to standard GSP preferences, not a total absence of tariff preferences,[179] owing to the additional layer of withdrawal of the GSP+ if legislation is no longer effectively implemented.[180] This shows a two-tier nature of the GSP, with negative conditionality on the standard GSP and EBA, and with the GSP+ a far more generous conditionality, a middle ground between being positive and negative.[181] Thus, although the GSP+ was in fact withdrawn, it could still be perceived as a soft exercise of conditionality.

The investigation revealed human rights violations of a widespread and grave nature, including murders of aid and NGO workers. One member of civil society received a death threat over the release of information to aid the GSP+ investigation.[182] The exercise of negative conditionality spurred violence and negativity despite its nature as a sustainable development instrument. Its benefits were so great, particularly for the RMG industry, that it was tightly gripped onto.[183] The findings warranted negative conditionality, which came into force in February 2010 by an implementing Regulation.[184] The EU was seen as 'acting tough' on human rights,[185] leveraging improvements in treatment

[178] Commission, 'EU temporarily withdraws GSP+ trade benefits from Sri Lanka' (15 February 2010) <trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145799.pdf> accessed 11 February 2019;; Commission, 'EU regrets silence of Sri Lanka regarding preferential import regime' (5 July 2010) 1 <trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146301.doc%20ftw.pdf> accessed 11 February 2019.
[179] Commission, 'Statement on Sri Lanka GSP+ report' (n 165) 2.
[180] GSP Regulation, Article 15(1).
[181] See GSP Regulation.
[182] Yap (n 171) 293.
[183] Rohan Edrisinha and Asanga Welikala, 'GSP Plus? Privileges: The Need for Constitutional Amendment' *The Sunday Leader* (17 February 2008) <www.thesundayleader.lk/archive/20080217/issues.htm> accessed 27 November 2019.
[184] Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka [2010] OJ L45/1, Preamble para 6.
[185] Castillejo (n 168) 1.

of the internally displaced Tamil population,[186] notwithstanding the lenient aspects of the process of negative conditionality. Nevertheless, critique of the GSP+'s effectiveness points to it being undercut by China and India, a failure to respond to political trends and a lack of coordination over its response to the civil war.[187]

ii. GSP+ withdrawal and RMG workers: forgotten pieces?

Another 'failure' of GSP+ withdrawal might be the absence of an evaluation of labour rights violations in the RMG industry, although the industry was the greatest beneficiary of the scheme and there were sufficient reasons to do so. De Schutter argues that this may depict either an unwillingness on the part of the Commission to remove a GSP+ on the basis of labour rights violations, or unwillingness to act where violations occur in particular industries,[188] which could also explain the lack of action in Bangladesh.

Withdrawal because of labour rights violations in the RMG industry may have been viewed as motivated by protectionist intentions,[189] although this is an argument less likely to hold up now given the many EU-based import-dependent firms. Focusing on civil and political rights in the ICCPR, CAT and CRC, made GSP+ withdrawal, at least partly, 'clear-cut' and 'less risky diplomatically'[190] but jeopardised the indivisibility of rights. Yap argues that businesses had the potential, in light of pending GSP+ withdrawal, to influence the government to improve its human rights record and so avoid negative conditionality.[191] Yap asserted that the Garments without Guilt initiative would otherwise fail if businesses did not establish themselves as ethical producers and in need of the GSP+.[192] They did not, however, take up such a role, which may have damaged any ethical reputation they purported to portray.

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[186] Höglund and Orjuela (n 148) 33.
[187] Castillejo (n 168) 1.
[188] Olivier de Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing 2015) 122.
[189] ibid, 123.
[190] ibid.
[191] Yap (n 171) 284.
[192] ibid, 297.

Whilst labour rights violations in the RMG industry were not accounted for as reasons for GSP+ withdrawal, the impact of withdrawal on the industry was considered. The EU drew a comparison with the scenario that, if the GSP had been applied in 2008 to import volumes as opposed to the GSP+, an additional EUR 78 million in import duties would have been collected.[193] Evidently, it was foreseen to have a negative impact. Nevertheless, it was made clear that forecasting the true economic impact was impossible, as it would depend on many factors.[194]

This resulted in speculation by a variety of RMG stakeholders. Many asserted the loss of 'thousands of jobs' and thus deterioration of living standards, taking very a negative stance towards the EU.[195] The GSP+ was seen as a possible solution to war-torn areas and the lack of employment therein.[196] Yet even if the GSP+ was not withdrawn, it could have resulted in exploitation of vulnerable people in Northern Sri Lanka in efforts to increase profit. Conflict is often a breeding ground for modern slavery.[197] Others lashed out at the government for not having understood the seriousness of negative conditionality for garment workers.[198] It was supported for its action as one in line with sustainable development.[199] Withdrawal was even perceived as justice for the Tamil population,[200] as an international recognition of human rights abuses against them. Negative conditionality was seen to go to the heart of social

[193] Commission, 'Statement on Sri Lanka GSP+ report' (n 165) 2.
[194] ibid.
[195] Randeep Ramesh, 'Sri Lanka's top envoy hits out at EU as cut in £1bn trade concession looms' *The Guardian* (10 September 2009) <www.theguardian.com/world/2009/sep/10/sri-lanka-eu-trade-cut> accessed 27 November 2019; Ranjith and Widner (n 18) 19.
[196] Höglund and Orjuela (n 148) 27.
[197] The Freedom Fund, 'Modern slavery and trafficking in conflict: The UN's response' (2016) <d1r4g0yjvcc7lx.cloudfront.net/uploads/UN-trafficking-in-conflict-WEB.pdf> accessed 27 November 2019.
[198] See Ranjith and Widner (n 18) 19; Suren Surendiran, 'Shirking a moral duty to Sri Lanka' *The Guardian* (08 October 2009) <www.theguardian.com/commentisfree/libertycentral/2009/oct/08/sri-lanka-eu-human-rights> accessed 27 November 2019.
[199] The Sunday Leader Lk, 'UN special envoy flies in to Lanka as govt. shifts deadline to end war' *The Sunday Leader Lk* (17 February 2008) <www.thesundayleader.lk/archive/20080217/politics.htm> accessed 27 November 2019.
[200] Surendiran (n 198).

development for garment workers, they were not forgotten cogs in the wheels of GSP+ withdrawal.

What, then, was the impact of negative conditionality on RMGs and workers? Pessimistic perspectives on GSP+ withdrawal opine high figures of economic loss,[201] and loss of global competitiveness.[202] In turn, it is asserted other RMG producing countries became more competitive, such as Bangladesh, India and Vietnam.[203] This resulted in relocations of production to places like Vietnam and Jordan.[204] Withdrawal could have contributed to modern slavery of migrant workers, in the same way in the Bangladesh case study the prospect of withdrawal was connected to modern slavery of workers (see Chapter 5).

Nevertheless, Sri Lanka continued to show real GDP growth at high levels from 2013-2017, and stable EU trade.[205] From 2012 to 2016, exports to the EU declined from 33% to 30.1% whilst exports to the U.S. increased from 21.7% to 27.3%.[206] Exports to the EU levelled off, increasing more slowly than before, but Sri Lanka's exports to the rest of the world grew faster after 2010.[207] The impact was a loss of opportunity to expand exports.[208] Furthermore, a study highlighted that garment manufacturers worked around loss of the GSP+ and buyers gave priority to good relationships with sourcing companies as opposed to cost changes.[209] One interviewee suggested that RMG producers went into niche markets and higher value garments,[210] which meant GSP+ withdrawal did not have severe consequences. Given the rising

[201] Abayasekara (n 146) 308; Bandara and Naranpanawa (n 27) 1439; Daily News, 'The GSP Impact on Sri Lanka' *Daily News* (2018) <www.dailynews.lk/2018/01/05/features/139000/gsp-impact-sri-lanka> accessed 27 November 2019.
[202] Abayasekara (n 146) 308.
[203] Kithmina Hewage and Semini Satarasinghe, 'GSP-Plus: An Elixir or just palliation for Sri Lanka's Export woes?' *Sri Lanka Brief* (2017) <srilankabrief.org/2017/05/gsp-plus-an-elixir-or-just-palliation-for-sri-lankas-export-woes/> accessed 27 November 2019.
[204] Abayasekara (n 146) 309.
[205] Commission, 'Trade in goods with Sri Lanka' (n 20).
[206] Central Bank of Sri Lanka, 'Economic and Social Statistics of Sri Lanka' (2017) 86 <www.cbsl.gov.lk/en/publications/other-publications/statistical-publications/economic-and-social-statistics-of-sri-lanka> accessed 27 November 2019.
[207] Richardson, Harrison and Campling (n 68) 45.
[208] Research Participant 15.
[209] Abayasekara (n 146) 309.
[210] Research Participant 15.

importance of other trade partners, perhaps the influence of the EU has deteriorated, which may have ramifications for its human rights leverage in the re-grant of the GSP+ and future engagement.

For workers, it is unlikely the withdrawal caused a huge impact. Estimates of factory closures ranged from 2 to 90 and job losses from 2000 to 10000.[211] Both trade union and employer interviewees stressed the impact of withdrawal on employment.[212] This is contrasted by a study which concludes the withdrawal had limited impact on levels of employment and workers' rights.[213] The greatest effect may have been on workers in small-scale factories obtaining sub-contracted work contracts,[214] and the informal industry.[215] Arguably, withdrawal could have expanded the informal economy as a cheaper form of production and in other industries.

Was GSP+ withdrawal a 'sustainable development' measure? On the one hand yes, because it provided international acknowledgement of human rights abuses. On the other hand, no. It has been linked to reduced household income for low-income workers,[216] job losses and factory closures even if the scales of this vary. In addition, the leverage of trade unions was, in part, lost due to GSP+ withdrawal as the scheme had given workers' voices for decent work.[217] The EU did not maintain support of workers after withdrawal.

C. GSP+ Re-granting and a new political scenario

i. Re-granting the GSP+: Labour rights on the table?

A study of Sri Lanka's GSP+ prior to withdrawal found it fell short as a sustainable development measure, not increasing the welfare of workers or reducing poverty.[218] GSP+ withdrawal seems to have had similar effects. The GSP+ was re-granted in 2017, a decision that was prospective since 2015, when the new government was elected. The

[211] Richardson, Harrison and Campling (n 68) 46.
[212] Research Participant 13, Trade union; Research Participant 20, Employer Organisation.
[213] Richardson, Harrison and Campling (n 68) 46.
[214] Premaratna, Weerawansa and Wijegunawardana (n 29) 54.
[215] Research Participant 21; Research Participant 20, Employer Organisation.
[216] Bandara and Naranpanawa (n 27) 1456.
[217] Research Participant 15.
[218] Sarvananthan and Sanjeewanie (n 84) 20.

GSP+ boosts the competitiveness of Sri Lanka's exports close to the duty-free and quota-free benefits of the GSP EBA afforded to Bangladesh and shows a renewed commitment to human rights. EU trade partly legitimised Sri Lanka's human rights assurances. The decision was orientated around the changed political situation. This was reflected in interviews.[219] The EU described the new government as a 'turning point' with an 'ambitious reform agenda' and noted its re-engagement with the international community and commitments to national reconciliation.[220] It saw a political opportunity to re-invest in Sri Lanka.

Within a short space of time after the new political party came into power, officials asked how it could apply for the GSP+.[221] It is because of this that one interviewee perceived that the EU feels more comfortable and confident of human rights improvements, moving away from the horrors of the civil war.[222] The thinking seems to be, as put forward, 'if you think you can change them, then you give them a concession that is valuable to them and make them do the change'.[223] The GSP+ becomes about the prospect of future change, to an extent overarching the current human rights situation. This is why monitoring of the situation is so important, where the EU can engage with the country on areas where implementation is 'unsatisfactory',[224] not only the identification of 'serious and systematic violations' as in the GSP and GSP EBA.

In June 2016, Sri Lanka applied for the GSP+.[225] This necessitated an assessment of the human rights, governance and environmental situation in light of the conditions. Unions supported the re-grant as a tool through which they could improve workers' rights.[226] It

[219] Research Participant 16, CSO; Research Participant 15.
[220] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3) 1.
[221] Research Participant 15.
[222] Research Participant 16, CSO.
[223] Research Participant 15.
[224] Commission, 'Report on the Generalised Scheme of Preferences covering the period 2016-2017' COM(2018) 36 final, 8.
[225] CCC, IndustriALL and ITUC, 'Joint Position on Sri Lanka' (2016) 1 <www.industriall-union.org/sites/default/files/uploads/documents/2016/SRI_LANKA/ccc_industriall_ituc_position_sri_lanka.pdf> accessed 27 November 2019.
[226] Research Participant 13, Trade Union.

presented an opportunity for labour rights violations in the RMG industry to be pushed to the fore. This was taken up by civil society, and CCC, IndustriALL Global Union and the ITUC believed violations of the ICCPR and ILO conventions needed to be addressed prior to reinstatement of trade preferences, including those relating to freedom of association.[227] They saw it as a renewed opportunity for the EU to act on labour rights. Attempts at the European Parliament were made to block GSP+ re-grant owing to deficiencies under ILO Conventions Nos. 87 and 98.[228]

An MEP in a prior study made a suggestion for a resolution by the European Parliament that would outline steps for Sri Lanka to take to prevent it from doing the 'bare minimum'.[229] A roadmap was necessary, involving aspects like supplier responsibilities to prevent low wages, gender mainstreaming in trade unions and targeted sanctions,[230] similar to the Compact. One interviewee pointed to a roadmap containing labour law amendments unions viewed necessary for the GSP+, stipulating the government was considered unwilling to meet its conditions.[231] While no roadmap is publicly available, there are some reports the EU proposed 58 conditions to re-granting.[232] The lack of a transparent roadmap or Compact-style instrument is a missed opportunity for the EU to emanate human rights values and integrate civil society into the process. It would have been a welcome addition to clarifying the scope and content of positive conditionality, meaning the EU should require a certain level of implementation to countries seeking the GSP+, especially those who have had the trade scheme withdrawn.

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[227] CCC, IndustriALL and ITUC (n 225) 1.
[228] European Parliament resolution on the Commission delegated regulation of 11 January 2017 amending Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences [2017] B8-0273/2017.
[229] Richardson, Harrison and Campling (n 68) 35.
[230] ibid, 7; CCC, IndustriALL and ITUC, 'Joint Position on Sri Lanka GSP+ Status' (2017) 3 <cleanclothes.org/resources/publications/joint-position-on-sri-lanka-gsp-status/view> accessed 27 November 2019.
[231] Research Participant 13, Trade Union.
[232] Sri Lanka Brief, 'Sri Lanka: EU proposes 58 human rights conditions to resume GSP Plus' *Sri Lanka Brief* (May 2016) <srilankabrief.org/2016/05/sri-lanka-eu-proposes-58-human-rights-conditions-to-resume-gsp-plus/> accessed 27 November 2019.

Before its grant, in reviewing Sri Lanka's human rights situation, the EU assessed three areas: shortcomings in the country's implementation record, positive elements where the country shows progress and constraints suffered.[233] It engaged with civil society and other international actors on this, though not to the extent of the Bangladesh Compact and the role of businesses was more unclear. It aims at continual engagement through GSP+ monitoring.[234] One interviewee asserts CSOs and trade unions are 'always consulted' as part of the decision-making process in headquarters and on parliamentary visits.[235] Engagement with the ILO is core to making a credible assessment of labour rights' violations.

The EU concluded there were significant areas of progress since GSP+ withdrawal in 2010.[236] Its evaluation pointed towards a lack of concern at the CAS to conclude there was no *serious* failure to implement ILO standards.[237] The issue, as was reflected in the Bangladesh case study, is that there is too much reliance on the CAS and not on other forms of ILO condemnation.[238] Even with no serious failure to implement, the EU Trade Commissioner noted that the re-grant does not mean that it is pretending the situation is perfect.[239]

The EU made it clear that not every problem of implementation should exclude countries from trade preferences,[240] which further complicates the matter of boundaries in the GSP+. Unions and civil society were not content with the almost 'lassiez-faire' attitude of the EU, indicating that an absence of a special paragraph should not mean there

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[233] Commission, 'Report on assessment of the application for GSP+ by Sri Lanka' (n 130) 4.
[234] Research Participant 15.
[235] ibid.
[236] Commission, 'Report on assessment of the application for GSP+ by Sri Lanka' (n 130) 5.
[237] ibid, 9.
[238] See Jeffrey Vogt, 'A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized Scheme of Preferences (GSP)' (2015) 31(3) The International Journal of Comparative Labour Law and Industrial Relations 285
[239] Commission, 'EU grants Sri Lanka improved access to its market as incentive for reform' (17 May 2017) <trade.ec.europa.eu/doclib/press/index.cfm?id=1663> accessed 27 November 2019.
[240] Commission, 'Report on assessment of the application for GSP+ by Sri Lanka' (n 130) 3.

has not been a serious failure to meet the conditions.[241] The re-grant was seen as 'whitewashing abuse', acting as a 'stamp of approval' on labour rights violations that had been ongoing since its withdrawal.[242] More could have been done in the process of re-grant.[243] Labour rights were brought to the table, but they were just an appetiser. The EU's review of implementation of ILO standards has been inadequate.

The question is whether the GSP+ is about implementation and ratification of the conventions or enhanced implementation. This would involve asking for steps to be complied with and setting an example as a leader in human rights, both for the EU and Sri Lanka. The EU should have asked for more from Sri Lanka before granting the GSP+, with a Compact-style instrument, taking note of CEACR and CFA concerns. This would have strengthened the boundaries of conditionality. Monitoring can carry this forward, and the GSP+ can become about enhanced implementation, not just granting preferences, but positive conditionality akin to 'deep engagement' for all beneficiaries.

ii. The GSP+ as a fresh start for decent work?

Enhanced implementation is important because being a GSP+ beneficiary spurs expectations over the status of labour rights, one of the reasons Sri Lankan exporters used the scheme as a basis for Garments without Guilt. Through its grant, the EU has the responsibility to facilitate an opportunity for more and better jobs.[244] The GSP+ has certainly brought about benefits for the economy, one interviewee identifying a sudden increase in exports.[245] Economically it may have temporary, limited effect. It is warned that the GSP+ is only there to provide 'temporary relief' and the private sector needs broader economic reforms, especially owing to Brexit and its potential impact on the

[241] CCC, IndustriALL and ITUC, 'Joint Position on Sri Lanka GSP+ Status' (n 230) 3.
[242] Thulsi Narayanasamy, 'EU approval of Sri Lankan labour standards whitewashes abuse' (Open Democracy, 15 October 2017) <www.opendemocracy.net/can-europe-make-it/thulsi-narayanasamy/eu-approval-of-sri-lankan-labour-standards-whitewashes-abuse> accessed 27 November 2019.
[243] Richardson, Harrison and Campling (n 68) 35.
[244] Commission, 'EU grants Sri Lanka improved access to its market' (n 239).
[245] Research Participant 15.

garment industry.[246] The effect is thus to be 'marginal and short'.[247] Many interviewees brought up the issue of Brexit outside of the interview, and some within,[248] highlighting concerns as to the trade and development role of the UK in Sri Lanka when it leaves the EU.

On a more positive note, the GSP+ has attracted companies back from competitors and from elsewhere in Asia including Japan and Korea because they can access the EU market with more favourable tariff preferences.[249] One factory manager exports mainly to the U.S. but now is considering expanding EU production because of the GSP+ and more opportunities in the EU market,[250] an opinion likely to be mirrored by other exporters. Some improvements are perceived in human rights, although not to the extent of the Compact's influence in Bangladesh in bringing about multi-stakeholder, industry-specific changes.

The danger is in not requiring enhanced implementation and looking to future potential changes instead of current changes. The government has been too ambitious, creating slow progress in human rights.[251] The 2018 monitoring report, albeit covering a period less than 6 months, suggests that many reforms have stalled or insufficient progress has been made on them.[252] A trade unionist interviewee contrasts the situation before the GSP+ where the government set out commitments and after where they just want the economic benefit,[253] a political façade for change. Not enough time has been given to see if monitoring can bring about more enhanced changes.

Improvements that have occurred are not merely down to the GSP+ but factors including changes in the government, politics and pressures from worker organisations.[254] The GSP+ has generated questions over the benefits it brings for workers on the ground, raising awareness of its connection to sustainable development and the EU's

[246] Hewage and Satarasinghe (n 203).
[247] Research Participant 16, CSO.
[248] Research Participant 15.
[249] ibid.
[250] Research Participant 18, EPZ Factory Manager.
[251] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3) 1.
[252] ibid.
[253] Research Participant 13, Trade Union
[254] Richardson, Harrison and Campling (n 68) 7.

normative agenda. It seems from interviews that positive conditionality is viewed not on a country level, between the EU and the government, but on a company level, a matter for the businesses themselves to address directly. Interviewees queried how the GSP+ benefits trickle down to workers, arguing that it should have been coupled with a mechanism to show this.[255] Such a mechanism could take the form of identifying businesses that use the tariff preferences and recording whether they give extra benefits to the workers.[256] In such a query is the expectation of enhanced positive conditionality, delving into the depths of what conditionality entails for individual workers, which is not possible in the current state-orientated GSP framework, but could be through GSP+ connected instruments and coordination with the ILO.

Sri Lanka complies with the minimum GSP+ standards, yet workers and unions want something more.[257] A union interviewee pointed to a European Parliament mission prior to the granting of the GSP+ wherein it was allegedly promised 50% of the benefits would go to workers.[258] Notably the interviewee asserted that they, and other unions, had calculated how much the GSP+ increased exports and based on this costed up a 2000 LKR (£8.57) salary increase for all workers.[259] Such expectations are unrealistic, though a measure such as that described would integrate RBC in a revolutionary fashion, and address low wage issues in Sri Lanka.

These expectations largely came down to where responsibility is attributed for compliance with the GSP+ conditions. A union interviewee had the opinion that it was wrong for employers to deny a benefit from the GSP+.[260] The labour movement places weight on businesses as responsible for upholding labour rights as opposed to the government.[261] Another interviewee pointed to the direct benefit of the GSP+ being the

[255] Research Participant 19; Research Participant 13, Trade Union.
[256] Research Participant 19.
[257] ibid.
[258] Research Participant 13, Trade Union.
[259] ibid.
[260] ibid.
[261] Ruwanpura and Wrigley (n 37) 1035.

buyers not the manufacturers,[262] attributing responsibility for any extra benefit to wider supply chain governance. The EPZ factory manager interviewed reinforced this assumption, stating that 'all *buyers*' adhere to the GSP+ conditions,[263] whilst being unsure on what this actually entailed, pointing out all the benefits workers received in the factory. It was suggested that buyer's ethical demands had greater impact than those of the GSP+ on the way production is carried out.[264] The government's responsibility in meeting the conditions seemed to be less significant and was not mentioned by interviewees other than identifying ratification of ILO conventions.

When the GSP+ was granted, the EU published a business guide for Sri Lankan exporters. In it, businesses were not seen as having responsibility for compliance, but instead to have a 'vested interest' in ensuring compliance.[265] The EU went further, asserting that in accordance with the GSP+, exporters should consider implementing mechanisms such as the employment of a compliance officer or department.[266] This responds in part to some of the demands identified above. The EU aims to promote RBC through the GSP+, though in a timid fashion akin to the Compact. It is more disconnected to the trade scheme without a Compact-style bridge.

Nevertheless, labour rights violations persist. The EU has a good rapport with the ILO, acting as a promoter of the latter's standards,[267] which lays the foundations for collaborative change. Interviewees identified ILO programmes brought about by the GSP+ to train workers on labour rights.[268] Another considered that the EU's relationship with the ILO prioritised areas that the government should focus on, as opposed to merely doing the minimum.[269] An example was the influence the trade

[262] Research Participant 19.
[263] Research Participant 18, EPZ Factory Manager.
[264] Research Participant 14.
[265] International Trade Centre, 'EU GSP+ Business Guide for Sri Lankan Exporters' 17 <www.intracen.org/uploadedFiles/intracenorg/Content/Redesign/Projects/EU-SRI_LANKA/GSP%20Business%20Guide%20English_Final%20VERSION.pdf> accessed 27 November 2019.
[266] ibid.
[267] Research Participant 15.
[268] Research Participant 20, Employer Organisation.
[269] Research Participant 21.

scheme brought on the support for ratification of the Protocol on Forced Labour.[270] Enhanced implementation is about ensuring decent work in all areas, pushing forward ILO objectives. Even if the process of re-granting did not bring about enhanced implementation, it has occurred in the GSP+'s operation and EU monitoring.

Political willingness only goes so far, a lesson learnt from the EU's engagement in Bangladesh. Accordingly, positive conditionality has only limited positive effects for workers, which are lesser than those created by the threat of negative conditionality. The government lacks dedication to tackling anti-union discrimination,[271] one of the areas of most concern in Sri Lanka's RMG industry. EU leverage is also weakened as labour rights in the industry are not an area of international outcry at the level of those in Bangladesh. Its 2018 monitoring report points to only some progress in creating a free and independent trade union environment.[272] No movement has been made on the 40% requirement for collective bargaining and authorities are still merely considering options to lower this.[273] Access to justice is hindered by the inability of unions to bring discrimination cases before the courts and further actions are needed.[274] In contrast, in Bangladesh, changes were proposed to its union thresholds due to the combined effect of the Compact and threat of GSP withdrawal.

Furthermore, there remains discrepancies between the ages of employment and trade union membership. Prior to the GSP+ being re-granted, the government indicated a commitment to amending this.[275] Only the age of compulsory education was changed, increasing from 14 to 16 years.[276] In addition, access to EPZs has taken only small steps forward. An employer interviewee pointed out that there were measures

[270] ibid.
[271] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3) 13.
[272] ibid, 11.
[273] ibid, 13.
[274] ibid, 11.
[275] International Labour Conference (105th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2016) III(Part 1A), 132.
[276] Commission, 'Report on assessment of the application for GSP+ by Sri Lanka' (n 130) 5.

in place in EPZs to provide for a place that workers could meet with union leaders.[277] The optimism expressed by this interviewee is unrealistic. Whilst two more trade union centres were established as part of the GSP+ process, there are only five centres.[278] IndustriALL criticises them for being inaccessible for workers.[279] An established roadmap could have included steps to bring about more and better centres with ILO-EU cooperation.

An encouraging outcome of positive conditionality has been the affirmation of the 27 conventions through Sri Lanka's adoption of a Human Rights Action Plan 2017-2021.[280] This predominantly promotes the rights of the child, civil and political rights and women's rights, and is weaker on labour rights such as freedom of association and collective bargaining. It shows what a difference Rana Plaza made to focus the attention on labour rights violations in Bangladesh.

Some areas have been left behind, not forming part of the GSP+ conditions. Wages are one issue that needs addressing. One interviewee had a positive perspective that the GSP+ influenced the regular meetings of wage boards and improvement of living conditions.[281] It is also a way to promote a businesses' image as ethical. Wages are a supply chain issue, and initiatives in Europe such as the Dutch Textile covenant can influence wages in supplier countries.[282]

One report has found that over the past ten years wages have fallen by 25% coupled with an increase in working hours.[283] This can be attributed to a loss of competitiveness with the operation of negative

[277] Research Participant 20, Employer Organisation.
[278] Commission, 'Report on assessment of the application for GSP+ by Sri Lanka' (n 130) 5.
[279] International Labour Conference (105th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2016) 111(Part 1A), 134.
[280] The Government of Sri Lanka, 'National Action Plan for the Protection and Promotion of Human Rights 2017-2021' (2017) <www.pmoffice.gov.lk/download/press/D00000000063_EN.pdf> accessed 5 August 2019.
[281] Research Participant 15.
[282] See AETS, 'Study on the responsible management of the supply chain in the garment sector' (European Union 2016) 39 <ec.europa.eu/europeaid/sites/devco/files/garment-study_en.pdf> accessed 27 November 2019.
[283] Longhi (n 90).

conditionality. It is mirrored in other reports detailing also the redundancy of workers in breach of statutory protection and stagnation of wages.[284] The trade union interviewee pointed to a halt in salary revisions and change only occurring in one EPZ, Katunayake.[285] The issue was brought to the GSP+ monitoring committee but to no satisfactory outcome.[286] It is positive that this is being brought to the EU's table, and by trade unions, but the issue now is the EU's propensity to push them forward. The GSP+'s separation from brands and retailers restricts its impact on RBC throughout the supply chain.

A further issue which warrants greater attention in further GSP+ monitoring, is that of informal workers. Contract workers are only briefly mentioned in the EU's 2018 monitoring report.[287] Routes need to be explored for dealing with the informal economy, even if this means the prohibition of agencies.[288] The ILO's CEACR has called for a system whereby trade unions can effectively engage with and represent the interests of these workers.[289]

IV. Conclusion

Sri Lanka's civil war set in motion GSP+ withdrawal, whilst its later change in government represented a new commitment to human rights leading to the re-granting of the GSP+. Its role within the RMG industry is typical of Asian RMG producing countries, in the making up of garments. Unlike in Bangladesh, there has been a place for ethical initiatives like Garments without Guilt, an initiative which is laudable but is not based on ILO conventions. It has meant Sri Lanka has orientated itself towards higher-end garments.

Even with ethical initiatives, there remain workers' rights violations. Trade unions are blockaded by issues such as access to EPZs, company-led Employee Councils, and thresholds for collective

[284] Richardson, Harrison and Campling (n 68) 46.
[285] Research Participant 13, Trade Union.
[286] ibid.
[287] EU GSP+ assessment of Sri Lanka 2016-2017 (n 3) 10.
[288] Richardson, Harrison and Campling (n 68) 32-33.
[289] International Labour Conference (106th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, 2017) III(Part 1A), 172.

bargaining and anti-union discrimination, against which workers have little protection in the justice system. Moreover, there are very low wages, in 2014 the lowest in the Asia/Pacific, which are suppressed by overtime, holidays, benefits like meals and transport. In EPZs, there are some reports that Sri Lanka's labour shortage in the RMG industry is being tackled by wage increases, but these are set against increasing employment of agency workers. Workers do, however, benefit from a higher level of workplace safety than in Bangladesh, largely owing to purpose-built buildings, although this is set against a lack of suitable OSH inspectors. Finally, women face difficulties obtaining equal wages and social protection, and not enough focus has been accorded them.

In efforts to tackle these issues, the EU pursues normativity through trade and development. The GSP+ has been a propeller of both economic and social development, representing the EU as a sustainable development actor. This is combined with development cooperation which has for some time focused on human rights, from the essential elements clause in the CA to recurrent development funding oriented around the EU's rights-based approach to development.

The withdrawal of the GSP+ was due to serious violations of the ICCPR, CAT and CRC, conditions of the scheme. Withdrawal occurred as these conditions were considered ineffectively implemented, but merely downgraded the preferences to the standard GSP, as opposed to removing all preferences. Throughout the investigation, the government was uncooperative and it was viewed as an intrusion on national sovereignty, legitimised through EU involvement of other actors like the UN. Sri Lanka was, however, aware of the conditions when it first applied for the GSP+, even if it was heavily influenced by the need for reconstruction after the tsunami. The EU showed in its reactions to the civil war that it can be both dynamic and responsive when human rights violations take place.

The investigation did not account for labour rights violations in the RMG industry, solely focused on civil and political rights' violations occurring during the civil war. This questions the indivisibility of rights. Nevertheless, the possible impact of GSP+ withdrawal on the RMG

industry was projected and the EU did not anticipate the end of the industry, merely a stoppage of export increases. There were other suggestions that the impact would be devastating. The actual impact was more a loss of opportunity to expand exports rather than a loss of exports, although it does raise the question whether negative conditionality can be a sustainable development measure if it can halt or reduce economic and social development.

Re-granting of the GSP+ was another opportunity for labour rights to be put back on the table, largely influenced by the change from authoritarian rule to a government more focused on human rights. Through this, civil society including CCC, pushed the EU to act on labour rights. Unfortunately, the EU did not consider a serious failure to implement ILO standards, focusing too much on the ILO special paragraph. A roadmap could also have been adopted to clarify the measures required in the implementation of ILO conventions to obtain the GSP+. Its absence is a missed opportunity for the EU.

In this research, the possibility arose of running the GSP+ with an ex-ante roadmap. This would have ensured delineation of boundaries between the GSP schemes. Without it, there has not been a fresh start for decent work, although there is a demand for some filtering down of GSP+ benefits to workers in factories exporting under the scheme. Much of this depends on the way responsibility for compliance with the GSP+ lies, businesses pointing to the supply chain and buyers, unions pointing to businesses, and neither stressing the role of the government. Labour rights have not seen any revolutionary changes or commitments, although the GSP+ has spurred Sri Lanka's ratification of the Protocol for Forced Labour.

This is a dynamic case study illustrating the effects of both negative and positive conditionality. It leads into the case study of the EU's FTA in Vietnam, which contrasts to the use of conditionality as human rights leverage in both Bangladesh and Sri Lanka, demonstrating an alternative approach.

Chapter 7 Vietnam and the new generation EU FTA

I. Introduction

When GSP beneficiaries economically develop and graduate from the GSP, both the EU and the former beneficiary may seek to negotiate an FTA to maintain favourable trade preferences. The EU-Vietnam FTA is seen as a stepping stone for the much-desired EU-ASEAN FTA which would liberalise trade on a larger scale.[1] Vietnam is, in the interim, a GSP beneficiary, and signed an FTA and Investment Protection Agreement (IPA) with the EU on the 30th June 2019.[2] The FTA is to be presented for Vietnamese ratification and the European Parliament's consent. It forms part of the EU's 'new generation' approach to FTAs.[3] The conclusion of the FTA was stalled by *Opinion 2/15,* discussed in Chapter 3, on the EU-Singapore FTA, which highlighted elements of mixity or shared competence in new generation FTAs, thus requiring EU MS ratification. The outcome of this was the splitting of the EU-Vietnam FTA into an FTA, of exclusive competence (Article 207 TFEU), and IPA, of shared competence.

As part of the run-up to the FTA, the partners concluded a PCA in 2012, which entered into force in 2016.[4] The PCA acts as an umbrella over EU-Vietnam relations and, uniquely, includes a legal connection to the FTA in the form of an enforcement backstop. This could be used in response to Vietnam's violations of the broad SDC in the FTA. Both the PCA and SDC propel decent work, integrating features like RBC. This research assesses the SDC's potential to contribute to improvement in labour rights in the RMG industry of Vietnam, including its textual provisions, monitoring frameworks and enforcement procedure.

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[1] European Parliament, 'EU-Vietnam free trade agreement' (Briefing, 2018) 1 <www.europarl.europa.eu/RegData/etudes/BRIE/2018/614702/EPRS_BRI(2018)614702_EN.pdf> accessed 27 November 2019.

[2] Commission, 'EU-Viet Nam free trade agreement' (30 June 2019) <trade.ec.europa.eu/doclib/press/index.cfm?id=2041> accessed 27 November 2019; Commission, 'EU-Vietnam trade and investment agreements (authentic text as of August 2018)' (September 2018) <trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 27 November 2019.

[3] See Chapter 3.

[4] Framework Agreement on Comprehensive Partnership between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part [2016] OJ L 329 ("PCA").

According to the European Commission, the PCA and FTA are about providing an enhanced basis for active promotion of human rights.[5]

This chapter first assesses the country context. It then addresses workers' rights. It analyses the PCA provisions relevant to decent work. It then analyses the FTA, the negotiation process leading up to its adoption and its economic benefits. An in-depth assessment is made of the SDC, including the decent work content, monitoring and enforcement processes.

This chapter uses doctrinal and socio-legal research. In the preceding case studies, interviews by the author during country placements with the ILO in Bangladesh and Sri Lanka addressed instruments already operating in relations with the EU in those countries and assessed their impact on labour rights in the RMG industry. Here, much of the analysis is on a prospective basis as the FTA has not, as of November 2019, entered into force.

II. Country Context

A. The RMG Industry

Vietnam is one of the largest clothing exporters in the Asia-Pacific region, with exports totalling $37 billion (£30 billion).[6] Top exports are in manufacturing products. Exports to the EU in 2018 made up 17.6%, after the U.S.,19.9% and above China, 17.3%.[7] 9.2% of exports to the EU were made up of clothing, the majority being machinery and transport equipment,[8] reflecting a diversified industry but one that maintains a leading position in RMGs.

[5] Commission, 'Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement' (Staff Working Document) SWD (2016) 21 final, 15.
[6] ILO, 'Strong export and job growth in Asia's garment and footwear sector' (Research Note Issue 1, 2015) 2 <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_419798.pdf> accessed 27 November 2019.
[7] Commission, 'European Union, Trade in goods with Vietnam' (2019) 8 <webgate.ec.europa.eu/isdb_results/factsheets/country/details_vietnam_en.pdf> accessed 27 November 2019.
[8] ibid, 4.

Vietnam is 117/180 on the Corruption Perceptions Index 2018 with a score of 33/100,[9] and a poor human rights record.[10] The RMG industry functions against a backdrop of a one-party Communist state, which, as HRW notes, 'maintains a monopoly on political power and allows no challenge to its leadership'.[11] This has led to a restrictive space for civil society, with assaults on human rights activists.[12] Corruption has resulted in forced labour, for example in disguised drug rehabilitation centres, connecting modern slavery to the RMG supply chain.[13] There is one official union, the Vietnam General Confederation of Labour (VGCL). The party appoints the leadership of the union.[14] Employers form branches of it and workers cannot legally form an independent union.[15] A climate of fear suppresses civil society.[16]

Vietnam was a late entrant to the RMG industry as a result of war, U.S. sanctions and membership of the socialist bloc until the late 1980s.[17] The war occurred from 1955 to 1978, fought between the communist state of North Vietnam, supported by countries such as China, and the anti-communist state of South Vietnam, supported by countries including the U.S., with war crimes on both sides.[18] It entered

[9] Transparency International, 'Vietnam' <www.transparency.org/country/VNM#> accessed 27 November 2019.
[10] See UN Economic and Social Council, 'Concluding observations on the second to fourth periodic reports of Viet Nam' (2014) UN Doc E/C.12/VNM/CO/2-4.
[11] HRW, 'Vietnam' <www.hrw.org/asia/vietnam> accessed 27 November 2019.
[12] HRW, 'No Country for Human Rights Activists: Assaults on Bloggers and Democracy Campaigners in Vietnam' (2017) <www.hrw.org/report/2017/06/18/no-country-human-rights-activists/assaults-bloggers-and-democracy-campaigners> accessed 27 November 2019.
[13] HRW, 'The Rehab Archipelago: Forced Labour and Other Abuses in Drug Detention Centres in Southern Vietnam' (2011) <www.hrw.org/report/2011/09/07/rehab-archipelago/forced-labor-and-other-abuses-drug-detention-centers-southern> accessed 27 November 2019.
[14] Angie N Tran, Jennifer Bair and Marion Werner, 'Forcing change from the outside? The role of trade-labour linkages in transforming Vietnam's labour regime' (2017) 21(5) Competition & Change 397, 401.
[15] Bernadine Van Gramberg, 'Industrial disputes in Vietnam: the tale of the wildcat' (2013) 51 Asia Pacific Journal of Human Resources 248, 251.
[16] Anti-Slavery International, 'Sitting on Pins and Needles' (2019) 8 <www.antislavery.org/wp-content/uploads/2019/04/Pins-and-Needles-Vietnam-supply-chain-report.pdf> accessed 27 November 2019.
[17] Rhys Jenkins, 'Vietnam in the global economy: trade, employment and poverty' (2004) 16 Journal of International Development 13, 13.
[18] See Benjamin B. Ferencz, 'War Crimes and the Vietnam War' (1968) 17(3) American University Law Review 403.

the RMG industry with an expanse of low-skilled and cheap workers.[19] It has its own textiles industry,[20] but also imports from China,[21] making it easier to remain competitive with short lead times.

In efforts to rejuvenate the country after the war, the policy campaign, 'Doi moi' (economic renewal)[22] was adopted in 1986.[23] Its objective was to liberalise trade and promote foreign investment.[24] It brought about a shift from agriculture into unskilled industry,[25] which played a key role in facilitating export-led development.[26] The RMG industry has contributed to Vietnam's achievement of lower MIC status.[27] The country has pursued international cooperation, and in 1996, concluded a CA with the EU and joined the ASEAN.[28] In 2007, it joined the WTO in continuance of its export-oriented strategy.[29] These factors led to an increase in the share of global RMG exports from 0.5% in 1995 to 7.4% in 2015.[30]

The industry has three main production units: state-owned enterprises, private firms and foreign-owned enterprises.[31] The majority of producers operate cut, make and trim tasks, making material into RMGs.[32] Ho Chi Minh City in Southern Vietnam is the major RMG

[19] Khalid Nadvi and others, 'Vietnam in the global garment and textile value chain: impacts on firms and workers' (2004) 16 Journal of International Development 111, 111.
[20] ibid, 112.
[21] Jan Grumiller and others, 'The economic and social effects of the EU Free Trade Agreement with Vietnam' (2018) 8/2018 OFSE Research Report, 40 <www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/8_Vietnam_Study.pdf> accessed 27 November 2019.
[22] Hege M. Knutsen, 'Industrial Development in buyer-driven networks: the garment industry in Vietnam and Sri Lanka' (2004) 4 Journal of Economic Geography 545, 545.
[23] Jenkins (n 17) 13.
[24] ibid, 14.
[25] ibid, 15.
[26] Grumiller and others (n 21) 37.
[27] World Bank, 'The World Bank in Vietnam' <www.worldbank.org/en/country/vietnam/overview> accessed 27 November 2019.
[28] Council Decision of 14 May 1996 concerning the conclusion of the cooperation agreement between the European Community and the Socialist Republic of Vietnam [1996] OJ L136; see Daniela Sicurelli, 'The EU as a norm promoter through trade. The perceptions of Vietnamese elites' (2015) 13 Asia Europe Journal 23, 27.
[29] Grumiller and others (n 21) 40.
[30] ibid 38.
[31] Nadvi and others (n 19) 112.
[32] Grumiller and others (n 21) 41.

production area and has speedily expanded.[33] There are four EPZs, three in Ho Chi Minh City and one in Tay Ninh Province, next to the city, which receive financial benefits.[34] By contrast to Bangladesh and Sri Lanka, subcontracting is less common for export-oriented producers owing to difficulties managing quality and time.[35]

Until the EU-Vietnam FTA enters into force, the EU's trade relationship with Vietnam is governed by the standard GSP. Vietnam constituted 18% of all EU imports from GSP beneficiaries in 2015, Bangladesh taking up 9%.[36] In 2016, it accounted for 23% of total imports from all standard GSP beneficiaries and of this footwear accounted for nearly 40%,[37] reflecting the assertion that leather, footwear, textiles and RMG industries benefit most from preferences.[38] The standard GSP has made it difficult for Vietnam to compete with countries like Bangladesh benefiting from duty-free and quota-free access under the GSP EBA.[39] The standard GSP tariffs for textiles and garment exports to the EU are, on average, 9%.[40] The FTA would remove or reduce these tariffs, desirable for exporters and import-dependent firms.[41]

The textiles and garment industry is the largest formal employer, providing jobs for 2.5 million people.[42] Job growth averaged 9.7% annually from 2013 to 2016.[43] It is estimated that 75% or more workers

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[33] Kenta Goto, 'Starting businesses through reciprocal informal subcontracting: evidence from the informal garment industry in Ho Chi Minh City' (2013) 25 Journal of International Development 562, 565.
[34] Vietnam Briefing, 'Development Zones in Vietnam' *Vietnam Briefing* (4 June 2013) <www.vietnam-briefing.com/news/development-zones-vietnam.html/> accessed 27 November 2019.
[35] Goto (n 33) 571.
[36] Commission, 'Report on the Generalised Scheme of Preferences covering the period 2016-2017' (Communication) COM(2018) 36 final, 3.
[37] ibid, 4.
[38] Grumiller and others (n 21) 29.
[39] ibid, 38.
[40] ibid, 43.
[41] Jappe Eckhout and Arlo Poletti, 'The Politics of Global Value Chains: Import-Dependent Firms and EU-Asia Trade Agreements' (2016) 23(19) Journal of European Public Policy 1543, 1546-1548.
[42] Grumiller and others (n 21) 37.
[43] Phu Huynh, 'Developing Asia's garment and footwear industry: Recent employment and wage trends' (2017) 1 <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_581466.pdf> accessed 27 November 2019.

in garment, textile and footwear production are female,[44] similar to Bangladesh and Sri Lanka. This includes migrants from rural regions.[45] In contrast to the other case studies, here women are not perceived with the same stereotype of docility.[46]

The ILO has been active in promoting workers' rights in the industry through the Better Work programme. It creates space for engagement on workers' rights within the restrictive country context. Better Work is hailed as 'the most developed and significant' of workers' rights projects.[47] It has been engaged in Vietnam since 2009, both improving competitiveness and working conditions, involving European brands and retailers, including H&M and John Lewis.[48] An ILO senior advisor has stated that the VGCL's support for regular tripartite dialogue was an outcome of Better Work.[49] Workers report increased pay, better job security and shorter working hours from factories participating in the programme.[50] It is an example of building ownership and support in Vietnam on a small scale.[51]

B. Workers' Rights

Vietnam is determined by the ITUC to have 'systematic violations of rights'.[52] This extends into a culture of secrecy surrounding labour rights in the industry, with research having been blocked, access to factories prevented.[53] In brief, the industry is 'a microcosm of the national political climate'.[54] The Labour Code of Vietnam is the primary tool protecting

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[44] ibid.
[45] Nadvi and others (n 19) 121.
[46] Alice Evans, 'The Politics of Better Work for Women: Vietnam's Garment Industry' (DLP Gender and Politics in Practice 2018) 7 <res.cloudinary.com/dlprog/image/upload/ECTyjhVFmTn176lxJ1kKwfEeSUjiemC6qsLNlEgR.pdf> accessed 27 November 2019.
[47] Mark Anner, 'CSR Participation Committee, Wildcat Strikes and the Sourcing Squeeze in Global Supply Chains' (2018) 56(1) British Journal of Industrial Relations 75, 84.
[48] Better Work, 'Better Work Vietnam: At a Glance' <betterwork.org/where-we-work/vietnam/bwv-programme/> accessed 27 November 2019.
[49] Evans (n 46) 10.
[50] Better Work (n 48) 3.
[51] Evans (n 46) 9.
[52] ITUC, '2018 ITUC Global Rights Index' <www.ituc-csi.org/ituc-global-rights-index-2018> accessed 27 November 2019.
[53] Anti-Slavery International (n 16) 11, 26.
[54] ibid, 11.

workers' rights.[55] The Ministry of Labour, Invalids and Social Affairs is responsible for enforcement. Vietnam has ratified 24 ILO conventions, less than Bangladesh and Sri Lanka. Of these, six of the eight fundamental conventions have been ratified, excepting Conventions No.87 and 105 on freedom of association and the abolition of forced labour. Convention No.98 was ratified in July 2019 and will enter into force in July 2020.

i. Labour rights violations: A murky area

Vietnam will only have limited obligations on the steps taken to improve rights under Convention Nos.87 and 98. The CFA can examine complaints about freedom of association regardless of ratification, though complaints regarding Vietnam predate 1973. Union freedom is limited and influenced by employers to the extent that the ability to seek redress at an international level is hindered.

Trade unions are 'authoritarian symbols', rather than acting for workers.[56] The VGCL has branches in all provinces and sectoral unions, amongst which is the National Union of Textile and Garment Workers.[57] Due to unions' inability to represent workers, women's rights are little understood.[58] Reports suggest discrimination, especially against pregnant women, exists and is underreported throughout the industry.[59]

The Labour Code is established to protect the rights and interests of workers,[60] and trade unions are given rights including collective bargaining and court litigation.[61] Child labour is prohibited, and all employees must be at least 15.[62] Enforcement of these rules is weak and

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[55] Van Gramberg (n 15) 250.
[56] ibid, 5.
[57] Do Quynh Chi, 'The missing link in the chain?' (FES 2017) 37 <library.fes.de/pdf-files/bueros/vietnam/13334.pdf> accessed 27 November 2019.
[58] ActionAid, 'Stitching a better future: Is Vietnam's boom in garment manufacturing good for women?' (2017) 14-16 <www.actionaid.org.uk/sites/default/files/publications/stitching_a_better_future.pdf> accessed 27 November 2019.
[59] Better Work, 'Annual Report 2017: An Industry and Compliance Review Vietnam' (2017) 12 <betterwork.org/blog/portfolio/better-work-vietnam-annual-report-2017/> accessed 27 November 2019.
[60] Trade Union Law Article 1, Article 4(2-3) Labour Code Article 3(4) in Better Work, 'Guide to Vietnamese Labour Law for the Garment Industry' (2018) 11 available at: <betterwork.org/blog/portfolio/better-work-vietnam/> ("ILO Better Work Guide").
[61] Trade Union Law Articles 10, 14, 15 in ILO Better Work Guide, 11.
[62] Labour Code Article 3, 8, 164 in ILO Better Work Guide, 11.

the Code is 'both flawed and incompletely specified'.[63] The scrutiny placed on businesses' compliance with labour law is limited.[64] Many businesses are not unionised even in the face of legislation mandating employer responsibility for establishing VGCL unions.[65] Further, inspections are rare, and there are an estimated 400-500 inspectors for 50,000-60,000 enterprises in Vietnam, for which comprehensive assessment is near impossible.[66] Firms are thus encouraged to undertake self-assessment,[67] which may be tarred by corruption.

VGCL unions can negotiate and sign collective bargaining agreements and litigate in court.[68] As some employers are union representatives,[69] collective bargaining becomes essentially defunct. VGCL unions can call a strike,[70] but only in limited circumstances. Strikes can be on 'interest based disputes' and cannot be on 'rights-based disputes', the latter would be those arising from, inter alia, the labour law, or the labour contract, the former issues such as health and insurance benefits.[71] Strikes are illegal if they are rights-based strikes.[72] The lack of space for unions has led to what is termed 'wildcat strikes', strikes characterised by a lack of authorisation by the union or a violation of a contractual promise not to strike.[73] Restrictions on unions have meant wildcat strikes in Vietnam are 'well-orchestrated, complex and large

[63] Van Gramberg (n 15) 254, 265.
[64] Tu Phuong Nguyn, 'Workers' Rights in Vietnam from a Regulatory Perspective' (2017) 41(2) Asian Studies Review 263, 264.
[65] Van Gramberg (n 15) 252.
[66] Grumiller and others (n 21) 51.
[67] ibid.
[68] Trade Union Law Articles 10, 14, 15 and Decree 431 2013/ND-CP in ILO Better Work Guide, 14.
[69] Mark Anner, 'Wildcat strikes and Better work bipartite committees in Vietnam: Toward an elect, represent, protect and empower framework' (2017) Better Work Discussion Paper No. 24, 31 <ler.la.psu.edu/gwr/documents/2017AnnerStrikesBetterWorkandPICCsVietnam.pdf> accessed 27 November 2019.
[70] Labour Code Articles 209-213 in ILO Better Work Guide, 19.
[71] Tran, Bair and Werner (n 14) 402.
[72] Labour Code Article 215 in ILO Better Work Guide 21.
[73] James Atleson, 'Work group behaviour and wildcat strikes: The causes and functions of industrial civil disobedience' (1973) 34(4) Ohio State Law Journal 751, 754-755.

scale'.[74] Newspapers limit reports so that it seems there are less than in practice.[75]

The lack of independent unions is a leading cause of the wildcat strikes.[76] These strikes are also influenced by factors relating to the 'legal, economic and political framework' of the country or by employer behaviour encompassing labour rights violations and poor workplace conditions.[77] They largely take place in the export sector.[78] The RMG industry accounts for 40% of all national strikes,[79] higher than in other industries. For example, large scale strikes took place between December and January 2005/2006 in foreign owned enterprises, involving tens of thousands of workers and ending only when a 40% increase in the minimum wage was issued, provoking more strikes from other factories.[80]

Workers who participate in wildcat strikes face disciplinary measures and criminal penalties, usually fines.[81] Labour rights activists have been beaten by police to ensure independent unions are not created.[82] Activists that have attempted to create independent unions have been convicted and imprisoned, some under sentences for 'violating national security provisions of Vietnam's penal code', and others have disappeared altogether.[83] This suppression extends to instances of forced labour, interviews with workers indicating exploitation, threats and coercion.[84] This paints a rights-deficient picture of work in the industry. NGOs that attempt to support workers have limited influence; their access being restricted to limited mandates.[85]

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[74] Van Gramberg (n 15) 249.
[75] ibid, 260.
[76] Nina Torm, 'The role of trade unions in Vietnam: A case study of small and medium enterprises' (2014) 26 Journal of International Development 207, 208.
[77] Van Gramberg (n 15) 253.
[78] Tran, Bair and Werner (n 14) 402.
[79] Anti-Slavery International (n 16) 24.
[80] Tran, Bair and Werner (n 14) 402.
[81] Labour Code Article 233 in ILO Better Work Guide, 21.
[82] HRW, 'Not Yet a Workers' Paradise: Vietnam's Suppression of the Independent Workers' Movement' (2009) <www.hrw.org/report/2009/05/04/not-yet-workers-paradise/vietnams-suppression-independent-workers-movement> accessed 27 November 2019.
[83] ibid.
[84] Anti-Slavery International (n 16) 15.
[85] ibid, 5.

ii. A Lack of Living Wage

Approximately nine in ten workers in the garment, textiles and footwear industries are salaried employees.[86] Average annual wage growth in the garment and footwear industry since 2013 is at 7.8%,[87] influenced by wildcat strikes. Women are paid 10% less than men.[88] Women workers are generally sewers and helpers, while men are cutters and mechanics with higher wages.[89] The minimum monthly wage in the RMG industry was between $100-$145 (£77-111) as of 2015 depending on the province/region, which is the sixth lowest among the top 20 exporting garment countries, Bangladesh and Sri Lanka being lower.[90] Minimum wages are set by the Minimum Wage Council which includes representatives from the VGCL, employer associations and the government.[91] Average nominal wages go beyond the minimum wage, at $218 (£168), compared to Bangladesh at $163 (£125) and Sri Lanka at $115 (£88) per month.[92] Workers might be entitled to allowances including for transport or bonuses,[93] which can either decrease or increase their wages.

Low wages have been a further factor for wildcat strikes. Combined with 'unrealistic' high targets common to RMG production, wages are too low for adequate provision of living conditions and workers are reliant on bonuses.[94] There is a widely held sense that living wages are not a high priority in the RMG supply chain,[95] a perspective boosted by variations in forms of pay, whether hourly, piece rate or as job

[86] Huynh (n 43) 2.
[87] ibid.
[88] ibid.
[89] Anti-Slavery International (n 16) 12.
[90] Matthew Cowgill, Malte Luebker and Cuntao Xia, 'Minimum wages in the global garment industry: Update for 2015' (2015) <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_436867.pdf> accessed 27 November 2019.
[91] Grumiller and others (n 21) 50.
[92] Huynh (n 43) 3.
[93] Nguyn (n 64) 268.
[94] Van Gramberg (n 15) 261.
[95] Mark Starmanns, 'Purchasing practices and low wages in global supply chains: empirical cases from the garment industry' (ILO Conditions of Work and Employment Series No.86, 2017) 7 <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_561141.pdf> accessed 27 November 2019.

wages.[96] This is a commonality across the South Asian RMG industry. A Better Work study found 40% of factories paid workers incorrectly for overtime and 60% failed to meet legal requirements on paid leave.[97] Across Bangladesh, Sri Lanka and Vietnam, workers have been paid well below suggested living wages, actual income obscured by workplace 'extras' like meals and transport which some employers use as a tactic to pay less. Employers arbitrarily deduct wages upon workers' mistakes.[98]

iii. Workplace Safety

Vietnam has ratified key ILO OSH conventions, including the OSH Convention, enabling a floor of safety. Employers have responsibilities, inter alia, to ensure safe and hygienic working conditions.[99] RMG enterprises with more than 1000 employees must establish an OSH committee, including union personnel and medical staff.[100] Workplace safety is less politically sensitive than workers' rights issues, albeit more expensive, as seen in the Bangladesh case study.

Like in Sri Lanka, structural integrity of buildings and OSH has not warranted as significant a status as in Bangladesh. As reported by Better Work, fires are frequent. In 2012 there were 1,600 fires in Vietnamese factories, including garment factories.[101] Reports of building collapses are scarce. OSH challenges largely include the obstruction of exits and escape routes, locked exits and inadequate fire systems.[102] Research has shown that factories do not adhere to OSH and workers lack training and protective gear.[103] The Better Work programme is working to tackle these issues in collaboration with brands and retailers, and they are being brought to the fore in tripartite consultations which will assist in tackling them on a larger scale.

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[96] ILO Better Work Guide, 27.
[97] Better Work, 'Annual Report 2017' (n 59) 5.
[98] Anti-Slavery International (n 16) 17.
[99] ILO Better Work Guide, 49.
[100] ibid, 62.
[101] Better Work, 'Better Work Vietnam: Thematic Synthesis Reference Report: Fire Safety' (2013) 5 <betterwork.org/blog/portfolio/better-work-vietnam-thematic-synthesis-report-fire-safety/> accessed 27 November 2019.
[102] Better Work, 'Annual Report 2017' (n 59) 5.
[103] Anti-Slavery International (n 16) 15.

Less is done about broader matters of OSH like long working hours, inadequate workplace facilities or healthcare. For example, the average overtime in Vietnam is between 400-500 hours annually, even though the labour law restricts overtime to 300 hours per year.[104] New labour law has been proposed to increase this to 600 hours per year,[105] a way to ensure employers can ease out maximum productivity yet with implications for workers' health. This is an area which often slips attention in EU external relations yet should not as it is part of decent work.

III. The EU's Normative Power in Bilateral Trade and Development with Vietnam

The EU plays an important role as a normative trade and development partner of Vietnam in this rights-deficient context.[106] It actively supports sustainable development and social inclusiveness in the country.[107] This contributes to an overall perception in Vietnam of the EU as a development partner, especially when combined with the development friendly ethos of the GSP,[108] although perhaps not to the extent of the GSP EBA or GSP+. The GSP has facilitated growth in the economy and reduction of poverty,[109] whilst openness to international cooperation led to the ratification of ILO conventions.[110] The GSP has not, however, ensured robust labour rights protection, its effects being more economically oriented.

The GSP was complemented by a 1996 CA.[111] This was regarded as a 'significant step' towards political cooperation.[112] It contained a human rights essential elements clause but not a provision enabling

[104] Grumiller and others (n 21) 50.
[105] ibid.
[106] See Chapter 3.
[107] Commission, 'Multi-annual Indicative Programme for Vietnam 2014-2020' (2014) 1 <ec.europa.eu/europeaid/multi-annual-indicative-programme-vietnam-2014-2020_en> accessed 27 November 2019.
[108] Sicurelli, 'The EU as a norm promoter through trade' (n 28) 32.
[109] Yoon Heo and Nguyen Khanh Doanh, 'Trade liberalisation and poverty reduction in Vietnam' [2009] The World Economy 934, 956.
[110] See Daniela Sicurelli, 'The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of the Negotiations with Vietnam' (2015) 11(2) Journal of Contemporary European Research 230, 236.
[111] Council Decision of 14 May 1996 concerning the conclusion of the cooperation agreement between the European Community and the Socialist Republic of Vietnam [1996] OJ L136.
[112] Sicurelli, 'The EU as a Promoter of Human Rights' (n 110) 236.

measures to be taken if the clause was violated. The Agreement was concluded at a time when the EU was becoming more focused on human rights in development, spurred forwards by the inclusion of a human rights clause in the 1991 Fourth Lomé Convention.[113] There was some resistance to the clause. On the one hand, it showed the EU could be effective in advancing human rights in the face of political opposition.[114] On the other, the clause was standard and implied a more active normative EU than was the case. It did not connect to the GSP. Regular dialogue on human rights was established from 2003 as a result of the Agreement.[115]

This led to the adoption of the PCA which replaced it in 2016.[116] The PCA signalled the commencement of a new phase of trade and development relations, characterised by the EU's move to embed human rights in the wider sustainable development agenda in its external relations. It is part of the process leading to entry into force of the FTA, a move influenced by Vietnam's agenda to expand international political relations and reduce dependency on China.[117] This provided the EU with a normative window of opportunity.[118] Like the Bangladesh Compact, it is a bridge between trade and sustainable development.

The Commission views it as a tool bringing together a 'holistic and coherent vision' for relations and an increase in economic integration and cooperation.[119] Dialogue on 'promoting sustainable development' is mandated and can give a clear picture of labour rights.[120] It is a primary tool for implementing labour rights policies, and needs to involve civil

[113] Marise Cremona, 'Human Rights and Democracy Clauses in the EC's Trade Agreements' (1995) 126 Law and Justice – Christian Law Review 105, 105.
[114] Matthias Maas, 'The European Union, Vietnam, and Human Rights as Law: the case of the 1995 EU-Vietnam framework agreement and its human rights clause' (2012) 10 Asia Europe Journal 215, 228.
[115] Sicurelli, 'The EU as a Promoter of Human Rights' (n 110) 236.
[116] PCA.
[117] Sicurelli, 'The EU as a Promoter of Human Rights' (n 110) 236.
[118] See Sicurelli, 'The EU as a norm promoter through trade' (n 28) 24.
[119] Commission, 'Human Rights and Sustainable Development in the EU-Vietnam Relations' (n 5) 3.
[120] PCA, Article 2(d).

society.[121] Discussions have been held on human rights, centred on civil and political rights as opposed to workers' rights.

Human rights and sustainable development commitments are intricate and detailed in the PCA, with an apparent strong normative baseline. Article 1 amplifies promoting and respecting human rights, representing 'a legally binding expression of their shared commitment to the promotion and protection of human rights',[122] giving the EU a legal basis to discuss labour rights violations.[123] It does this through the conventional manner of asserting that human rights are an essential element of the agreement.[124] Parties must 'cooperate in the promotion and protection of human rights',[125] which would indicate a necessity to work towards addressing issues such as trade union rights, forced labour and low wages, all elements of decent work.

The PCA goes further, integrating wider aspects of sustainable development relevant to the RMG industry. Emphases include provisions on gender, CSR and labour standards,[126] indicating a real opportunity to address workers' rights in the context of the RMG supply chain. First, the PCA mandates, using the term 'shall', cooperation towards strengthening of gender-related policies and programmes, capacity building and enabling access to fundamental rights for women. Taken seriously, this could lead to an overhaul of RMG worker gender issues, ensuring equal wages, female career advancement and access to justice (in turn requiring freedom of association). Second, the parties agree to promote industrial policy cooperation through promoting and encouraging CSR and RBC.[127] As seen from the Compact, there are hurdles in encouraging RBC. It does not promote any specific focus on export industries, nor the RMG industry, whilst being brief and not warranting an independent article.

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[121] Grumiller and others (n 21) 13.
[122] PCA, Article 1.
[123] Commission, 'Human Rights and Sustainable Development in the EU-Vietnam Relations' (n 5) 4.
[124] PCA, Articles 1.
[125] ibid, Article 35.
[126] ibid, Articles 33, 44 and 50 respectively.
[127] ibid, Article 44(e).

Third, Article 50 covers 'Labour, Employment and Social Affairs'. The agreement puts decent work as a key objective and centralises the ILO within efforts to ensure it.[128] Under Article 50(3) the parties 'reaffirm their commitments to respect, promote and realise' the ILO standards referred to in the 1998 Declaration and 'cooperate and provide technical assistance with a view to promote the ratification' of ILO conventions. This fulfils the need to orientate workers' rights at the centre of EU external policy around international standards.[129] The provision is a softer obligation, as both partners are already subject to the Declaration due to ILO membership.[130]

Nevertheless, the PCA boosts its effect, tying CLSs into development, especially as it is parallel to support for technical assistance and policy exchange at the ILO level.[131] This presents an opportunity for enhanced EU-ILO cooperation in the RMG industry, even mandating EU or MS funding for relevant ILO projects, especially with a gender focus. One way in which this can be implemented is through the ILO's Decent Work Country Programme, which emphasises Better Work.[132] It is not enough to have commitments without technical assistance. The EU and its MSs are leading donors in Vietnam and have committed funding in the 2014-2020 MIP which has an emphasis on sustainable energy, fostering governance and the rule of law.[133] The lack of human rights has been criticised as a 'missing link'[134] but the pursuit of the MIP's objectives is the first step to building labour rights given the country's context.

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[128] ibid, Article 50(1)(2).
[129] Andrew Clapham and Joanna Bourke Martignoni, ''Are we there yet?' In Search of a Coherent EU Strategy on Labour Rights and External Trade' in Virginia A.Leary and Daniel Warner (eds), *Social Issues, Globalisation and International Institutions* (Martinus Nijhoff Publishers 2006) 272.
[130] Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40(4) Legal Issues of Economic Integration 297, 308-309.
[131] Article 50(5).
[132] ILO, 'Decent Work Country Programme 2017-2021' (2018) <www.ilo.org/hanoi/Whatwedo/Publications/WCMS_630293/lang--en/index.htm> accessed 27 November 2019.
[133] Commission, 'Multi-annual Indicative Programme for Vietnam 2014-2020' (n 107) 4.
[134] Grumiller and others (n 21) 18.

Parties may take 'appropriate measures', 'in accordance with international law',[135] if either fails to fulfil its obligations, which will include the obligation to respect labour rights and provisions on CSR and gender equality.[136] This integrates conditionality into the PCA in a manner similar to GSP conditionality. Its presence indicates a depth of relations absent in the former CA. Appropriate measures may result in suspension of development cooperation or trade if labour rights are violated.[137] The floor for operation of this provision is unclear. It could operate, for example, if a party refuses to cooperate on designing gender based RMG projects. The 'international law' framework introduces some clarity. This might mean that actions would only be taken if a certain level of ILO condemnation of rights has been reached. The threshold is like the GSP's 'serious and systematic' criterion. The European Parliament has reported 'systematic violations of democracy and human rights' in Vietnam,[138] and no action has been taken by the Commission under this clause.

Overall, the PCA does have potential to improve workers' rights in the RMG industry, a conclusion helped by building a positive perception by factory management of the EU as a normative actor.[139] This is a perception that can only be built through enhanced trade and development.

IV. The new generation EU-Vietnam FTA and the SDC: beyond conditionality?

A. Economic Benefits for RMGs

The FTA, once legally effective, could improve workers' rights through both economic and social development. Economic development facilitates higher wages and better living conditions, when implemented properly. EU trade stakeholders place weight on market access as the

[135] PCA, Article 57(2)(4).
[136] ibid, Articles 57.
[137] Commission, 'The European Union and human rights in the world' (Supplement 3/95, 1995) Annex 2.
[138] European Parliament, 'Resolution of 26 November 2009 on the situation in Laos and Vietnam' [2009] (P7_TA(2009)0104) para 3.
[139] See Sicurelli, 'The EU as a norm promoter through trade' (n 28) 36; Ha Hai Hoang, 'Normative Power Europe through trade: Vietnamese perceptions' (2016) 30(2) International relations 176, 190.

FTA's 'most important' feature,[140] rather than sustainable development. At GSP graduation, without the FTA Vietnam would be subject to MFN tariffs which are the least favourable.[141] By contrast, the FTA will eliminate over 99% of tariffs.[142] This is subject to rules of origin where fabric must be sourced locally, in the EU or South Korea, to enjoy tariff preferences.[143]

Economic development facilitated through this will increase RMG competitiveness, beneficial for import-dependent firms that have lobbied for FTAs with ASEAN countries.[144] As seen through the eyes of government agencies, businesses and unions, the FTA presents an opportunity for 'export growth, economic development and a trigger for economic and political reform'.[145] At the same time, it could mean a rapid expansion of the RMG industry as RMGs become cheaper to import, which is why it is so important that FTAs, in the negotiation process and their implementation, ensure strengthening of workers' rights.

B. Stitching the FTA with a silver thread?

The FTA negotiations were launched in 2012 with an original view to conclusion at the end of 2015.[146] They stalled because of CJEU *Opinion 2/15*, which emphasised sustainable development as an area of exclusive competence.[147] Despite this, the process leading to the FTA did not signify strong efforts to integrate human rights.

First, notwithstanding the EU's hyped-up 'silver thread' running through its external human rights' policies, the negotiations side-lined

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[140] Grumiller and others (n 21) 43.
[141] See Chapter Two.
[142] Commission, 'EU and Vietnam finalise trade and investment discussions' (26 June 2018) <trade.ec.europa.eu/doclib/press/index.cfm?id=1875> accessed 27 November 2019.
[143] European Parliament, 'International Agreements in Progress: EU-Vietnam free trade agreement' (2018) 6 <www.europarl.europa.eu/RegData/etudes/BRIE/2018/628248/EPRS_BRI(2018)628248_EN.pdf> accessed 27 November 2019.
[144] Jappe Eckhardt and Arlo Poletti, 'The politics of global value chains: import-dependent firms and EU-Asia trade agreements' (2016) 23(10) Journal of European Public Policy 1543, 1548, 1553.
[145] Grumiller and others (n 21) 31.
[146] Ha Hai Hoang and Daniela Sicurelli, 'The EU's preferential trade agreements with Singapore and Vietnam. Market vs normative imperatives' (2017) 23(4) Contemporary Politics 369, 382.
[147] See Chapter 3.

human rights. As a bilateral agreement, it requires consent from both parties. The EU institutionally separated trade and human rights between the Commission and the European External Action Service (EEAS), restricting labour rights' discussions.[148] In other FTAs, labour rights stakeholders have found a lack of engagement and space in negotiations.[149] Given the lack of independence of civil society in Vietnam, it is probable that discussions would not have been meaningful without involvement of European and international RMG stakeholders. Vietnamese stakeholders are considered to have viewed human rights as a way to undermine economic objectives, and not an issue for trade negotiations.[150] The parallel conclusion of the PCA could have diverted human rights too much from trade into development, when they are meant to be a silver thread running through both.

Second, human rights were excluded from the Sustainability Impact Assessment (SIA), which is meant to give an 'in-depth analysis of the potential economic, social, human rights and environmental impacts' of trade negotiations.[151] SIAs are complex as they involve many actors and there are hurdles to measure impact, but can be invaluable in identifying impacts in restrictive country contexts.[152] It is a missed opportunity to engage in a decent work assessment, where instead the only relevance to the RMG industry is resultant increased employment.[153] The EP demanded a human rights impact assessment (HRIA) but the Commission took the perspective that the SIA was based on a mandate to negotiate an FTA with ASEAN in 2007, prior to Lisbon,

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[148] Sicurelli, 'The EU as a Promoter of Human Rights' (n 110) 232 - 234.
[149] James Harrison and others, 'Governing labour standards through Free Trade Agreements: Limits of the European Union's trade and sustainable development chapters' (2018) Journal of Common Market Studies 1, 7.
[150] Hoang (n 139) 194.
[151] Commission, 'Sustainability Impact Assessments' <ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm> accessed 27 November 2019.
[152] Samantha Velluti, 'The promotion and integration of human rights in EU External trade relations' (2016) 32(83) Utrecht Journal of International and European Law 41, 58-59.
[153] Commission, 'Commissions Services' Annex on Vietnam to the Position Paper on the Trade Sustainability Impact Assessment of the Free Trade Agreement between the EU and ASEAN' (2013) <trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151230.pdf> accessed 27 November 2019.

hence without as strong a treaty commitment to human rights.[154] This was a dubious justification using an outdated mandate. The European Ombudsman found the failure to carry out the HRIA to be maladministration as it was essential.[155] The Commission's statement that there would be an ex-post assessment was struck down as insufficient to have positive effects.[156] Excluding a HRIA casts doubt on sustainable development commitments and on the EU's sincerity to rights.

Third, the parallel TPP held centre stage. The drafted 2016 U.S. Side Agreement, under the Obama administration, made Vietnam's involvement conditional on labour rights reform, including freedom of association and collective bargaining.[157] This led to government reforms, pushed by the VGCL and Better Work,[158] which were short-lived. The Trump administration pulled out of the TPP in January 2017, which meant the reforms became defunct. Vietnam responded by revising the draft labour law, removing clauses allowing independent unions a place on tripartite bodies.[159] The Side Agreement would have been positive conditionality of a kind absent in the EU-Vietnam FTA.

The EU is not regarded as having the same leverage as the U.S., interviewees in a study noting that the FTA will 'most likely have little impact on reform'.[160] The EU faced a normative dilemma after TPP dissolution. It elected to push for ratification of remaining fundamental conventions by supporting an ILO project with this objective.[161] The FTA was projected as 'renewed external motivation' for labour rights

[154] Sicurelli, 'The EU as a Promoter of Human Rights' (n 110) 241.
[155] European Ombudsman, 'Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement' (26 February 2016) para 9, 11.
[156] ibid, para 20, 24.
[157] See United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations (2016) <ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf> accessed 27 November 2019.
[158] Evans (n 46) 12.
[159] Tran, Bair and Werner (n 14) 412.
[160] Interviewees in this study ranged from international NGOs to Industry Organisations in Vietnam, Grumiller and others (n 21) 33.
[161] ILO, 'Promoting ILO fundamental conventions towards ratification of Conventions 87, 98, 105 and actions to eliminate discrimination and forced labour in Viet Nam' <www.ilo.org/hanoi/Whatwedo/Projects/WCMS_635722/lang--en/index.htm> 27 November 2019.

improvement.[162] The PCA also influenced the EU's position, with its mandate for technical assistance where necessary to pursue decent work. EU-ILO cooperation has facilitated ratification of Convention No.98 in a difficult political context.

Additionally, it has been noted that there is an increase in collaboration between the government, ILO and EU on reforms.[163] The EU welcomes the government's plan to also submit Conventions Nos. 87 and 105 for ratification.[164] Vietnam is showing political willingness to improve labour rights through such commitments. MEPs were more vocal in calling for strong benchmarks for the FTA, including recognition of independent unions,[165] which would have gone further than the EU's technical assistance approach. They stressed 'jail scores of human rights defenders' and the lack of union independence.[166] As the splitting of the FTA removed EU MS ratification, the influence of the MSs is lessened.

C. The SDC: what role for decent work?

Where does this leave the textual provisions, monitoring and enforcement of the SDC for its operation? Notably, as they are bilateral, both parties agree to respect labour rights in partnership.[167] The SDC's objective is 'to *promote* sustainable development, notably by *fostering* the contribution of trade and investment related aspects of labour and environmental issues'.[168] In brief, the aim is to build foundations upon which, inter alia, decent work can be built. Sustainable development is the 'buzzword' for trade agreements,[169] rights-based and sustainable development frameworks replacing competition-based ones.[170]

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[162] ibid.
[163] Anti-Slavery International (n 16) 9.
[164] Commission, 'EU-Viet Nam free trade agreement' (n 2).
[165] Ramon Tremosa, '32 MEPs send a joint letter to Mrs Mogherini and Commissioner Malström to ask for more human rights progress in Vietnam' *Tremosa* (17 September 2018) <tremosa.cat/noticies/32-meps-send-joint-letter-mrs-mogherini-and-commissioner-malmstrom-ask-more-human-rights-progress-vietnam> accessed 27 November 2019.
[166] ibid.
[167] Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003) 350.
[168] SDC, Chapter 13.1.1, emphasis added.
[169] Lore Van den Putte and Jan Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) 31(3) The International Journal of Comparative Labour Law and Industrial Relations 263, 282.
[170] ibid, 275.

According to Vietnam's EU Delegation, a core component of the FTA relationship is the improvements in social compliance, with the government having interest in improving labour rights and raising standards in businesses.[171]

By the same token, although there is a clear commitment to the EU's normative agenda within the SDC, the difficulty is in its effectiveness in improving labour rights, especially for important industries like RMGs.[172] In 2017, it was concluded that the FTA had made 'no impact so far', although this conclusion was premature given later ratification of Convention No.98.[173] The expectation of the impact was only the leverage exercised before the agreement came into force. There are assertions that SDC provisions are violated in other new generation FTA partners,[174] without penalty. Nevertheless, it has been argued that the SDC is 'sufficiently robust and flexible'[175] to have a potential to improve labour rights.

i. An analysis of textual provisions

The substance of the SDC reveals similarities with the PCA. It centralises the UN's 2030 Agenda,[176] with several provisions relevant to its potential impact on decent work. By including human rights in trade agreements, the FTA widens and deepens it substantial content, governance, and strengthening through 'judicialisation'.[177] Labour rights have become an 'unobjectionable norm',[178] ensuring a role for decent work and the potential to improve labour rights.

The SDC places CLSs on the same level as human rights,[179] which is to be expected. It embeds labour rights at the international

[171] Anti-Slavery International (n 16) 38.
[172] ibid.
[173] Chi (n 57) 20.
[174] See Jan Orbie, Lore Van Den Putte and Deborah Martens, 'The Impact of Labour Rights Commitments in EU Trade Agreements: The Case of Peru' (2017) 5(4) Politics and Governance 1, 9.
[175] Bartels (n 130) 311.
[176] SDC, Chapter 13.1.2.
[177] Lore Van den Putte and Jan Orbie, 'EU Bilateral Trade Agreements' (n 169) 268.
[178] ibid, 278.
[179] ibid, 268.

level,[180] mainstreaming the importance of working with other actors on sustainable development.[181] The parties underline benefits of cooperation on trade-related labour issues, the phrase 'labour issues' footnoted to mean the DWA as referred to in the 2008 ILO Declaration.[182] This means labour rights are sufficiently broad to encompass cooperation on the identified violations, a living wage, OSH and structural integrity of buildings. It gives decent work a voice. The phrase has been worded in a manner that suggests a reference to labour rights over standards or principles,[183] although could equally be viewed as inadequate given the GSP's more 'solid' list of ILO conventions.

This concern is partially offset by a commitment to the 1998 Declaration and to making 'continued and sustained efforts towards ratifying' the fundamental conventions and considering ratification of other conventions.[184] Although the CLSs have been controversial in their past, and the provision does not state ratification of the related conventions is necessary,[185] it ensures both parties have the opportunity to discuss the serious, longstanding violations of union rights in the RMG industry. One study even suggests the labour standards have been perceived as binding.[186] It could be argued that sincerity in normativity requires implementation of the CLSs as part of the SDC, which could be justified by making this a requirement for all new generation FTA partners, even if this would be an obstacle to bilateral cooperation.

The SDC recognises the 'importance of full and productive employment', 'decent work for all' and consultation and cooperation on *trade-related* labour issues 'of mutual interest'.[187] The confinement of labour issues to those that are trade-related means ones affiliated with export industries, which could be useful for focus on the RMG industry and its place in the global supply chain. Yet it is similar to the Bangladesh

[180] Jan Orbie and Sangeeta Khorana, 'Normative versus market power Europe? The EU-India trade agreement' (2015) 13 Asia Europe Journal 253, 260.
[181] SDC, Chapter 13.14.
[182] ibid, Chapter 13.1.4.
[183] Velluti (n 152) 56.
[184] SDC, Chapter 13.4.3.
[185] Orbie, Van Den Putte and Martens (n 174) 3.
[186] Hoang (n 139) 193.
[187] SDC, Chapter 13.4.1.

Compact's emphasis on export factories as opposed to domestic RMG factories, which is a missed opportunity to take note of domestic RMG production taking place in worse conditions with less scrutiny, or production taking place in sub-contracted factories. It is different from the GSP which allows for a focus on labour rights issues taking place in the country.

Parties are also required to '*endeavour'* to ensure 'laws and policies provide for and encourage high levels' of social protection and improvements.[188] This mandates the endeavour of improvement, not the improvement itself, which makes monitoring more difficult. Weakening of protection is prohibited as 'detrimental' to the SDC's objectives and inappropriate as a form of encouragement for trade and investment.[189] The scope of FTAs is broadened through this non-regression clause. Nevertheless, it would have to be proven at enforcement that there was a weakening of labour standards in a way that trade and/or investment is encouraged, something difficult to demonstrate,[190] especially in countries like Vietnam where there is much secrecy surrounding workers' rights in the RMG industry. The SDC additionally prohibits the sustained or recurring failure to effectively enforce labour law,[191] like the GSP's prohibition of 'serious and systematic' violations of labour rights.

The FTA's provisions go beyond the GSP by including RBC. Parties agree to promote CSR, provided measures are not a 'means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade', referencing instruments like the OECD Guidelines for MNEs.[192] This ties into the PCA's promotion of RBC. The difficulty will be in concluding measures to meet the proviso, especially where Vietnam's context shows voluntary, incentive-driven measures do not offer adequate worker protection.[193] Anti-Slavery International suggests that the Commission should introduce measures setting out human rights

[188] ibid, Chapter 13.2.2.
[189] ibid, Chapter 13.3.1.
[190] Orbie, Van Den Putte and Martens (n 174) 3.
[191] SDC, Chapter 13.3.3.
[192] ibid, Article 13.10.2.e.
[193] Anti-Slavery International (n 16) 5.

obligations and mandatory due diligence of businesses operating in the EU with a view to ensure responsible supply chains.[194] As ever, the normativity of RBC is a sensitive area of EU policy, and is mainly tackled by programmes in partnership with the ILO. There is a project on responsible supply chains in Asia implemented by the ILO, OECD and EU, but in Vietnam this does not cover the RMG industry, a missed opportunity to engage with the RBC obligations of the PCA and FTA.[195]

These textual provisions taken as a whole set out relatively strong obligations to commit to decent work. Each trade partner retains sovereignty to determine sustainable development objectives and establish levels of domestic protection 'as it deems appropriate',[196] somewhat contrary to the endeavouring of improvement in decent work and the non-regression clause. This enables the maintenance, to a degree, of the status quo, and leeway for the partners.[197] It makes any floor of rights more ambiguous.

ii. Monitoring of implementation

Ensuring a high standard of rights' protection necessitates a strong institutional monitoring framework. This comprises a Committee on Trade and Sustainable Development, Domestic Advisory Groups (DAGs) and a Panel of Experts which is involved in enforcement. This monitoring framework is specific to the SDC, which bolsters its importance and the significance of the sustainable development provisions. Monitoring can facilitate improvements to labour laws and RBC.[198] Done properly, dialogue through monitoring can ensure transparency, openness to public consultation and civil society participation.[199] It could influence labour law and the creation of free and independent unions,[200]

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[194] ibid, 27.
[195] ILO, 'Responsible Supply Chains in Asia – Vietnam' <www.ilo.org/hanoi/Whatwedo/Projects/WCMS_632390/lang--en/index.htm> accessed 27 November 2019.
[196] SDC, Chapter 13.2.1.
[197] Orbie, Van Den Putte and Martens (n 174) 4.
[198] See Grumiller and others (n 21) 50.
[199] Lillian Richieri Hanania, 'The Social Dimension of Sustainable Development in EU Trade Agreements: Strengthening International Labour Standards' (2016) 59 German Yearbook of International Law 435, 458.
[200] Lore Van den Putte and Jan Orbie, 'EU Bilateral Trade Agreements' (n 169) 270.

simultaneously tackling the issues related to women's rights, living wages and OSH.

The Committee is more of a trade partner-level dialogue, comprising 'senior officials from the relevant administrations of each Party or officials they designate', monitoring the SDC's implementation.[201] The DAGs are intended to be more inclusive, advising on the SDC's implementation with a balanced representation of economic, social and environmental stakeholders, with parties making the decision as to procedures for their establishment and appointment of group members.[202] A joint forum between DAGs or 'groups of each Party' submits reports to the Committee.[203] Therefore, the DAG has limited power, giving reports that may not be read by high-level officials who make the final decisions. This is not bottom-up governance and the format would have benefited from using the method in the Bangladesh Compact whereby high-level and other stakeholders sat at the same table. It is unlikely the framework will bring about reform using EU labour law as a roadmap as some suggest.[204]

Moreover, the power appointed to the parties to elect participants in the DAGs blocks balanced representation. It is likely to be infiltrated by state controlled VGCL unions and selected CSOs who lack independence. International NGOs can help with organising and funding grassroots CSOs, especially through sub-granted EU funding,[205] who may be able to participate in the DAGs. Fear of reprisals would be a heavy deterrent, which means dialogue might lack transparency.[206] If the government ratifies the remaining fundamental conventions and free and

[201] SDC, Article 13.15.2-3.
[202] ibid, Article 13.15.4.
[203] ibid, Article 13.15.5.
[204] Evgeny Postnikov and Ida Bastiaens, 'Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements' (2014) 21(6) Journal of European Public Policy 923, 928.
[205] Jeff Kenner, Katrina Peake and Stuart Wallace, 'The EU's Engagement with Civil Society' in Jan Wouters and others (eds), *The European Union and Human Rights: Law and Policy* (OUP 2020) (in press).
[206] Jan Orbie and others, 'Promoting sustainable development or legitimising free trade? Civil society mechanisms in EU trade agreements' (2016) 1(4) Third World Thematics: A TWQ Journal 526, 528.

independent unions form, the same concerns of anti-union discrimination would manifest.

Difficulties with the monitoring framework have been recognised from other new generation FTAs with a lack of consistent civil society involvement,[207] ambiguous selection procedures of dialogue actors and governments lacking accountability in follow-up.[208] According to civil society, their opinions are not taken seriously and the interactions are superficial,[209] likely influenced by the way DAGs have little say in monitoring rights. In addition, free and independent unions have viewed their participation as merely legitimising the agreement as opposed to ensuring labour rights change.[210] Dialogue has, in brief, 'not been fruitful'.[211] Moreover, the EU office in Vietnam lacks mechanisms for systematic monitoring of labour rights.[212] The effectiveness of the framework depends on a number of factors, including the EU's political will to take human rights seriously, the extent of labour rights on the agenda, and the frequency of meetings.[213]

iii. Dispute Resolution

Enforcement is equally significant in ensuring effectiveness in improving labour rights. Enforcement under the SDC is different from the general dispute settlement procedure for the FTA.[214] Disputes over the SDC begin with governmental consultation between the parties over the problem(s) at issue and their effects on the SDC's objectives.[215] If further discussion is needed, this is then brought to the Committee which can seek the advice of the DAG, parties or expert assistance.[216] Given the

[207] Deborah Martens and others, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) 23(1) European Foreign Affairs Review 41.
[208] Jan Orbie and others, 'Promoting sustainable development or legitimising free trade?' (n 206) 528-529.
[209] James Harrison and others, 'Governing labour standards' (n 149) 10.
[210] ibid.
[211] ibid, 11.
[212] Anti-Slavery International (n 16) 38.
[213] Lore Van den Putte and Jan Orbie, 'EU Bilateral Trade Agreements' (n 169) 272; Kenner, Peake and Wallace (n 205).
[214] SDC, Article 13.16.1.
[215] ibid, Article 13.16.
[216] ibid, Article 13.16.4-5.

issues highlighted with these institutions, it is unlikely that such proceedings will have real change.

Finally, disputes can be escalated to a Panel of Experts with the ability to make recommendations.[217] The composition of the Panel is decided by the Committee and must, in a labour law case, comprise individuals with specialist knowledge of, or expertise in, labour issues.[218] As its composition is decided by the Committee, there is a danger of continuing selection of government-biased stakeholders, lessened slightly by the fact EU Committee members will have the opportunity to also decide on members. The Panel of Experts then consider the issue and publish recommendations.[219]

These are not binding on the party considered at fault but are supported by the mandate to engage with the ILO in dispute proceedings. With RMG issues, this should involve the identification and utilisation of ILO expertise and areas of need of technical assistance which could be facilitated by the EU. It is argued the enforcement mechanism lacks credibility, which will discourage labour rights activists and prospective independent unions.[220] Credibility could be built through the ILO, ensuring representative DAGs and expanding Committees to give space for some involvement, even if on a rotating basis, of unions when independent, CSOs and employers. It would mirror the ILO tripartite framework and lend legitimacy to the process. Credibility will also be built by the follow-up to implementation of actions or measure that have been recommended by the Panel of Experts.[221]

Notwithstanding difficulties with composition, the enforcement procedure in the new generation FTAs has not been unused. As detailed in Chapter Three, the EU has initiated this enforcement process with regards to South Korea, issuing reports condemning human rights violations and demanding action. This is in response to critique that it had

[217] ibid, Article 13.17.
[218] ibid, Article 13.17.3-4.
[219] ibid, Article 13.17.
[220] James Harrison and others, 'Labour standards provisions in EU Free Trade Agreements: reflections on the European Commission's reform agenda' [2018] World Trade Review 1, 11.
[221] SDC, Article 13.17.9.

insufficient political influence on South Korea's progress in ratifying four remaining fundamental ILO conventions.[222] As the FTA is bilateral, enforcement will be tailored to Vietnam's political and socio-economic situation.[223] South Korea's human rights situation is not dissimilar to Vietnam's, and it shows the EU is not unwilling to enforce human rights elements through trade. In addition, enforcement is a streamlining, engaging process which may help to foster political willingness on the part of Vietnam.[224] Without a timescale, it is likely such proceedings could take years as with the GSP, which offers greater flexibility for the EU to take account of country context whilst taking heed of the danger of sending an overly friendly signal to new generation FTA partners.[225]

In addition, the FTA has a route of 'back door conditionality'. It makes an 'institutional and binding linkage' to the PCA.[226] If a party considers the other has committed a 'material breach' of the PCA, it can take 'appropriate measures'.[227] The FTA is part of the overall EU-Vietnamese relations through the PCA.[228] Like negative conditionality in the GSP underpinning the Bangladesh Compact, the PCA becomes the 'penalty default'[229] as this linkage could allow for full or partial trade sanctions. The EU Trade Commissioner, Malmström asserts the EU reserves the 'right to freeze our diplomatic relations or impose trade embargoes and other political sanctions', where 'human rights are systematically and severely abused'[230] suggesting what might be the threshold for use of conditionality. As the PCA's decent work provisions are like those of the FTA, the EU allows itself scope for sanctions when

[222] James Harrison and others, 'Governing labour standards' (n 149) 12.
[223] Velluti (n 152) 57.
[224] Tamara Takács, 'Human Rights in Trade: The EU's Experience with Labour Standards Conditionality and its Role in Promoting Labour Standards in the WTO' in Jan E Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011) 106.
[225] Fierro (n 167) 103.
[226] Commission, 'Human Rights and Sustainable Development in the EU-Vietnam Relations' (n 5) 7.
[227] EU-Vietnam FTA Chapter 17, Article 17.18.2.
[228] ibid, Article 17.22.2.
[229] See Gráinne de Búrca, Robert O.Keohane and Charles Sabel, 'Global Experimentalist Governance' (2014) 44 British Journal of Political Science 477.
[230] Commission, 'EU-Vietnam: Human Rights and Sustainable Development' (12 May 2015) 3 <trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153438.pdf> accessed 27 November 2019.

the provision of aspects like financial assistance and issuing of recommendations, fail.[231]

V. Conclusion

The entry into force of the EU-Vietnam FTA and its extensive SDC carries expectation as to its effectiveness in improving labour rights in Vietnam's RMG industry. This is bolstered by the umbrella PCA. These trade and development instruments face challenges from corruption, the authoritarian political system, forced labour and controlled, suppressed representation of workers. This research has shown Vietnam to have systematic violations of rights, including severe restrictions on freedom of association and collective bargaining.

A positive step was noted with the ratification of Convention No.98 in July 2019, which leaves two further fundamental ILO conventions unratified, Convention No.87 and 105 on freedom of association and forced labour, which Vietnam has committed to ratify in the future. Albeit ratification is a positive step, there is a serious issue with the culture of secrecy surrounding access to industry and factories, limited monitoring and enforcement powers of the ILO especially as voice is suppressed in the ability to bring cases to the CFA. A lack of worker voice has led to wildcat strikes, lack of living wage and concerns over workplace safety.

The EU has a role as a normative actor to improve workers' rights through trade and development. The GSP has had only limited impact through facilitating growth in the economy and reduction of poverty, without ensuring robust labour rights protection. The PCA has the potential to have greater influence than the EU's former CA, being a bridge between trade and sustainable development, including dialogue and a depth of issues such as gender, CSR and labour standards. It also includes the 'appropriate measures' clause, integrating conditionality absent in the former CA, and following an international law framework in the exercise of this clause.

The PCA leads up to the FTA, which, with its focus on trade liberalisation, may pose a risk to workers' rights. This makes it even more

[231] See Chi (n 57) 19.

important that the FTA has a strong worker rights basis in the SDC. Negotiations leading to the FTA side-lined human rights, leading to doubt on the EU's sincerity on rights. This was made more difficult by the TPP's U.S. Side Agreement which meant more of a focus was on the U.S. conditions as opposed to the EU's normative leverage. This situation has now been altered through the EU's support of the ILO project aimed at the ratification of the fundamental ILO conventions, reflecting the positivity that EU-ILO cooperation can bring about.

The FTA's SDC continues the trend of centralising the 2030 Agenda, including a reference to the ILO's DWA and thus incorporating a wider scope of decent work beyond fundamental ILO conventions. Stressing the CLSs means both parties can discuss serious, longstanding violations of union rights in the RMG industry. Some hurdles in the SDC include the restriction of cooperation to only 'trade-related issues' of 'mutual interest', a confinement meaning only labour rights in the export industries such as RMGs will be discussed, a missed opportunity to tackle sub-contracting and the informal economy. The SDC includes RBC, but it is more ambiguous as to the Partner's role beyond promotion. Projects supporting this in the RMG industry are needed. The monitoring framework for the SDC boosts its importance but falls short as in its provisions for participation of civil society in dialogue.

The central route for disputes in the SDC is through the Panel of Experts with its non-binding report of recommendations. As has been shown, the EU is willing to initiate this procedure, perhaps because of the lack of severe consequences it can yield, but it does represent an opportunity to raise serious labour rights violations and engage in discussion with a partner country. A back-door enforcement route is included through a link to the PCA's 'appropriate measures' trigger as the penalty default, which can lead to trade conditionality akin to the GSP.

This research has shown that each case study exists in contrast to the other, presenting a unique set of contextual circumstances and

variety of trade and sustainable development instruments employed by the EU to variable effects.

Chapter 8 Conclusion

I. Overview

This thesis set out to analyse 'to what extent the EU trade and sustainable development instruments effectively promote labour rights in the RMG industry of South Asia'. It utilises a variety of research methods including interviews undertaken during time as a Visiting Scholar with the ILO in Bangladesh and Sri Lanka in order to answer this research question and the sub-questions specific to each country, as set out in the Introduction. Underpinning this thesis is the understanding of the EU as a normative actor that plays a central role in promoting labour rights through its trade and development instruments.

As this thesis has shown, the Rana Plaza factory collapse put labour rights violations in the RMG industry into the spotlight. It was an outcome of the demands of fast fashion for cheap, readily available, on-trend clothing. While being useful for developing countries' economic progress, the RMG industry has severe consequences for its workers, as described in Chapter Four. They face low wages, anti-union discrimination and gender inequality. Work is often undertaken in factories with insufficient workplace safety, at risk of fires, collapsing buildings, narrow and blocked stairwells and other health hazards. Across the case studies, it is made clear that the EU can be both dynamic and responsive to human rights violations. The EU cannot create new labour rights in RMG producing countries, but it can promote labour rights with the aim of enhancing protection, as demonstrated in the case studies.

II. A Comparative Analysis

A. Context

The case studies form the centrepiece of the thesis. Contextual features across all case studies such as corruption in Bangladesh and Vietnam's authoritarian system have weakened labour rights, impeding the EU's ability to promote labour rights effectively. This is especially so where the countries have adopted restrictions for workers in EPZs, evident in Bangladesh's separation of the labour law for EPZ workers. Sri Lanka is

the only one of the three countries studied to have ratified all eight fundamental ILO conventions, a reflection of both its GSP+ status and the lower severity of labour rights violations than in Bangladesh and Vietnam.

Of the fundamental ILO Conventions Nos.87 and 98 relevant to trade unions, only Vietnam remains to ratify No.87. This is apparent in the extremely restrictive VGCL, a state and employer-based union which prohibits free and independent unions and places restrictions on striking only for interest-based disputes and not rights-based disputes. These restrictions led to the research finding that it is unlikely engagement with the VGCL will lead to valuable dialogue in the EU's new generation FTA and PCA. Restrictions led to similar outcomes for engagement with Bangladesh, as unions, although free to form, face organisational and administrative hurdles in doing so, meaning they represent a small portion of the workforce. Sri Lanka's obstacles on union activity had less impact on EU engagement. There were concerns over gender equality across all case studies. This impacts on the representativeness of civil society with which the EU engages.

Unique to Bangladesh is the horizontal distrust, between unions, and vertical distrust, between unions and employers/government, preventing constructive tripartite meetings which then impacted on Compact and ILO/EU engagement with unions. As suggested in Chapter Five, there needs to be significant behavioural changes and dialogue needs to take place to overcome these divides.

Low wages in all the case studies are generated from each countries' comparative advantage in low production costs ensuring they remain competitive in the Asian supply chain context, described in Chapter Four. As a result, wages do not equate to 'living' wages and poor living conditions for RMG workers. Despite this being a key issue, the EU has shown neglect of it, leaving it for RBC, which has meant it has not gained traction in external relations.

Workplace safety (OSH and structural integrity of buildings) has been assessed in all case studies. It is clear the RMG industry has severe problems with workplace safety, similarities including fire safety and

blocking of exits. The research also found cultural issues, in Bangladesh the locking of factory gates to create a secure working environment but in practice causing more deaths in fires. Much of the focus of EU external relations has been on structural integrity of buildings and not on OSH elements like back pain. This was especially the case in Bangladesh because of the Rana Plaza factory collapse.

B. EU Development Cooperation

The case studies show the EU has been a longstanding development partner through CAs. They acknowledge that trade alone cannot support sustainable development, and it must be complementary to development cooperation. Bangladesh and Sri Lanka's CAs with their 'essential elements' clauses and coupled opportunity to take 'appropriate measures' have had a lesser role than the EU-Vietnam PCA. The EU-Vietnam PCA was upheld as signalling a new phase in EU trade and development relations, a bridge between trade and sustainable development in the same way as the Compact was described.

The PCA is unique in its aspects of incorporating elements of decent work like RBC, thus it is posed in a much more positive light than Sri Lanka and Bangladesh's CAs. The PCA also has some bite, allowing for 'appropriate measures' to be taken where rights are violated. An updated or revised PCA for all EU trade partners/beneficiaries will ensure meaningful and effective decent work improvements and be a welcome update to the narrow approach of the CAs. They should include the prospect of appropriate measures, as discussed in Chapter Seven. The PCA can be a useful umbrella framework for the EU's external relations in trade and development as depicted in Vietnam.

Development funding complements the development cooperation agreements. The EU has put in place 2014-2020 MIPs with each of the countries which lack labour rights objectives. However, the MIPs provide necessary funding to build democratic contexts which will assist with EU engagement with workers' rights in those countries.

C. EU Trade and Sustainable Development Instruments

i. Significance of the GSP

The first thing that is notable from the case studies is all three countries benefit from the GSP (prior to entry into force of the EU-Vietnam FTA). Bangladesh has made greatest use of the preferences, which has had positive effects on its economic and social development. The importance of the GSP EBA was obvious in Chapter Five: all interviewees were aware of the EBA and the prospect of GSP withdrawal, awareness that was lessened with the Compact. This was put down to the significance of EU trade for Bangladesh, unparalleled in Sri Lanka and Vietnam. This is evident in the finding that in Sri Lanka, few interviewees were aware of the GSP+ and its role in the RMG industry. Those that were expressed negative perceptions of withdrawal, premised on issues of sovereignty. The greater awareness of the different schemes, the higher prospect of the forms of conditionality having impact on workers' rights in the RMG industry.

ii. Negative Conditionality in Sri Lanka and Bangladesh

The assessment of the prospect of negative conditionality in Bangladesh underlined several factors accounted for in the decision for withdrawal, a very different scenario to the operation of GSP+ withdrawal from Sri Lanka.

Politically, the prospect of EBA withdrawal was perceived to have damaging effects on the EU's relationship with Bangladesh. This was not a government operating in isolation from international cooperation as in Sri Lanka. Economically, the withdrawal from Bangladesh was predicted to inflict heavy losses on the RMG industry. An employer research participant even pointed to a new level of 'sweatshop' that would be created in the event of withdrawal. In these circumstances, trade needs to be moulded into sustainable development. Withdrawal would not be putting decent work first. Despite negative reports of job losses and factory closures after Sri Lanka's GSP+ withdrawal, the impact of negative conditionality there was found to have been buffered by factors like supplier relationships and U.S. trade. It was, however, noted that as

withdrawal of the GSP+ only downgraded it to a GSP, the EU's leverage may in fact have been lessened.

In Bangladesh, ILO assessments played a paramount role in the decision against GSP EBA withdrawal, including the 2016 special paragraph, CFA case law and CEACR conclusions. Overall, it was found that these indicated the presence of serious and systematic violations, enough to trigger GSP withdrawal. Uniquely, in the ILC the GSP was referenced as leverage for the improvement of labour rights, a reflection of the intertwining of trade and decent work at ILO level. As shown, GSP+ withdrawal from Sri Lanka did not involve the assessment of labour rights of RMG workers. It was criticised for the EU's preference for civil and political rights over economic and social rights.

Civil society had a role in both Sri Lanka's EU GSP+ withdrawal and in the EU's consideration of EBA withdrawal from Bangladesh. In the former, withdrawal was perceived as justice for the Tamil population, although the point was also made that withdrawal has been connected to loss of trade union leverage as the GSP+ gave unions a driving force for rights. In the latter, civil society such as CCC called for an initiation of the GSP investigation, but this contrasted research participant fears, both of unions, local CSOs and employers, of GSP EBA withdrawal. There was no equivalent sense that GSP withdrawal was justice for RMG workers or victims of Rana Plaza, the difference being their dependence on jobs and income directly related to the GSP EBA.

iii. Ex-ante Engagement with Labour Rights

Chapter Six and Seven's assessment of EU engagement with labour rights prior to the grant of the GSP+ and signing of the EU-Vietnam FTA shows that the EU falls short. The GSP+ assessment of Sri Lanka leading to the re-grant of the trade scheme was criticised for not comprehensively accounting for labour rights violations in the RMG industry. The EU was more interested in granting the GSP+ due to expressed political willingness to change in future, as opposed to changes prior to granting the scheme. Chapter Six stressed the attitude

of the EU that re-granting the GSP+ did not equate to an acknowledgement that the situation was ‘perfect’.

The process leading up to the signing of the EU-Vietnam FTA likewise did not adopt an ex-ante comprehensive assessment of labour rights in the RMG industry. Human rights were presented as side-lined in negotiations, excluded from an SIA and diverted to the now defunct U.S. TPP side agreement. Unlike in Sri Lanka with the re-grant of the GSP+, the EU failed to engage with civil society and missed a window of opportunity to discuss labour rights violations. Instead, the EU is funding an ILO project working towards ratification of Vietnam’s remaining ILO fundamental conventions. This is criticised as not going far enough, and HRIAs need to be re-designed and utilised consistently in FTA negotiations and should be considered for GSP+ beneficiaries.

iv. Improvements in Decent Work in Practice and Positive Conditionality

Across all case studies, actual and prospective improvements to decent work for RMG workers have been noted. There were several positive changes to Bangladesh’s RMG industry. Overarching these were a change in attitudes of RMG stakeholders and increased awareness of the ILO and EU’s influence in the RMG industry, which were upheld as positive improvements for RMG workers. The changes, and their scale, are unique to the Bangladesh case study, on account of the Bangladesh Compact and its pillar structure.

Chapter Five split changes into the time after Rana Plaza, identified as the first phase, and after the ILO’s special paragraph, identified as the second phase. Under the first, identified changes such as to the minimum wage and labour law were criticised as mainly superficial. In the second phase, changes were described as more substantive owing to the combined leverage of the ILO’s special paragraph and threat of EBA withdrawal. This shows combined EU and ILO enforcement can lead to positive labour rights’ improvements.

There were encouraging changes to workplace safety in Bangladesh which are threatened by difficulties financing remediation of

factories failing to meet safety standards. It suggests that the EU integrate remediation funding into development cooperation. It also highlights factory management dissatisfaction of having to comply with many initiatives. Chapter Five articulates the role of the EU in dealing with this dissatisfaction, which will involve working with brands and retailers in RBC.

Nevertheless, the EU has taken an arms-length approach to RBC in both Bangladesh and Sri Lanka. In Bangladesh, the Compact's RBC pillar excludes pricing, showing a lack of EU influence in promotion of supply chain codes of conduct. This has influenced a situation where factory management and government has become hostile to the perceived 'imposition' of RBC initiatives like the Accord. In Chapter Six, the EU's approach to RBC has been with a business guide for Sri Lankan exporters on the GSP+. The EU must undertake an in-depth assessment of ways to foster relationships between those at different levels of the supply chain. This can be through funding ILO projects in the RMG industry, done well in EU MS funding of the ILO's Better Work programme.

Without 'pillars' and commitments as in the Bangladesh Compact, the operation of the GSP+ in Sri Lanka has not led to changes to labour law or more effective tripartite dialogue. Freedom of association and collective bargaining even lacks detail in tools like Sri Lanka's Human Rights Action Plan. Nevertheless, unique to this case study was the finding of the expectation of direct worker benefit as a result of the GSP+. Research participants expected a filtering-down mechanism including features like higher wages for factories using GSP+ preferences. This can only be attributed to the GSP+'s positive conditionality, leading to an expectation of extra workers' rights unparalleled in the other case studies. The expectation was highlighted as going further than the GSP+ conditions and is described as 'enhanced implementation'. Sri Lanka's ratification of the Protocol on Forced Labour was also put forward as 'enhanced implementation'.

Prospectively, enhanced implementation can occur through the EU-Vietnam FTA as its SDC centralises the 2030 Agenda, going further

than the GSP+, GSP EBA and even the Compact. The Compact was evaluated as ‘deep engagement’ and a bridge between trade and sustainable development, but it was criticised in Chapter Five for its exclusion of factors like wages, women’s rights and OSH. In contrast, Chapter Seven describes the SDC as giving decent work a ‘voice’, incorporating issues like RBC, women’s rights and even a prospect for engagement on wages. The critique expressed in the chapter is that the SDC’s provisions are largely aspirational, not demanding change. This has created difficulties which are expressed, such as in monitoring the commitments in the SDC.

As to the enforcement process in the EU-Vietnam FTA, this is presented as a route for dispute settlement which gives flexibility for cooperation and dialogue. Whilst the Panel of Experts and its recommendations have been utilised by the EU against South Korea, the procedure is depicted as unlikely to have strong impact as recommendations are non-binding. Chapter Seven discusses the link between the SDC and the PCA, which allows for stronger enforcement. It suggests that this is ‘back-door’ conditionality, where the EU could have integrated labour rights as a silver thread equally through conditionality in both SDC and FTA.

Alike to the institutional monitoring framework in the Bangladesh Compact, the EU-Vietnam SDC has the potential to ensure effective frequent discussions on labour rights. Nonetheless, akin also to the distrust impeding successful tripartite dialogue in Bangladesh, in Vietnam dialogue is described as impeded by the socialist system, lack of union independence and civil society freedom. Where dialogue does take place with civil society in the DAG structures, those consulted have limited power. Their reports may not even be read by high-level officials making the final decisions. Chapter Seven draws upon negative assessments made of EU FTA dialogue to present a doubtful prospect of success.

Of the country case studies, no other instrument paralleled the Compact’s extent of engagement with such a range of RMG stakeholders. The weightiest factor behind its success in engagement is its exclusive focus on the RMG industry such that it could leverage a

greater number of specific changes. Such an exclusive focus is not possible through the GSP+ or EU-Vietnam FTA without an additional separate instrument like the Compact or EU-ILO funded projects under the remit of the trade schemes.

III. General Conclusions

EU trade and development co-exist. This research has grounded them in an international law framework, including labour law, trade law and development cooperation. This framework is complex and fragmented. In Chapter Two, an assessment was made of the international framework and its implications for trade and labour rights in the RMG industry.

First, the thesis grounded the international labour law framework of the ILO in its principles of social justice, decent work and 'labour is not a commodity'. This thesis has shown how these principles can be applied to the RMG industry with the effect that it is the clothes that must remain the commodity, not the workers, who are commoditised through labour rights violations. It highlights the challenges faced by the ILO since its establishment, leading to adaptation of law and policy to secure social justice. The Chapter stresses that although the EU cannot ratify ILO conventions, it has multifaceted interactions with them, including through ILO technical assistance. One of the most notable forms of technical assistance in the RMG industry has been the ILO's Better Work programme.

Second, Chapter Two examines WTO law, using as a starting point the failure to include a social clause. The WTO is highlighted as lacking a labour rights dimension and a relationship with the ILO. Yet, the Chapter argues that, instead, the relationship between the ILO and WTO needs to be strengthened through the ILO's acknowledgement of the WTO when making statements on protectionism and comparative advantage. It subsequently assesses arguments that the WTO Article XX exceptions should be used for labour rights, namely those on public morals, protecting human life and goods produced by prison labour. It claims that even if they were, the Article XX tests are stringent and

unlikely to be satisfied, and a necessary territorial connection would be lacking.

Following from this, Chapter Two evaluates the protectionist quotas that were imposed on the textiles and clothing industry. It portrays them in a paradoxical light as when the quota system was in operation to protect the industries of developed economies, efforts were made to endow developing countries with a role in the WTO, through non-reciprocity and preferential trade in the GSP. Chapter Two underlined the *EC-Tariff Preferences* case as central to the establishment of objective standards for obtaining the GSP. The WTO stalemate, following the Doha round of negotiations, has held back affirmation of the needs of developing countries, aligning them with the UN's SDGs.

Third, at UN level, SDG 8 on decent work and economic growth now plays an important part in shaping the EU's trade and development policies. Notwithstanding critique, the combination of decent work and economic growth is viewed as necessary. The goal is an alternative to the WTO's social clause, tackling the negative effects on decent work that economic growth can bring and setting the stage for the inclusion of labour rights within trade.

How does the EU respect this international framework within its trade and sustainable development policies? In Chapter Three, this thesis discussed how the EU has attempted to make trade a vessel for decent work, a shift which comes across prominently in the new generation FTAs. It argued that sustainable development is a core norm given the 2030 Agenda, and decent work a minor norm. Development cooperation policies follow this, increasingly focused on decent work, consistent with the CJEU's acknowledgement of the connection between human rights and development.

In the context of trade, the Chapter analyses the EU's rights-based approach to development. Its 2017 Consensus on Development and Action Plan on Human Rights and Democracy demonstrates its commitment to labour rights. Accordingly, the EU participates in industry-specific RBC through initiatives like the Bangladesh Compact. Chapter Three stresses the European Parliament's flagship initiative on the RMG

industry, which proposes binding legislation on due diligence and a wage-setting mechanism following ILO standards, as a ground-breaking proposal that could bring about a bolstered push for decent work, but it is unlikely to be implemented.

The thesis follows with an analysis of positive and negative conditionality. Chapter Three found significant leeway in the lengthy GSP withdrawal process. Negative conditionality is considered linked to ILO condemnation, although still uncertain in its boundaries, giving room for challenges to withdrawal decisions. Conditionality was portrayed as context-based as opposed to purely rights-based. As suggested in Chapter Three, the EU could set clearer boundaries for withdrawal with a further Regulation. Chapter Three also perceived the GSP conditions as potentially violating the principles of indivisibility, a narrower list than that for positive conditionality.

In contrast, positive conditionality (the GSP+) was found to be more about deep engagement as a form of GSP 'poster child'. This was notwithstanding questionable human rights records of GSP+ beneficiaries. Criticism was made of the ease at which countries can obtain the GSP+, so long as there is no serious failure to implement one or more of the 27 conventions. At the other end of the spectrum is praise for the EU's developing relationship with the ILO through GSP+-related projects as this provides transparency and capacity to GSP+ beneficiaries.

Chapter Three concludes with an assessment of the EU's new generation trade policy. It found comprehensive SDCs with dialogue and cooperation existing in enforcement procedures. It used the EU's move to initiate enforcement in the EU-Korea FTA as an indication of the future use of enforcement in the FTAs, but with questionable future impact.

This thesis has presented a multi-faceted, country-specific approach to assessing the effectiveness of EU trade and sustainable development instruments in promoting labour rights in the RMG industry of the Asian country case studies. Most changes in the RMG industry have occurred in the Bangladesh case study, a finding directly linked to

the incident of Rana Plaza creating the centrifuge for international attention.

From the analysis presented in this thesis, the EU must maintain and strengthen its relationship with the ILO to ensure legitimacy and credibility in its promotion of labour rights in trade partner/beneficiary countries. Proactive EU-ILO engagement in Compact-style initiatives like the PCA bridges trade and sustainable development and, where they are industry-specific, they can channel efforts into places where they are most needed. Engagement with decent work through all trade instruments is vital to go beyond a narrow focus on CLSs and include elements like RBC and pricing issues. Notwithstanding shortcomings in the EU's trade and sustainable development instruments in law and practice, this thesis shows that the EU does, and can, effectively promote labour rights in the RMG industry through trade and sustainable development instruments.

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