

UNIVERSITY OF TARTU
SCHOOL OF LAW
Department of Public Law

Johannes Borbe

**BUSINESS AND HUMAN RIGHTS:
HUMAN RIGHTS OBLIGATIONS OF THE EU WITH REGARD TO THE RIGHT
TO DEVELOPMENT IN EXTRATERRITORIAL POLICY ACTIONS
- AN ASIAN CASE STUDY -**

Master Thesis

Supervisor: Prof. Merilin Kiviorg, Ph.D.Law
and Prof. Julia Laffranque, Ph.D., Dr. Juris

Tallinn
2023

Summary

This master thesis aims to analyse the potential effects of the EU external trade policy focusing on the trade agreements with Asian countries, in particular, India, the Philippines, and Indonesia. The effects the thesis analyses in these countries primarily concern the Human Right to Development. Although on the international level, it is a non-legally binding, soft law instrument, it is recognised as an inalienable human right that is part of the people's right to self-determination. Furthermore, it is interlinked with the UDHR, the ICCPR, and the ICESCR, known as the International Bill of Human Rights. The Declaration on the Right to Development constitutes the rights and duties of states to formulate appropriate national development policies in Art.2 Para.3, which requires the international community to cooperate with the states in such a way that they can fulfill their obligation (see Art.3 Para..3 and Art.4 Para.1). The responsibility of states to prevent and redress business-related human rights violations is recognised in the United Nations Guiding Principles, which aim to address business-related human rights violations by providing responsibility for businesses and their host states, known as human rights due diligence and corporate social responsibility. The thesis argues that in combining the Right to Development and the Guiding Principles on Business and Human Rights, one can assume that states and businesses, particularly multinational enterprises, must respect the Right to Development. If the host states do not regulate companies under their jurisdiction, they also violate the Guiding Principles and the Right to Development. Since this thesis is concerned with EU foreign policy, which opens up the possibility for EU companies to violate these human rights, the EU might be accountable because it does not act in such a way that will contribute to the fulfillment of the responsibility of its member states, as this thesis argues.

Furthermore, while the EU claims in its founding treaties to be founded based on values like human rights, the rule of law, and democracy, this does not seem to affect the EUs foreign policy actions in developing countries, which are often described as aggressive or applying double standards in its insistence on the integration of human rights clauses. It is a practice that is heavily criticised in different academic fields for its inconsistency. Furthermore, this thesis argues that it is not appropriate to make the chance for development through trade depend on the EU assessment of the human rights situation in other countries with a similar level of human rights protection by the national constitution and international human rights law. This is the case because, in this way, the EUs foreign policy practices interfere with the Asian countries' sovereign policy choice to regulate their territory and its resources in accordance with the countries' constitutions. At the same time, European states violate the same rights as the concerned Asian states, at the same time while demanding the protection of

human rights. This thesis points out that if the trade agreements discussed in the thesis were concluded, they would have adverse effects on some parts of the mentioned countries' economies and significantly increase and worsen the existing poverty of the countries' societies, further violating the described Right to Development. Considering the experience of the three countries with which this thesis is concerned, the author concludes that the European policy in adding to the currently visible block-building in the world might have a negative impact on the EU's own economic position. This thesis comprises five chapters and is separated into two main parts using different research methods. The first part of chapters 1-3 consists of an analysis based on legal texts from textbooks, articles, and other available sources. While Chapters 4-5 comprise the second part of the thesis, which consists of a legal comparative method to provide an understanding of the level of protection of human and fundamental rights in the Indian, Philippines, and Indonesian constitutions, which offers the opportunity to compare it with the protection of human rights in the EU.

Keywords

Development, human rights, EU requirements, trade agreements, Corporate social responsibility

Résumé

Käesoleva magistritöö eesmärk on analüüsida ELi väliskaubanduspoliitika võimalikku mõju, keskendudes Aasia riikide, eelkõige India, Filipiinide ja Indoneesiaga sõlmitud kaubanduslepingutele. Mõju, mida lõputöö analüüsib nendes riikides, puudutab eelkõige inimõigust arengule. Kuigi rahvusvahelisel tasandil on see õiguslikult mittesiduv, pehme õiguse (ingl *soft law*) instrument, on seda tunnustatud kui võõrandamatut inimõigust, mis on osa rahvaste enesemääramisõigusest. Lisaks on see seotud inimõiguste ülddeklaratsiooni, kodaniku- ja poliitiliste õiguste konventsiooni ning majanduslike, sotsiaalsete ja kultuurialaste õiguste rahvusvahelise paktiga, neid kolme tuntakse rahvusvahelise inimõiguste deklaratsioonina. Vastavalt Arenguõiguse deklaratsiooni art. 2 lõikele 3 kujutab see endast riikide õigust ja kohustust kujundada asjakohast riiklikku arengupoliitikat, mis kohustab rahvusvahelist üldsust tegema riikidega koostööd nii, et nad saaksid oma kohustust täita (vt art. 3 lg 3 ja art. 4 lg 1). Riikide vastutust ettevõtlusega seotud inimõiguste rikkumiste ärahoidmise ja heastamise eest tunnustatakse ÜRO juhtpõhimõtetes, mille eesmärk on tegeleda ettevõtlusega seotud inimõiguste rikkumistega, nähes ette ettevõtete ja nende asukohariikide vastutuse, mida tuntakse kui inimõiguste nõuetekohast hoolsust ja ettevõtte sotsiaalset vastutust. Magistritöös väidetakse, et ühendades arenguõiguse ning äritegevuse ja inimõiguste juhtpõhimõtted, võib eeldada, et riigid ja ettevõtted, eelkõige rahvusvahelised ettevõtted, peavad austama arenguõigust. Kui asukohariigid ei reguleeri oma jurisdiktsiooni alla kuuluvaid ettevõtteid, rikuvad nad ka juhtpõhimõtteid ja arenguõiguse deklaratsiooni. Töös käsitletakse ELi välispoliitikat, mistõttu on ELi ettevõtetel võimalus neid inimõigusi rikkuda, seetõttu võib EL olla vastutav, sest ta ei tegutse nii, et see aitaks kaasa oma liikmesriikide vastutuse täitmisele, nagu käesolevas töös väidetakse.

Lisaks, kuigi EL väidab oma aluslepingutes, et ta on rajatud sellistele väärtustele nagu inimõigused, õigusriik ja demokraatia, ei näi see mõjutavat ELi välispoliitilist tegevust arengumaades, mida sageli kirjeldatakse kui agressiivset või topeltstandardeid kohaldavat, kui ta nõuab tungivalt inimõiguste klauslite integreerimist. See on praktika, mida erinevates akadeemilistes valdkondades kritiseeritakse selle ebajärjekindluse tõttu. Lisaks sellele väidetakse käesolevas töös, et ei ole asjakohane panna kaubanduse kaudu toimuva arengu võimalust sõltuma ELi hinnangust inimõiguste olukorrale teistes riikides, kus inimõiguste kaitse on sarnasel tasemel riikliku põhiseaduse ja rahvusvahelise inimõiguste õiguse alusel. See on nii, sest sel viisil sekkub ELi välispoliitika praktika Aasia riikide suveräänsesse poliitilisse valikusse reguleerida oma territooriumi ja selle ressursse kooskõlas riikide põhiseadustega. Samal ajal rikuvad Euroopa riigid samu õigusi kui asjaomased Aasia riigid, nõudes samal ajal inimõiguste kaitset. Magistritöös jõuti järeldusele, et kui antud töös

käsitletud kaubanduslepingud sõlmitakse, avaldavad need negatiivset mõju riikide mõnedele majanduse osadele ning suurendavad ja süvendavad oluliselt riikide ühiskonnas valitsevat vaesust, rikkudes veelgi kirjeldatud õigust arengule. Võttes arvesse kolme riigi kogemusi, mida käesolev lõputöö käsitleb, järeltab autor, et Euroopa poliitika, mis annab juurde lisa praegu maailmas nähtavale alustalade ehitamisele, võib avaldada negatiivset mõju ELi enda majanduslikule positsioonile. Magistritöö koosneb viiest peatükist ja on jagatud kaheks peamiseks osaks, milles kasutatakse erinevaid uurimismeetodeid. Esimene osa, mis koosneb peatükkidest 1-3, koosneb õigustekstide analüüsist, mis põhineb õpikutel, artiklidel ja muudel kättesaadavatel allikatel. Peatükid 4-5 moodustavad töö teise osa, mis on koostatud võrdleva õiguse meetodil, et anda ülevaade inim- ja põhiõiguste kaitse tasemest India, Filipiini ja Indoneesia põhiseadustes. Need annavad võimaluse võrrelda seda inimõiguste kaitsega ELis.

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Table of Contents	6
Abbreviations	9
Introduction	11
Chapter I The External Human Rights Policy of the EU	
1. Fundamental Principles of the EU- Primary EU Law	19
2. The Role of Business and Human Rights in the EU Law	20
3. Introduction of the CCP	20
4. The Brussels Effect	23
5. Actions of the EU in the Field of Business and Human Rights	24
6. EUs Legal Authority to Enact Human Rights Legislation	25
Chapter II Accountability of the EU Based on the UNGP	
1. Accountability of the EU for Extraterritorial Human Rights Violations Caused by European Companies	30
2. Legal Extraterritorial Responsibilities of the EU	32
3. International Human Rights Law Obligations - Requirements of the UNGP on Business and Human Rights	33
4. Accountability of the EU for Violations of Human Rights	34
5. EUs Obligations under the UNGP	36
5.1 Due Diligence as Central Element of the UNGP	36
5.2 The EUs Obligation to Carry Out Human Rights Impact Assessment	38
5.3 Access to Remedy of Victims of Extraterritorial Human Rights Violations through EU Trade Agreements in EU Courts	40
5.4 Collective Access to Remedy in the EU for Victims of Extraterritorial Human Rights Violations in the Context of EU Trade Agreements	42
Chapter III The Right to Development as an International Human Rights Obligation in the Context of the EUs Foreign Policy Actions	
1. Introduction to the Right to Development	45
1.1 Legal Obligations under the Right to Development	47
1.2 The Fight against Poverty and the Right to Development	48
1.3 The Right to Development in the Context of the Sustainable Development Goals	50
2. Interim Conclusion	51

Chapter IV Case Study on the Impact of EU Trade Agreements on the Protection of Human Rights in Asia

1. Introduction	52
1.1 Human Rights in Asia	53
2. Protection of Human Rights in Asia	54
2.1 Protection of Human Rights in India	54
2.1.1 Fundamental Rights	54
2.1.2 International Human Rights Instruments in India	56
2.2 Protection of Human Rights in the Philippines	56
2.2.1 Fundamental Rights	56
2.2.2 International Human Rights Instruments in the Philippines	57
2.3 Protection of Human Rights in Indonesia-	57
2.3.1 Fundamental Rights	57
2.3.2 International Human Rights Instruments in Indonesia	59
3. Protection of Human Rights in the ASEAN Human Rights Declaration	59
4. Interim Conclusion	62

Chapter V Analysis of EU - Asia Trade Agreements Concerning their Effect on Human Rights

1. India	63
1.1 Strategic Partnership	63
1.2 Bilateral Investment and Trade Agreements	64
1.3 Human Rights Issues in the India FTA Negotiation Process	65
1.3.1 Lack of Transparency	65
1.3.2. Influence of an EU- India FTA on Indian Agriculture and Dairy Sector	65
1.4. Interim Conclusion	68
2. The European Trade Policy in ASEAN States	69
2.1 Introduction	69
2.2 Human Rights in the EU-ASEAN Relations	69
3. Philippines	70
3.1. EU-Philippines Framework Agreement on Partnership and Cooperation	70
3.2. Negotiations of a Potential FTA	73
4. Impact of the Potential EU Indonesia CEPA	74
4.1. Partnership and Cooperation Agreement	74

4.2. Human Rights Impacts of a Potential EU-Indonesia CEPA	75
4.2.1. Palm Oil Industry Related Issues	75
4.2.2. Other Human Rights Issues	77
Conclusion	80
Bibliography	87

Abbreviations

AA	Association Agreement
Art.	Article
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
BITA	Bilateral Investment and Trade Agreement
BRICS	Brazil, Russia, India, China, South Africa
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCP	Common Commercial Policy of the EU
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention of the Elimination of All Forms of Discriminations Against Women
CEPA	Comprehensive Economic Partnership Agreement
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFR	Charter of the Fundamental Rights of the EU
CIL	Customary International Law
CJEU/ECJ	Court of Justice of the European Union/European Court of Justice
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
DFID	British Department for International Development
ECHR	European Charter of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EPA	Economic Partnership Agreement
EU	European Union
EUCFR/CFR	European Charter of Fundamental Rights
FRA	European Union Agency for Fundamental Rights
FPIC	Free, Prior and Informed Consent
FTA	Free Trade Agreement
G20	Group of Twenty
G7	Group of Seven
GATT/WTO	General Agreements on Tariffs and Trade
GATT	
GC	General Court of the European Union
GDP	Gross Domestic Product
GSP/GSP+	EU Generalized Scheme Preference
HRIA	Human Rights Impact Assessment
HRW	Human Rights Watch
ICCPR	International Convention on Civil and Political Rights

ICESCR	International Convent on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
ILC	International Law Commission
ISDS	Investor-Stat Dispute Settlement Mechanisms
ISPO	Indonesian Government Sustainable Palm Oil Certification Scheme
ITO	International Trade Organisation
MNC	Multi National Corporation
NAP	National Action Plan
NGO	Non- Governmental Organisation
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
Para	Paragraph
PCA	Partnership and Cooperation Agreement
PCIJ	Permanent Court of International Justice
PTA	Preferential Trade Agreement
RSPO	Roundtable on Sustainable Palm Oil, International Palm Oil Certification Schemes
RTD	Right To Development
R2P	Responsibility to Protect
SVS	Savage-Victim-Saviors
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
ToL	Treaty of Lisbon
UDHR	Universal Declaration of Human Rights
UN	United States
UNGP	UN Guiding Principle on Business and Human Rights
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
WTO	World Trade Organisation

Introduction

The fact that the European Union (EU) sanctioned significant parts of the trade it had before the Russian attack on Ukraine shows how the EU uses its trade policy to express its opinion on certain political situations. This politicisation of the EU's trade relations also affects its policy regarding the conclusion of trade agreements with third countries. Young and Ülgen describe this trade policy connection to influence third countries' internal policies as a globalist policy.¹ In addition to the economic influence the EU wishes to gain with its foreign trade and investment policy. It starts to develop a link between trade and human rights. With the Treaty of Lisbon (ToL) from 2009, the EU, among other policies, applies its way of thinking that trade is linked to human rights into its foreign policy, for example, by human rights clauses in the concluded agreements.² This policy seems to be more affected by an ideological way of thinking about the world, which reveals more about the inner conflict of the European Union than it does about the situation in third countries. This conflict is highlighted by the EU's desire to create a common economic market and strengthen its global economic position and protect human rights inside of its territory and even outside of its borders while getting access to minerals, metals, and other resources from developing countries. At the same time, there are significant barriers to access to remedy in EU courts for victims of extraterritorial human rights abuse, as the author will show. This connection of a superior trading position with human rights conditionality almost seems like the EU is trying to 'lecture' other countries on human rights.

Dole describes this external policy of using a superior position to provide economic incentives to other countries in exchange for their agreement to implement European standards in trade agreements as neo-colonialism.³ This description is not surprising given that the developing countries' chances for further development depend on their agreement with the EU's assessment of compliance with values like human rights protection and democracy, influencing the development prospects of their partner countries. Suppose this is the case in negotiations with Asian countries. In that case, it may violate the affected Asian contracting states' and societies' Right to Development, which is linked to self-determination and full sovereignty over natural wealth and resources as Art. 1.2 of the Declaration of the

¹ Youngs, R., Ülgen, S., The European Union's Competitive Globalism, Reviewing Globalisation, Carnegie Europe 17 February 2022.

<https://carnegieeurope.eu/2022/02/17/european-union-s-competitive-globalism-pub-86329>.

² Velluti, S., The Promotion and Integration of Human Rights in EU External Trade Relations, Utrecht Journal of International and European Law 32(83) 2016, p.41.

³ Dole, T., Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights-Advantages and Disadvantages in Weiß N., Thouvenin, J.-M., The Influence of Human Rights on International Law, Springer 2015, p.226.

Right to Development constitutes.⁴ The European Court of Justice (CJEU) addressed the question of the extraterritorial scope of the EU law in a few famous judgements, such as Portugal v. Council,⁵ Front Polisario Case,⁶ and Commission v. Council.⁷ UN human rights expert Alfred de Zayas also addressed the potential risks of this EU policy.⁸ The author of this thesis aims to argue for the acceptance of an inherent link between the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the Right to Development (RTD). States are primarily responsible for creating national and international favourable to realising the right to development.⁹ Although the Right to Development is considered a human right, which the state has to provide for all people, a report by the British Department for International Development (DFID) described that individuals can also be duty bearers under the Right to Development. According to the report, it can be considered that minority groups are seen as beneficiaries. The report further argues that states, in some cases, can be regarded simultaneously as duty holders and right holders. For example, states have an obligation to formulate appropriate national development policies. According to the cited report, this could mean that states can have human rights claims against other states and even the international community, for example, in cases where the international community limits the state's ability to develop appropriate development policies. As the cited report points out, this would be against the traditional understanding of human rights.¹⁰ Therefore the Right to Development could possibly be seen as the coalescence of conventional human rights law with the traditional international law domain, which would, in the opinion of the author of this thesis, potentially open up the possibility for similar more people-centered norms in the future. This could be a chance to introduce more effective legal mechanisms, for example, in environmental law. The United Nations Office of the High Commissioner for Human Rights (UNOHCHR) describes the Right to Development as simultaneously individual and collective.¹¹ This cited fact sheet points out the state's duty to respect, protect and fulfill all human rights, including those covered under the Right to Development. This specifically

⁴ UNOHCHR, the Right to Development at a glance, downloadable https://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf.

⁵ CJEU Judgement Portugal v. Council, 3 December 1996, C-268/94.

⁶ CJEU Case C-104/16 P, (Front Polisario) from 21 December 2016.

⁷ CJEU Commission v. Council from 11 June 2014, Case C-377/12.

⁸ UNOHCHR, EU/Trade agreements: UN rights expert warns against bypassing national parliaments, 24 June 2016, <https://www.ohchr.org/en/press-releases/2016/06/eu-trade-agreements-un-rights-expert-warns-against-bypassing-national>.

⁹ UNOHCHR, The Right to Development at a glance, downloadable, https://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf.

¹⁰ Piron, L.-H., The Right to Development, A Review of the Current State of the Debate for the Department for International Development, DFID 2002, p.12.

¹¹ UNOHCHR, Fact Sheet No.37, Frequently Asked Questions on the Right to Development 2016, p.3ff.

includes the state's obligation to safeguard individuals and groups against violations of their rights by third parties.¹²

This above written argumentation questions the appropriateness of the insistence on integrating human rights conditionality clauses in the EU trade agreements. Especially that all the analysed countries are members of the three primary international human rights instruments Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR) known as the International Bill of Human Rights. Furthermore, it can be argued that such clauses do not, in all cases, lead to development-friendly treaties. In addition, since the Russian attack on Ukraine, international media reports a higher activity of the BRICS countries.¹³ This development hints at a shift in global economic influence since more countries want to join BRICS or at least prefer to establish trade relations with BRICS members rather than the EU. As this introduction has shown, the link between economic benefits and human rights raises some questions related to international law and human rights. This thesis aims to analyse the legal connection between the Asian countries' Right to Development and the European external obligations arising from its external trade policy under the United Nations Guiding Principles.

In today's modern globalised world, multinational enterprises have become the biggest player in world trade, reaching a level where some of them have budgets that exceed the Gross Domestic Product (GDP) of some nations (presumably developing countries) GDP. This negatively influences individual nation-states' ability to establish and control the rules of the economic system. Problems can arise when host states do not have the capacity to apply their own national laws to these multinational corporations acting on their territory or when home countries are not willing to regulate or limit the multinational corporations under their jurisdiction or their activities. The former international economy, with a political and diplomatic sphere and total and unique state power, has been replaced by a multinational economy where multinational corporations (MNCs) play an increasingly decisive role in globalisation¹⁴, Taboada Calatayud et al. write. This change in the international world made it necessary to address this development, which was the UN's aim when the UNGP was drafted.

¹² UNOHCHR, Fact Sheet No.37, Frequently Asked Questions on the Right to Development 2016, p.3ff.

¹³ English.Gov.CN, the State Council, the People's Republic of China, BRICS countries vow to deepen business cooperation, June 9 2022.

https://english.www.gov.cn/news/international/exchanges/202206/09/content_WS62a14a42c6d02e533532be44.html.

¹⁴ Taboada Calatayud, M.J., et al. The Accountability of Multinational Corporations for Human Rights' Violations, Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol n° 64/65, p.172.

The United Nations Guiding Principles aimed to address business-related human rights violations in such a way that will prevent them from happening ex ante and provide access for remedy ex post. The author of this thesis argues that if the EU's external policy requires countries to comply with trade agreements that negatively affect some sectors of business, the EU must be responsible for the violations of human rights which occur in this context.

However, in a widely criticised decision¹⁵, the ECtHR argued that membership in an international organisation could not cover states' individual responsibility for human rights violations. This leads to legal uncertainty for the victims of human rights violations, mainly if multinational business enterprises violate their human rights.

The underlying research problem this thesis addresses is the right for development protection in the European trade agreements and the possible issues regarding its enforcement. One of these problems is a potential lack of accountability for violations of the United Nations Guiding Principles and other international and EU law instruments, which are linked to the right to development that seems to exist in the EU's external policy. Therefore this thesis seeks to address the following questions:

1. To what extent would the EU external policy affect the people's Right to Development that has to be provided by the state?
2. Can the EU be made responsible under the UN Guiding Principles on Business and Human Rights for human and workers' rights violations under the European Charter of Fundamental Rights and international human rights documents?
3. Would the European external policy conflict with international human rights obligations such as the right to health, access to food, right to education, right to a human income, and others linked to the Right to Development?
4. Does the link between human rights and trade limit the Right to Development and its related rights in a positive way, or is that just a political agenda¹⁶ as it is sometimes criticised?¹⁷
5. To what extent does the EU's trade policy interfere with the principle of sovereignty established under international law and confirmed in the Permanent Court of International Law (PCIJ) Lotus case¹⁸ by making the national economy produce for European states and

¹⁵ Douglas-Scott, S., The European Union and Human Rights after the Treaty of Lisbon, *Human Rights Law Review* Vol.11 Issue 4 2011, p.665ff.

¹⁶ Bartels, L., The Trade and Development Policy of the European Union, *The European Journal of International Law*, Vol.18 No.4 2007, p.756.

¹⁷ Dole, T., Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights-Advantages and Disadvantages in Weiß N., Thouvenin, J.-M., *The Influence of Human Rights on International Law*, p.225.

¹⁸ In the "Lotus case" the Permanent Court of International Justice established the opinion that states are sovereign and therefore they only can be bound to fulfill obligations under international treaty law to which they gave their consent, see S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10 (Sept. 7); para.44.

access the European market depending on compliance with European values?

6. What are the EU's obligations regarding its external policy decisions under the UN Guiding Principles on Business and Human Rights?

7. How far is the EU fulfilling its obligation to provide access to remedy for extraterritorial business-related human rights violations?

The described EU practice could violate the contracting states' sovereign rights, as noted in the Lotus case, because it could constitute a case of an abuse of the unequal bargaining power between the two parties. By abusing its bargaining power, the EU could hinder the Asian countries' freedom of consent in the formation of treaty relations.¹⁹ Following the Vienna Convention on the Law of Treaties, the cited author points out that

treaties resulting from the threat or use of corrective threats are not binding.

Regarding consent to treaties, the noted author points out that the Vienna Convention on the Law of Treaties is limited to ensuring that the terms of the treaties do not violate the peremptory norms of international law. Otherwise, states are free to agree to the most unequal treaty terms, she notes further.²⁰ The impression that the EU is using its bargaining power in the above-described way is further proven by Hachez, who points out, that the partner countries for trade agreements are often developing countries. Therefore he concludes that the concluded agreements are not mainly focussing on trade issues but more on non-trade issues such as promoting democratic values and human rights in those countries. And therefore, the term "development agreements" would be more accurate.²¹ The Right to Development today has become an internationally recognised and protected right under the United Nations Declaration on the Right to Development of 1986.

The European trade agreement has already been discussed in different academic fields, such as foreign policy, economy, and ethics. In the field of international law and human rights, the area of business and human rights is relatively new. If trade relations are covered from a human rights perspective, the research mainly focuses on African countries, less than on Asian countries, as this thesis will. Focussing on Asia is especially interesting because there are already well-established trade relations with the European Union. Furthermore, the EU is most recently trying to establish additional trade agreements with Asian countries.

That means that any interferences in the internal policies of a state is not in accordance with international law when it is not agreed in the treaty in question. Since trade agreements apply certain obligations to comply with EU standards, they should comply with the principles that were established in the "Lotus Case".

¹⁹ See De Jonge, A., From Unequal Treaties to Differential Treatment: Is There a Role for Equality in Treaty Relations?, Asian Journal of International Law Vol.4. 2014, p.126.

²⁰ Ibid.

²¹ Hachez, N., "Essential Elements' Clauses in EU Trade Agreements: Making Trade Work in a Way that Helps Human Rights?" Cuadernos Europeos de Deusto 82, Núm. 53/2015, p.84.

Within this research, it will be necessary to include sources from the above-named academic fields and combine them when necessary. A third aspect that has to be analysed is the effect of treaty obligations for both parties in this agreement. The connection between international contract law and international business law with the business and human rights field contains potential for new discussions in EU law and business and human rights. The method that will be used can be described as divided. It is partly based on a text analysis of legal documents. The other central part of this paper will consist of the related legal comparative case study. Where available, legal practices such as case law of international courts will be integrated into the analysis. As all the countries mentioned in this thesis are members of the ICCPR and the ICESCR, for the purpose of this thesis, this argument does not concern the obligation to fulfill these international conventions but instead, the sovereign right to choose how these instruments are integrated into the national law context as long as the countries practice is not in violation of this international human rights instruments.

The first chapter focuses on establishing what the EU does to secure human rights in countries with trade relations in the context of human rights due diligence and corporate social responsibility obligations. Both concepts refer to the UN Guiding Principles on Business and Human Rights. Human rights due diligence is a legal concept that extends the responsibility for human rights violations which can be attributed to states. This introduces a new level of responsibility for global businesses under state jurisdiction. Since the Guiding Principles of Business and Human Rights were introduced, states have been responsible for human rights violations by businesses working in their jurisdiction but outside their territory.²² Corporate Social Responsibility (CSR) is a duty that applies to all businesses and, therefore, to their home states to comply with environmental law, workers' human rights standards, and other applicable international law obligations in their business operations all over the world.²³

The second chapter will elaborate on the accountability of the EU for extraterritorial corporate human rights violations through the UNGP. It will establish in how far the EU possesses legal extraterritorial responsibility. Furthermore, it will introduce the different duties of the EU and its member states under the UNGP.

The third chapter introduces the Right to Development, which is constituted in the 1986 UN General Assembly Declaration on the Right to Development and refers to states as duty holders with obligations to protect the enshrined rights of the people under its jurisdiction who are the holder of the rights granted in this declaration. The author of this thesis argues

²² See McCorquodale, R., et al., Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises, *Business and Human Rights Journal* 2 2017, p.189f.

²³ See Mares, R., Decentering Human Rights from the International Order of States: The Alignment and Interaction of Transnational Policy Channels, *Indiana Journal of Global Legal Studies*, Vol.23, No.1 (Winter 2016), p.175ff.

that by infringing on the states' sovereign polity space through trade agreements, the EU might violate the states' opportunity to secure the enjoyment of the enshrined rights of its citizens. The chapter connects the Right to Development and the fight against poverty. Poverty contradicts society's chances for economic, social, and cultural development and hinders the enjoyment of the Right to Development. According to the declaration on the right to Development, states and the international community are obligated to create development-friendly policies.

The fourth chapter constitutes the beginning of the case study included in this thesis and provides an overview of the human rights protected in Asia. Furthermore, it shows which fundamental rights India, the Philippines, and Indonesia protect in their constitutions. This will provide an opportunity to compare the three constitutions regarding protected rights and a possibility to compare it with the rights protected in the EU. Likewise, this chapter will show which international human rights the three chosen countries have agreed to protect.

The fifth chapter will analyse the European trade agreements with the selected Asian states, which are still under negotiations. This chapter will show that although the agreements are not concluded, they are expected to have an effect, especially on the poor parts of society, as the analysis of the public information will show. This chapter further describes how the European external trade policy has affected the protection of human rights in the selected countries. Especially with the related development of the new east-west block-building tendency, it is worth analysing the EUs actions and their outcome for the human rights situations in these countries. This is especially interesting when we consider that the G7, in which most members are EU members before last year's G20 summit in Indonesia, have shown great interest in pulling the country away from Russia and BRICS and tried to tighten its relations with these countries.²⁴ Another country that does not follow the EUs wishes to sanction Russia is India, as sanctioning Russia would not go along with India's economic interests.²⁵ A country that was less discussed in the European media yet, but also tends to have increased relations with the BRICS states is the Philippines.²⁶ Furthermore, in the case of India, the EU

²⁴ Institut Montaigne, Indonesia: Looking Up to Russia, and Away from Europe, Three questions Gilang Kembara, 18 July 2022 <https://www.institutmontaigne.org/en/analysis/indonesia-looking-russia-and-away-europe>.

²⁵ Ravi, A., Why India Won't Condemn Russia, Foreign Policy, 11 April 2022, <https://foreignpolicy.com/2022/04/11/india-russia-ukraine-war-diplomacy/>.

²⁶ Espeña, J., How the Russia-Ukraine War Will Impact Philippines-Russia Relations, Despite steady improvements in defense ties, there isn't much at stake in the two countries' bilateral relations, The Diplomat 25 March 2022. <https://thediplomat.com/2022/03/how-the-russia-ukraine-war-will-impact-philippines-russia-relations/>.

is the country's biggest trading partner.²⁷ An excursus on the EU Vietnam FTA in this chapter will further show that while demanding the human rights conditionality of its partner countries, the EU does not always fulfill its own human rights obligations.

²⁷ Eberhardt, P., Kumar, D., Trade Invaders, How big business is driving the EU-India free trade negotiations, Corporate European Observatory, India FDI Watch Brussels, Delhi, 2010, p.8., https://corporateeurope.org/sites/default/files/publications/trade_invaders_0.pdf

Chapter I The External Human Rights Policy of the EU

1. Fundamental Principles of the EU- Primary EU Law

Art. 47 states that the EU possesses international legal personality and therefore is an independent entity in its own right. That implies that the EU has the ability to conclude and negotiate international agreements in accordance with its external commitments, become a member of international organisations, and join international conventions.²⁸

Many other authors have shown a visible shift in the last decades from a trade union to a policy-establishing union led by its fundamental rights and the idea to strengthen them over the world.²⁹ The EU constitutes this commitment at the center of its internal policy. Art. 2 TEU states that the EU is founded *inter alia* on the value of respect for human rights.³⁰ Only one paragraph further, in Art. 3(1), the TEU provides the basis for promoting its values. Art. 6 TEU provides the key human rights provision that gives legally binding status to the Charter of Fundamental Rights of the European Union (EUCFR), provides for the EU members' obligatory accession to the European Convention on Human Rights (ECHR), and references fundamental rights as general principles of EU law. These three articles have to be read in conjunction with each other.³¹ It must be noted that this strong commitment to human rights was not always at the center of the European states' attention, which gets visible when the EUs treaties are compared to the original European Economic Community (EECs) provisions. This assumption is further proven by the Court of Justice of the European Union (CJEU) case law, which confirms that fundamental rights have not been a domain of the EEC.³² Because of this, Velluti writes:

*The narrative of a Europe of fundamental rights constitutes a carefully constructed political myth of the EU, which has not yet impeded the EU to develop narratives on fundamental rights at a later stage which claim retrospectively are and have always been inherent in the EU.*³³

²⁸ EUR-Lex Publications Office of the European Union Glossary Team, Legal personality of the Union, last update 24.03.2017, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:union_legal_personality

²⁹ Velluti, S., 'The Promotion and Integration of Human Rights in EU External Trade Relations', Utrecht Journal of International and European Law 2016 32(83), p.41-68.

³⁰ Ibid., p.43

³¹ Ibid.

³² See CJEU Case 1/58 Friedrich Stork & Cie v High Authority of the European Coal and Steel Community and CJEU Case 40/64 Marcello Sgarlata and Others v Commission of the EEC.

³³ Velluti, S., 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32(83) Utrecht Journal of International and European Law, p.43f.

The EU's integration of its values into its external policy makes it necessary to consider the scope of the EU's fundamental principles, which were discussed in various articles³⁴. The discussion about the scope of the extraterritorial applicability of the EU law is of significant importance for developing the answer to the question this paper raised in its introduction. Therefore it will be discussed in greater detail in one of the following parts of this paper.

2. The Role of Business and Human Rights in the EU Law

Since its creation in its current form, the EU has been increasingly active in adopting norms that directly or indirectly affect European businesses, as Parodi notes.³⁵ She further argues that the freedom to conduct a business can be limited in accordance with Art. 52 of the Charter, if the limitation is provided by law, respect the rights and freedom related to business.³⁶ Although she shows that there has been a shift in how the EU deals with businesses, Parodi notes in her text that the CJEU seems to have no clear tendency. However, she notes that in cases where enterprises claim a violation of their rights and freedoms, the court's decision appears to favour the business.

In contrast, according to her case law analysis, the CJEU, in cases that concern individual claims of violations of fundamental rights, will most likely decide in favour of the individual.³⁷ In her last paragraph, Parodi comments on the right to judicial protection in cases of human rights violations caused by businesses. According to her, victims of human rights violations by businesses have a right to an effective remedy and a fair trial which is granted under Art. 47 of the EU Charter. She notes that this right is limited to human rights violations outside the EU territory but by EU businesses. Therefore she argues victims of such actions do not fall in the scope of Art. 47 EU Charter and do not have a possibility to complain before EU courts.³⁸

3. Introduction of the Common Commercial Policy of the EU

The ToL is the legal basis for the EU's approach to establishing a link between trade- and non-trade issues. It forms the base of introducing the Common Commercial Policy of the EU (CCP). One of the first effects of the CCP was the introduction of the so-called essential

³⁴ See for example Gammage, C., 'A critique of the extraterritorial obligations of the EU in relation to human rights clauses and social norms in EU free trade agreements', *Europe and the World: A Law Review* Vol.2(1) 2018, p.1-20 or Ryngaert, C., *EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations*, *International Community Law Review* Vol.20 2018, p.374-393.

³⁵ Parodi, M., *The EU Charter of Fundamental Rights as the Source of Judicially Enforceable Obligations to the Activity of Private Companies*, in Buscemi, M., Lazzerini, N., Magi, L., Russo, D., *Legal Sources in Business and Human Rights, Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.99.

³⁶ *Ibid.*, p.103f.

³⁷ *Ibid.*, p.112.

³⁸ *Ibid.*, p.116.

element clauses in bilateral trade -and investment agreements. Another important feature introduced in the CCP was the application of human rights conditionality in the context of the EU's system of generalised preferences for developing countries, known as the Generalised Scheme of Preferences or (GSP+).³⁹ This policy fulfills the requirement of the EU in Art. 207 Treaty on the Functioning of the EU (TFEU) imposed on itself. Art 207 TFEU states *[that] the common commercial policy shall be conducted in the context of the principles and objectives of the union's external actions,*⁴⁰

described above. In the context of the influence of this European policy approach, it is noteworthy that even the CJEU confirmed the obligation

*to observe International Law in its entity, including Customary International Law (CIL).*⁴¹ This could, as Kube writes, also mean that the EU's foreign trade and investment policy must be in accordance with the Universal Declaration of Human Rights (UDHR)⁴² and other related human rights law documents. Another important aspect the EU must consider when acting outside its territory is the application of its rights. Important to name in this context is the CFR (European Charter of Fundamental Rights), which, according to van Elsuwege, applies in this case.⁴³ This could mean that a European trade agreement that does not provide the opportunity to complain before European courts in case of a violation of human rights or fundamental rights would, in theory, lead to a breach of international human rights obligations. Moreno-Lax and Castello provide an additional argumentative approach for discussing if the CFR has extraterritorial applicability. They suggest interpreting the CFR in a way that does not apply to specific territories but to areas in which the EU is active.⁴⁴ The opinion that the CFR must be extraterritorially applicable is further confirmed by the ECJs case law, as the case of *Mugraby*⁴⁵ or the already cited *Front Polisario* case⁴⁶.

Although the court did not further elaborate on this point in the *Front Polisario* case, it mentioned another problem. Suppose the EU can be held responsible for human rights violations in the context of its trade agreements. In that case, the question that must be asked

³⁹ Van Elsuwege, P., *The Nexus between Common Commercial Policy and Human Rights: Implications of the Lisbon Treaty* in Hahn, M., van der Loo, G., (eds.), *The law and practice of the Common Commercial Policy: the first 10 years after the Treaty of Lisbon*, Brill/Martinus Nijhoff 2020, p.416.

⁴⁰ *Ibid.*, p.417.

⁴¹ CJEU Case C-366/10, from 21 December 2011, ITAA, EU:C:2011:864, Para.101.

⁴² Kube, V., 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?', *EUI Department of Law Research Paper*, No. 2016/10, p.20.

⁴³ Van Elsuwege, P., *The Nexus between Common Commercial Policy and Human Rights: Implications of the Lisbon Treaty* in Hahn, M., van der Loo, G., (eds.), *The law and practice of the Common Commercial Policy: the first 10 years after the Treaty of Lisbon*, Brill/Martinus Nijhoff 2020, p.422.

⁴⁴ Moreno-Lax, V. and Costello, C., 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity: the Effectiveness Model', in Peers, S., et al. (eds.), *Commentary on the EU Charter of Fundamental Rights*, Nomos 2014, p.1682.

⁴⁵ CJEU Case *Muhamed Mugraby v. Council*, Case C-581/11 P of 12 July 2012.

⁴⁶ CJEU Case C-104/16 P, (*Front Polisario*) from 21 December 2016.

is: Do victims of human rights violations through EU external policies have a right to submit a case because of the violations of EU fundamental rights and human rights before the courts of the EU? And if this right exists, what are the conditions for the persons whose rights are violated in the context of actions that can be attributed to the EU? The CJEU's conclusion was that the Front Polisario group does not fulfill the requirements to have legal standing.⁴⁷

Another critical point concerning the integration of human rights conditions in bilateral Free Trade Agreements (FTAs) is made by Kolsky Lewis. She concluded in her article that while positive impacts through human rights clauses in bilateral trade agreements cannot always be ruled out, these positive impacts can be described as marginal. This is further proven by the fact that the most corrupt countries, as well as the countries which most seriously violate human rights, according to her, do, in most cases, not participate in FTAs.⁴⁸ Then, the cited author agrees with others in the context of this work already mentioned authors on the fact that since most FTAs are concluded between a developing country and a developed country, the bargaining power is unequal. This, according to her, would lead to the exclusion of developing countries and their interests. She concludes that agreements on the World Trade Organisation (WTO) level would be more favourable for developing countries as bilateral FTAs since the WTO would give them a voice in the process of policies that affect them.⁴⁹ In the context of this thesis, the most recent action the EU has undertaken to improve its due diligence mechanism also has to be considered, namely the adoption of its negotiating position (general approach) on corporate sustainability due diligence directive. This directive applies to large EU companies as well as to non-EU companies. It contains obligations for large companies regarding actual and potential adverse impacts on human rights and the environment.

Furthermore, it includes penalties and civil liability mechanisms for businesses that violate the obligations.⁵⁰ Kilimcioğlu commented that even the draft directive falls short of complying with the UNGPs and the OECD Guidelines. Therefore she concludes that it is disheartening to see a pioneering country in the field of business and human rights (by becoming the first member state to adopt a vigilance law) trying so hard to undermine the obligations of the financial sector.⁵¹

⁴⁷ Gammage, C., 'A critique of the extraterritorial obligations of the EU in relation to human rights clauses and social norms in EU free trade agreements', *Europe and the World: A Law Review* Vol.2(1) 2018, p.7.

⁴⁸ Kolsky Lewis, M., *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means*. Loyola University Chicago *International Law Review* Vol.12 No.1 2014, p.21f.

⁴⁹ *Ibid.*

⁵⁰ See Council of the European Union Press release from 01 December 2022, Council adopts position on due diligence rules for large companies, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/>

⁵¹ Kilimcioğlu, B., *How Does the Financial Sector Relate to the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive?*, EJIL Talk February 22 2023, <https://www.ejiltalk.org/how->

4. The Brussels Effect

The expressed wish of the EU to implement its values outside its borders through bilateral economic agreements by linking values to economic strengths seems to be consistent with the Brussels Effect, which refers to the EU's unilateral ability to regulate the global market place as Bradford describes in her book with the same title.⁵² She explains that the Brussels Effect emerges through the EU's market force. It arises from a set of enabling conditions sustained by markets rather than the EU's active efforts to export its regulation. Therefore this theory shows that markets are transmitting the EU's regulation even to market participants and regulators. The author of this thesis agreed with Bradford that the EU is using its economic strength as a norm-setting power through trade agreements such as FTAs and Preferential Trade Agreements (PTAs). According to Bradford, that also includes extraterritoriality and territorial extension. The territorial extension allows the EU to regulate activities outside of the EU but has a negative effect on the EU.⁵³ This regulatory power of the EU, which leads to the Brussels Effect, is sometimes criticised as regulatory imperialism because it interferes with the sovereign right of a government to exercise legislative jurisdiction over its territory.⁵⁴ As Bradford shows in the book's last chapter, the Brussels Effect is under threat from inside and outside the EU.⁵⁵ Although the EU tries to implement its values through its external trade policy, as stated among other values in the ToL and other EU policies. Therefore it tries to use what can be described as the Brussels Effect. The Brussels Effect seems to have lost some of its influence. Maybe this was because other countries developed an understanding of the EU's intention and instead turned to other trading partners, such as China, which would shrink the influence of the Brussels Effect. From an international law perspective, it would be understandable for other states to be reluctant to give up their sovereign rights to the EU *de facto* or *de jure*, as Bradford describes in her book. In the view of the author of the thesis, Bradford's analysis has missed discussing another result of the Brussels Effect, which is the fact that when the EU acts outside of its own territory through its own legislation of third parties, it might be accountable for violations of rights that can be related to the EU, as it will be discussed in one of the following chapters of this thesis.

[does-the-financial-sector-relate-to-the-european-commissions-proposal-for-a-corporate-sustainability-due-diligence-directive/](#)

⁵² Bradford, A., *The Brussels Effect, How the European Union Rules the World*, Oxford University Press 2020, p.1ff.

⁵³ See *Ibid.*, p.85f.

⁵⁴ See *Ibid.*, p.247f.

⁵⁵ *Ibid.*, p.265ff.

5. Actions of the EU in the Field of Business and Human Rights

As shown above, the number of legislations by the EU in order to be able to address potential risks for human rights has increased over recent years. While the EU has encouraged its member states to include the UNGP in the form of so-called NAPs (National Action Plans) in their national legislations⁵⁶, this paper is more focused on the EU's approach to the evolving business and human rights field. One of the first of these measures was the development of coherent European Corporate Social Responsibility (CSR) legislation by the European Commission, followed by the implementation of a new CSR strategy in 2011 with the aim to address business-related human rights impacts.⁵⁷ The effect of the European CSR policies is monitored and regularly reported.⁵⁸ The actions taken by the European Commission have also influenced the EU Parliament, which pointed out the importance of a European CSR policy in two resolutions in 2012. These are European Parliament Resolutions 2012/2097⁵⁹ and 2012/2098.

Furthermore, the European Parliament insisted on implementing CSR and business and human rights standards regarding the Organisation for Economic Co-operation and Development (OECD) Guidelines in international trade and cross-border business operations.⁶⁰ Business and human rights, especially the UNGP, play a significant role in the process of concluding the Action Plan on Human Rights and Democracy from 2015 in the Council of Europe. Those documents declare the EU's aim to promote and protect human rights worldwide.⁶¹ One action the council requested was to implement the UNGPs into European trade and investment agreements.⁶² In 2017 the Fundamental Rights Agency (FRA) published its expert opinion on improving access to remedy in business and human rights and, therefore, improving the third pillar of the UNGP. In this opinion, FRA points out the importance of access to remedy for implementing the other pillars of the UNGP, which are

⁵⁶ Bordignon, M., National Action Plans and Their Legal Value in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., Legal Sources in Business and Human Rights, *Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.199.

⁵⁷ Gata, F.L., From Soft International Law on Business and Human Rights to Hard EU Legislation? in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., Legal Sources in Business and Human Rights, *Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.254.

⁵⁸ Ibid, p.255.

⁵⁹ European Parliament Resolution 2012/2097 on Corporate Social Responsibility: Promoting Society's Interest and a Route to Sustainable and Inclusive Recovery.

⁶⁰ Gata, F.L., From Soft International Law on Business and Human Rights to Hard EU Legislation? in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., Legal Sources in Business and Human Rights, *Evolving Dynamics in International and European Law*, Bill Nijhoff, p.256.

⁶¹ EU Council, EU Strategic Framework and Action Plan on Human Rights and Democracy 11855/12.

⁶² Gata, F.L., From Soft International Law on Business and Human Rights to Hard EU Legislation? in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., Legal Sources in Business and Human Rights, *Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.256.

the state's duty to protect and its social responsibilities to respect human rights.⁶³ In its opinion, FRA has made specific recommendations regarding the access to remedy. This includes, among others, removing obstacles to access to justice in extraterritorial cases, Gata points out.⁶⁴

6. EUs Legal Authority to Enact Human Rights Legislation

At the latest, since the ToL, if not earlier through the EUCFR, human rights became part of EU fundamental rights and, therefore, primary EU law.⁶⁵ The EUs authority to enact legislation in the field of human rights is especially important, considering that the constitution for the European Union in 2005 failed to achieve sufficient signatures because of the lack of consent of France and Netherlands citizens.⁶⁶ To assume that the ToL, which replaces the failed European constitution, would somehow have a similar effect as a constitution with the result that the EU member states would become federal states of the united states of Europe which, in the opinion of the author is not a logical conclusion. Therefore the EU member states remain, at least partly, independent entities with their own jurisdiction. Although the author of the thesis has decided to use the term European companies for the reason of simplification, it is important to note that the companies are not registered in the EU but instead remain subjects of the jurisdiction of the member state of the EU in which they have been registered. However, the EU could enact legislation that influences its member states. In the determination that the EU has legislative power, the EU law relies on three principles enshrined in Art. 5 TEU. The first one of these principles is that the EU only possesses the authority conferred upon it by EU treaties. Secondly, the EU's actions cannot exceed what is necessary to achieve the objective of the treaties. Lastly, in areas where neither the EU nor national governments can act, the EU may intervene only if it can operate more effectively.⁶⁷ The areas where only the EU has jurisdiction include the customs union, competition rules, and trade.⁶⁸ In accordance with these principles in the field

⁶³ FRA Opinion 1/2017, Improving Access to Remedy in the Area of Business and Human Rights at the EU Level.

⁶⁴ Gata, F.L., From Soft International Law on Business and Human Rights to Hard EU Legislation? in Buscemi, M., Lazerini, N., Magi, L., Russo, D., Legal Sources in Business and Human Rights, Evolving Dynamics in International and European Law, Bill Nijhoff 2020, p.258.

⁶⁵ Douglas-Scott, S., The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review Vol.11 Issue 4 2011, p.664.

⁶⁶ Columbia Law School Arthur W. Diamond Law Library, European Union Legal Materials, The Constitution for the European Union and the Treaty of Lisbon, last visited 19.02.2023, <https://guides.law.columbia.edu/c.php?g=1221803&p=9087251>

⁶⁷ Muir, E., Fundamental Rights: An Unsettling EU Competence Human Rights Review Vol.15 Issue 1 2014 p.30.

⁶⁸ European Commission. Areas of EU Action, last visited, 19.02.2023, https://commission.europa.eu/about-european-commission/what-european-commission-does/law/areas-eu-action_en

of justice and fundamental rights, the EU and its member states have shared competencies.⁶⁹ The EU, therefore, has the competence to conclude trade agreements, but this does not answer the question of the accountability for human rights violations by European companies. Furthermore, it does not answer the question of responsibility for the European human rights policy in its external relations. This proves Douglas-Scott's argumentation that there has to be a co-respondent mechanism that holds the EU accountable when various member states are concerned, while the "concerned states" become correspondents. And in contrast, when only one member state is concerned, the EU becomes corresponsive.⁷⁰ Douglas-Scott further shows that the European Court of Human Rights (ECtHR) was asked to deal with a further problem. The solution the court developed in the Bosphorus case is known as the Bosphorus presumption.⁷¹ In this case, the Turkish airline charter company Bosphorus Airways, which leased an aircraft to Yugoslav Airlines, complained about the impoundment of this aircraft by the Irish authorities while it was in Irish territory for maintenance operation purposes. The impoundment was grounded on EC Council Resolution 990/93, which implemented UN sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro).⁷² The ECtHR found no violation, and Ireland not to be liable. This was based on the ECtHR's presumption that

*so long, as an international organisation is considered to protect fundamental rights in a manner that can be considered at least equivalent to that for which the convention provides, the court will presume that a state has acted in compliance with the convention, where the state has no discretion in implementing the legal obligation flowing from its membership of the organisation.*⁷³

According to the ECtHR, this presumption could be rebutted where the protection in the particular case is regarded as manifestly deficient.⁷⁴ As Douglas-Scott points out, this presumption of equivalent protection of human rights for the EU has been achieved much criticism. It was questioned why the EU should benefit from such a presumption if no member state of the ECHR would benefit from it. Furthermore, it was criticised that the equivalence assumption would only be rebuttable by the manifestly deficient protection of

⁶⁹ European Commission. Areas of EU Action, last visited, 19.02.2023, https://commission.europa.eu/about-european-commission/what-european-commission-does/law/areas-eu-action_en

⁷⁰ Douglas-Scott, S., The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review Vol.11 Issue 4 2011, p.664f.

⁷¹ Ibid., p.665f.

⁷² ECtHR Bosphorus Airways v. Ireland press release 362 from 30.06.2005.

<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1375632-1436174&filename=003-1375632-1436174.pdf>

⁷³ Douglas-Scott, S., The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review Vol.11 Issue 4 2011, p.665f.

⁷⁴ Ibid., p.666.

rights which would lead to a low abstract standard of human rights reviews instead of being based on the concrete circumstances of the case, as Douglas-Scott further explains in this article.⁷⁵ He continues to show that the reasoning that led to the Bosphorus Presumption refers back to the earlier ECtHR judgment of *M.&Co v. Germany*, where the European Commission of Human Rights held that

*a transfer of powers to an international organisation by a member state would not be incompatible with the states obligation under the ECHR, providing that, within the international organisation, fundamental rights would receive equivalent protection.*⁷⁶

A judgment that, according to Douglas-Scott, seems to be influenced by a similar finding of the German Constitutional Court in its *Solange II–Case*.⁷⁷ With regards to Douglas-Scott, it is unclear if the Bosphorus presumption will survive the EU's accession to the ECHR.⁷⁸ As this paper has shown, the EU was founded based on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and human rights, which are enshrined in Art. 2 TEU in accordance with Art. 7 TEU. The council of the EU has the task of monitoring the fulfillment of these principles by the member states.⁷⁹ As Ahmed and Jesús Buttler point out, the obligation of EU member states to protect human rights is based on the member states national constitution and, according to them, only later became the legal basis for the European community through the ECJs jurisdiction, which makes human rights a community obligation based on Art. 6 TEU.⁸⁰ Another important argument for the context of this thesis is discussed in the cited article. This concerns the fact that after the failed European constitution, according to international law, the EU legally remains an international organisation. In the opinion of the cited authors, states that conduct their activity through international organisations may not be able to cover their accountability through the organisation's conduct.⁸¹

Regarding the question of the legal competencies in the field of human rights, Muir points out that the member states have given the EU legal competencies to act in certain areas of fundamental rights as the right to the protection of personal data and the right not to be discriminated against, enshrined in Art.16 and 19 TFEU. According to that, there, at least

⁷⁵ Douglas-Scott, S., *The European Union and Human Rights after the Treaty of Lisbon*, *Human Rights Law Review* Vol.11 Issue 4 2011, p.667.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p.668.

⁷⁹ See von Bogdandy, A., *The European Union as a Human rights Organisation? Human Rights and the Core of the European Union*, *Common Market Law Review* Vol.37 2000, p.1309.

⁸⁰ Ahmed, T., de Jesús Butler, I., *The European Union and Human Rights: An International Law Perspective*, *The European Journal of International Law* Vol.17 No.4 2006, p.773.

⁸¹ *Ibid.*, p.777.

formally, has not been a legal competence of the EU to act in the area of fundamental rights.⁸² Muir describes further, as she expresses it, the “interesting fact” that the EU develops a link to fundamental rights in areas that may or may not be an expression of the fundamental rights competence of the EU. According to Muir, the EU started establishing levels of protection in policy fields not identified in the catalog of EU competencies, the EU treaties, as directly concerned with fundamental rights protection. This, she writes further, would make it difficult for affected groups or individuals to understand the dynamics of EU intervention on matters of fundamental rights protection. She continues that this can help the EU circumvent a direct and open political debate on the appropriateness of the EU intervention to define specific core values. According to her, this is problematic because the question of legal competence in areas of fundamental rights remains unclear based on the EU treaties.⁸³ This is an interesting observation as it would at least explain the link of the EU's external trade with human rights policies.

In conclusion of this part, it seems that the EU, as shown above, may act in the field of fundamental rights without a clear legal basis for its actions. The member states of the EU, who are also responsible for the jurisdiction over their multinational business enterprises, can be held accountable for violations of fundamental rights as the membership in the EU cannot cover their accountability. This is problematic for member states because it would be their business that violates human rights in Asia by acting in accordance with the trade agreements, which the EU concludes. In addition, this leads to legal uncertainty for the victims of human rights violations as it may be complicated for them to figure out where they have to complain about remedies. Even if they find the proper court, it may still be difficult as the member states could always claim they act in accordance with the trade agreements. If membership in the EU cannot cover national accountability *prima facie*, the victims seem to be left in the deadlock of legal uncertainty. The UNGP is designed to prevent this situation precisely, as this thesis will show. The fact that it is not entirely clear, based on the available sources, if the EU processes a competence to act on behalf of the member states in the field of human rights further strengthens the argument of legal uncertainty. This is the case because although the EU concluded the agreements, which may have influenced the violation of human rights, the actual violation is caused by European or even Asian businesses. That leads to a situation where the victim has to decide between three potential jurisdictions that might be able to satisfy the wish for remediation. Two of the jurisdictions are abroad in Europe, a foreign

⁸² Muir, L., *Fundamental Rights: An Unsettling EU Competence Human Rights Review*, Vol.15 Issue 1 2014, p.26.

⁸³ *Ibid.*, p.33.

system with different rules. That makes it even more difficult for non-Europeans to file a complaint. The jurisdiction in the victim's home country might dismiss the cases with the argumentation that the company who violated the human rights act in accordance with the country's legislation, which is influenced by the trade agreement with the EU. Until such a decision is made, it might be possible that the period to apply to European courts has expired. This could lead to non-compliance with the responsibilities under the UNGP the EU implements in its business policies. As argued before, this non-compliance has a link to the concluded agreements. The lack of attention to its own human rights obligations, for example, under the UNGP, is at least surprising if one considers that the EU is claiming to be founded on values like human rights. Furthermore, these values remain core principles until today, which it aims to strengthen around the world through the integration of its trade and investment agreements.

These agreements may even serve some local branches of business or some local companies. The following chapters of this thesis will show if that would compensate for possible negative consequences for the rest of the local societies in the contracting states of these EU trade agreements.

Chapter II Accountability of the EU Based on the UNGP

1. Accountability of the EU for Extraterritorial Human Rights Violations Caused by European Companies

A working paper that the European University Institutes published shows the obligation of states under the UNGP to protect against human rights abuses within their territory or jurisdiction by third parties, including business enterprises.⁸⁴ The paper points out further that because of the state-business nexus provided by the UNGP, in cases of state-controlled business entities or where acts of business entities can be attributed to the state, the abuse of human rights by the business enterprise may entail a violation of the state's international law obligation.⁸⁵ One of the cases where the ECtHR was asked to elaborate on the conditions under which states are required to secure human rights against corporate abuse was *Fadeyeva v. Russia*⁸⁶, the cited paper points out.⁸⁷ The paper argues further that although the ECHR does not have a direct binding effect on non-state actors. Nevertheless, where negative obligations constitute duties of result, in contrast, positive obligations impose duties of (diligent) conduct on the state to do what is reasonable and appropriate in protecting human rights.⁸⁸ The cited paper shows further that for a negative human rights obligation to arise, corporate conduct must be directly attributable to the state in order for the act of the private business entity can be treated as an act of the state itself.⁸⁹ According to the cited paper, under the domestic law of many Council of Europe member states as well as under the European Union law, corporate activities can be treated as an act of the state by virtue of state ownership and control, by virtue of the operation exercising public functions or by virtue of a combination of both.⁹⁰ But states and their businesses do not only have negative obligations. They also have positive obligations, or duties of diligent conduct, as the cited paper calls it. This means that states are required to take all reasonable and appropriate steps in order to protect individuals against violations by non-state actors. Some of these obligations directly flow from the ECHR.⁹¹ According to the cited study, it was argued that the existence of positive obligations is conditioned by the state exercising full and effective control over the

⁸⁴ Augenstein, D., Dziedzic, L., State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights, European University Institut Working Paper LAW 2017/15, p.5.

⁸⁵ *Ibid.*

⁸⁶ ECtHR Case of *Fadeyeva v. Russia*, Application no. 55723/00 from 9 of June 2005.

⁸⁷ Augenstein, D., Dziedzic, L., State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights, European University Institut Working Paper LAW 2017/15, p.7.

⁸⁸ *Ibid.*, p.7f.

⁸⁹ *Ibid.*, p.8.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, p.9.

area where human rights violations occur.⁹² As this thesis has shown, this could be difficult if business enterprises possess a greater GDP than the countries in which they operate. With regard to extraterritorial violations of human rights, the cited study notes that the UNGP itself does not contain a legal provision that would allow this argumentation.⁹³ This approach, however, seemed to have been changed because, in the draft General Comment on the UNGP, the Committee on Economic Social and Cultural Rights considered that, *extraterritorial obligations arise when a State Party may exercise control, power, or authority over business entities or situations located outside its territory in a way that could have an impact on the enjoyment of human rights.*⁹⁴

As the cited paper notes, this obligation extends to any business entity over which [a State Party] may exercise influence by regulatory means or by using incentives, which the other treaty bodies confirmed. Furthermore, the cited paper notes that the same distinction between direct extraterritorial jurisdiction and domestic measures with extraterritorial implications of the UNGP can be compared to the ECtHR distinction of acts performed outside the state territory and acts producing effects outside the state territory.⁹⁵ This distinction was approved in the ECtHR judgment in the case of *Al-Skeini*⁹⁶, which, according to the cited paper, can be regarded as the leading case on the extraterritorial applications of the ECHR.⁹⁷ This case law led, as the cited paper shows, to three obligations concerning corporate-related human rights violations: 1. the state's duty to prevent corporate-related human rights violations in relation to acts performed outside the state's territory, 2. the state's obligation to prevent corporate-related human rights violations in relation to acts producing effects outside the state's territory, and 3. state obligations to redress corporate-related human rights violations committed outside the state's territory.⁹⁸ Following this distinction from the *Al-Skeini* judgment, the circumstances in which acts performed outside of the state's territory bring an individual under the state's jurisdiction can be summarised into three categories, the cited paper points out. The first of these categories is effective control over a person located outside the state's territory. The second is effective control over an area located outside of the state's territory, and lastly the exercise of public powers on the territory of another state with the latter's invitation, consent, or acquiescence.⁹⁹ These categories of extraterritorial human rights

⁹² *Ibid.*, p.10.

⁹³ *Ibid.*, p.22.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ ECtHR Case of *Al -Skeini and others v. the United Kingdom* Application number: 55721/07.

⁹⁷ Augenstein, D., Dziedzic, L., *State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights*, European University Institut Working Paper LAW 2017/15, p.22.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, p.23f.

violation exist per the ECtHR case law for each category the author of the cited analysis summarises. The problem with corporate human rights violations is that the standard effective control test does not apply in this context. In the business and human rights context, the extraterritorial human rights violation will be committed by a corporate non-state actor, a constituent part of which the parent company is domiciled within the states territorial jurisdiction and thus under its defacto and dejure jurisdiction and control, where corporate conduct is directly attributed to the state.¹⁰⁰ Therefore the author of the cited analysis concludes that extraterritorial corporate human rights abuse can bring an individual under the state's human rights jurisdiction. Both of the above-described cases where a person can be in the European human rights jurisdiction are of potential interest within this thesis. The question that therefore needs further discussion is if EU trade agreements can be considered acts producing effects outside the state's territory.

2. Legal Extraterritorial Responsibilities of the EU

Having established the EUs responsibility to act by the norms of international law and human rights, this part of the thesis comments on some of the specific obligations. Some of them have already been mentioned in the context of this thesis before, as the responsibility to act development-friendly and therefore take the right to development into consideration and the rights of self-determination. Another not yet mentioned legal concept that must be taken into consideration is the rising importance of international business in the responsibility to protect, as Forrer and Seyle argue in their book on the topic.¹⁰¹ By far, the most essential international laws that have to be respected by international businesses can be found in the relatively new field of business and human rights, of which the most important rules are included in the UN Guiding Principles. It is important to note that the UNGP provides obligations for international business and requires states to provide suitable conditions for businesses to fulfill their obligations. The ECtHR has addressed the positive obligations of the states to protect and respect human rights in the context of business and human rights in several decisions, such as *Strock*,¹⁰² *Costello-Roberts*,¹⁰³ and *Powell*.¹⁰⁴ As shown by Forrer and Seyle, business and human rights do not contain isolated obligations. Still, they can be interpreted as building a legal bridge between themselves and the other legal obligations named above.

¹⁰⁰ *Ibid.*, p.27f.

¹⁰¹ Forrer, J., Seyle, C., (Eds.), *The Role of Business in the Responsibility to Protect*, Cambridge University Press 2022, pp.1-8.

¹⁰² ECtHR Judgement *Strock v. Germany* Application No. 61603/00 from 16 June 2005, Para.27.

¹⁰³ ECtHR Judgement *Costello-Roberts v. UK* Application No. 13134/27 from 25 March 1993, Para.103.

¹⁰⁴ ECtHR Judgement *Powell and Rayner v. UK* Application No. 9310/81 from 21 February 1990, Para.42.

3. International Human Rights Law Obligations- Requirements of the UNGP on Business and Human Rights

On the 16 of June 2011, the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights that the former Secretary-General Special Representative for Business and Human Rights John G. Ruggie has developed. The adoption of the UNGP marked the end of the discussion on the appropriate way to address the growing influence of businesses, described in the introduction of this thesis, which started in the past WWII period with the first discussion in the International Trade Organisation (ITO). However, this first attempt to address business-related human rights abuses remained unsuccessful.¹⁰⁵ Until in the 1970s, the UN Draft Code of Conduct for Transnational Corporations (UN Draft Code) was proposed by the developing countries. For the first time, it contains the provision to respect human rights. Following years of negotiations between developing and developed countries, it was abandoned¹⁰⁶ and, therefore, can be considered the next unsuccessful attempt to address corporate human rights abuses. This process of developing primarily voluntary guidelines to regulate business was ended by drafting the Norms of Responsibilities of Transnational Corporations and other Businesses regarding Human Rights (UN Norms), which contain non-voluntary obligations, by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003. Due to strong opposition, they were never adopted.¹⁰⁷ At the same time the UN Norms were drafted, the former UN Secretary-General Kofi Annan developed the UN Global Compact, a policy initiative promoting good corporate practices in various areas, including human rights.¹⁰⁸ As a result, of all these experiences, the UN appointed John Ruggie as a special representative who developed the "Protect, Respect and Remedy Framework." This describes the three different but complementary pillars that illustrate states' responsibility for business and human rights issues. This is first the duty of states to protect against human rights abuses by third parties, including businesses, through policies, regulations, and adjudication. Second: the corporate responsibility to respect human rights through due diligence processes that develop the opportunity for corporations to discern, prevent and address human rights impacts and third: the effective access by victims to judicial and non-judicial remedies. After it was adopted by the Human Rights Council, in a second

¹⁰⁵ Choudhury, B., Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into international Investment Agreements, University of Pennsylvania Journal of International Law Vol.38 No.2 2017, p.434f.

¹⁰⁶ See Choudhury, B., Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements, University of Pennsylvania Journal of International Law Vol.38 No.2 2017, p.437f.

¹⁰⁷ See Ibid., p.438.

¹⁰⁸ Ibid., p.439.

report, Ruggie developed it into the Guiding Principles on Business and Human Rights, Choudhury writes.¹⁰⁹ According to him, the UNGP provides a

*smart mix of voluntary and mandatory initiatives that were designed to strengthen human rights in a programmatic matter where change would be created "where it matters most-in the daily lives of people."*¹¹⁰

With the adoption of this document, the UN, for the first time, provided a standard-setting instrument in the field of business and human rights. Furthermore, that was the only time a document not previously negotiated by states was adopted.¹¹¹ Different events during the last several years, of which the most famous and maybe tragic was the Rana Placa Collapse in Bangladesh in 2013, left no other solution than to adopt a different understanding regarding the coexistence of business and human rights. The two fields should not be understood as different fields without a connection and, instead, have to be viewed in the way that business and human rights show clear links that interconnect them to each other.¹¹²

Suppose the EU has extraterritorial human rights obligations, as the author of this thesis agrees with Ryngaert¹¹³ and other cited authors. In that case, the further question that arises is: if victims of human rights violations in the context have sufficient access to an effective remedy as it is constituted in Principle 21 of the UNGP.¹¹⁴

4. Accountability of the EU for Violations of Human Rights

This thesis has already argued above that using the Bosphorus presumption, which the ECtHR developed, leads to legal uncertainty for victims of human rights violations in the context of EU trade agreements.¹¹⁵ Zagel, in her article, describes this situation as a legal gap.¹¹⁶ This problem exists because human rights violations do not only appear because of the involvement of third parties. Violations of human rights, such as those enshrined in the Declaration of the Right to Development, can be directly attributed to the trade agreement negotiated by the EU to benefit the businesses of its member states. Therefore this part of the thesis will give a brief overview of the ongoing discussion regarding this accountability gap.

¹⁰⁹ See Ibid., p.440.

¹¹⁰ See Ibid., p.440f.

¹¹¹ Ruggie, J. G., Global Governance and "New Governance Theory": Lessons from Business and Human Rights, Global Governance Vol.20 2014, p.5.

¹¹² See Choudhury, B., Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements, University of Pennsylvania Journal of International Law Vol.38 No.2 2017, p.431f.

¹¹³ Ryngaert, C., EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations, International Community Law Review Vol.20 2018, p.392f.

¹¹⁴ Bohoslavsky, J.P., Guiding principles on human rights impact assessment of economic policy reforms, The International Journal of Human Rights Vol.24 No.9 2020, p.1425f.

¹¹⁵ See Chapter 1 Section 1.7 of this thesis.

¹¹⁶ See, Zagel, G.M., International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap, Nordic Journal of Human Rights Vol.36 Issue1 2018, p.74f.

This discussion is noteworthy because recently, there has been a trend of states transferring legal power in certain areas to international organisations for them to be able to act on their behalf. This practice is used increasingly by states to create and implement international legal regimes as, for example, described in the Brussels Effect.¹¹⁷ In contrast to their member states, international organisations are not bound by international human rights law treaties because of the consent requirement, Zagel writes.¹¹⁸ Even though it does not seem easy to compare states' powers with those of International Organisations, Zagel notes that there is one exception, which consists of the EU. She describes that the EU holds comprehensive legislative and judicial powers to act with binding legal effect for states and individuals.¹¹⁹ According to her, this makes the legal powers of the EU comparable to those of states and allows for identifying relevant treaty obligations of EU Members attached to the powers transferred to the EU.¹²⁰ To ensure that the EU has the capacity to fulfill all obligations arising from such treaties, the CJEU allows such substitution only in cases where the EU holds the relevant executive powers, Zagel points out further.¹²¹ As shown above,¹²² the member states of the EU transferred their power to negotiate and conclude trade agreements to the EU. Therefore, the EU holds the relevant executive powers and, accordingly to the just described practice, is bound by the member states obligations connected with these powers. This theory is not debilitated by the fact that states can ratify different agreements or exclude an article from their legal recognition. The EU requires that its member states recognise international and European human rights instruments. Although this theory sounds convincing to the author of this thesis, Zagel points out that it is problematic because it disregards the fundamentals of international treaty law and weakens the separate legal personality of international organisations by depriving them of an essential component of that personality.¹²³ As Zagel concludes, if human rights law treaties can not directly bind international organisations, they may be indirectly bound. This would be possible because international organisations are required to respect the member state's human rights obligations and cooperate with the member states to fulfill their obligations when international organisations act according to their powers. This approach is becoming increasingly recognised in international law and an obligation addressed in some general comments, as Zagel points out.¹²⁴ This means that the

¹¹⁷ See Chapter 1 Section 1.5 of this thesis.

¹¹⁸ Zagel, G.M., *International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap*, *Nordic Journal of Human Rights* Vol.36 Issue 1 2018, p.76f.

¹¹⁹ *Ibid.*, p.79.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² See chapter 1 section 1.7 of this thesis.

¹²³ Zagel, G.M., *International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap*, *Nordic Journal of Human Rights* Vol.36 Issue 1 2018, p.89.

¹²⁴ *Ibid.*, p.90.

EU would have to conclude its trade agreements so that it will not hinder its member states from complying with their human rights obligations.

5. EUs Obligation under the UNGP

5.1 Due Diligence as Central Element of the UNGP

As the name Guiding Principles suggests, the UNGP is a soft-law instrument that does not have a legally binding effect. Therefore the UNGP builds on the legal concept of due diligence.

The origins of the legal concept of due diligence date back to the Roman law concept of the *bonus pater familias*, which described the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation.¹²⁵

Today, due diligence is one of the main principles of international law. It defines a duty of the state to take all necessary measures to prevent or react to acts or omissions and requires nothing more or less as to take reasonable measures of prevention that a well-administrated government could be expected to exercise under similar circumstances, Monnheimer writes.¹²⁶ According to Chiussi, the concept is a central part of the ILC's work on the liability of states for lawful acts, where it is a crucial element of the obligation to prevent transboundary harm or hazardous activities.¹²⁷ In cases concerning environmental harm, the ICJ has accepted it in several decisions, she writes further. The consequence of due diligence rules is that states may not have direct responsibility for the actions of third parties. Still, they have responsibility for having failed to take appropriate measures to address or prevent harm caused by third parties under their jurisdiction.¹²⁸ Chiussi describes the concept as the backbone of the state duty to protect human rights by linking the interplay between public and private parties in the application of International Humanitarian Law (IHL). That means states may be internationally responsible if they fail to exercise due diligence to prevent, punish and investigate or redress the harm that private actors caused.¹²⁹ Corporate human rights due

¹²⁵ Chiussi, L., Corporate Human Rights Due Diligence: from the Process to the Principle in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., Legal Sources in Business and Human Rights, *Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.12f.

¹²⁶ See Monnheimer, M., *Due Diligence Obligations in International Human Rights Law*, Cambridge University Press 2021, p.81f.

¹²⁷ McCorquodale, R., Corporate Social Responsibility and International Human Rights Law, *Journal of Business Ethics* Vol.87 2009, p.388f.

¹²⁸ Chiussi, L., Corporate Human Rights Due Diligence: from the Process to the Principle in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., Legal Sources in Business and Human Rights, *Evolving Dynamics in International and European Law*, Bill Nijhoff, p.14f.

¹²⁹ *Ibid.*

diligence is a central element of the second pillar, "respect human rights," of the UNGP.¹³⁰ According to Taylor, human rights due diligence requires companies to undertake several steps, which include the identification and assessment of the actual or potential human rights impacts which the company causes or contributes to through its activities or which may have a link to its operations, products or services by its business relationships.¹³¹ After assessing the impact of their activities, they are required to adapt the operations in the areas that have been found influential for the human rights situation according to the impact assessment results. In the third step, they have to measure and control the effectiveness of the measures that have been introduced to address human rights impacts. In the last step, they have to report on their solutions to address the impacts of their operations on human rights.¹³² The UNGPs approach to business and human rights is also integrated into the OECD Guidelines for Multinational Enterprises.¹³³ According to the OECD Guidelines, a Multinational Enterprise or Company is a company that operates in all sectors of the economy. They usually comprise of companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways, while they may be in private, state, or mixed ownership.¹³⁴ Over recent years there have been multiple states' actions to include due diligence in their national action plans (NAPs). The NAPs aim to introduce mandatory reporting and human rights due diligence processes for enterprises.¹³⁵ The UN Committee on economic, social, and cultural rights has addressed the states' duty to take positive measures to prevent human rights violations by companies under their jurisdiction in General Comment No.24.¹³⁶ In recent years the EU has been more active in adopting mandatory human rights due diligence policies, Chiussi further shows.¹³⁷

¹³⁰ See *Ibid.*, p.16f.

¹³¹ See Taylor, M.B., *Human rights due diligence in theory and practice* in Deva, S., Birchall, D., *Research Handbook on Human Rights and Business 2020*, p.91f.

¹³² Chisussi, L., *Corporate Human Rights Due Diligence: from the process to the Principle* in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., *Legal Sources in Business and Human Rights, Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.17.

¹³³ OECD Guidelines for Multinational Enterprises 2011 P.20 No A10-14 and B1/B2.

¹³⁴ *Ibid.*, p.17 No.4.

¹³⁵ Chisussi, L., *Corporate Human Rights Due Diligence: from the Process to the Principle* in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., *Legal Sources in Business and Human Rights, Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.20f.

¹³⁶ See UN Economic and Social Council Committee on Economic, Social and Cultural Rights, *General Comment No.24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* UN Doc E/C.12/GC/24 Para 16.

¹³⁷ Chisussi, L., *Corporate Human Rights Due Diligence: from the Process to the Principle* in Buscemi, M., Lazzarini, N., Magi, L., Russo, D., *Legal Sources in Business and Human Rights, Evolving Dynamics in International and European Law*, Bill Nijhoff 2020, p.23.

5.2 The EUs Obligation to Carry Out Human Rights Impact Assessment

Because the EU increasingly acts in the way of a foreign policy actor, especially in the context of its trade policy, it becomes essential to address the issue of the accountability of the EU for the human rights impacts of its extraterritorial foreign policy actions.¹³⁸ One of the main requirements of the UNGP is the states' duty to conduct Human Rights Impact Assessment (HRIA). The legal basis for protecting human rights in the context of trade agreements is based on the EUs own fundamental rights through the already discussed Articles 3(5) and 21 TEU. This is furthermore consistent with the EUs own principles and values.¹³⁹ For Jiménez Sánchez,

*this [...] assumes that the EU must guarantee consistency and effectiveness in its foreign relation practice. For her, this implies not only a formal position based on general statements but an active role in defending its key principles for foreign actions.*¹⁴⁰

This is contradicted by Micara, who points out that the ToL does not oblige the EU to protect and fulfill human rights in third countries.¹⁴¹ This paper has already argued that this assumption could be valid from a ToL interpretation focused only on the text itself.¹⁴² When considering the judgments already cited in the introduction of this thesis, such as *Front Polisario v. Council*, the author of this thesis tends more to agree with the argumentation of Jiménez Sánchez, who argues that there is today a legal requirement to protect human rights as part of its foreign relations practices, even if it was not originally part of the ToL. Kassoti and Wessel furthermore confirm this view.¹⁴³

However, Micara points out that the implementation of a Free Trade Agreement FTA can violate human rights if the provisions of the FTA conflict with human rights.¹⁴⁴ Concerning HRIA, Micara points out its importance to prevent ex ante the possibility that the FTA includes provisions that conflict with human rights.¹⁴⁵ The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy provides that human rights should be incorporated in impact assessments of trade agreements.¹⁴⁶ Although there is no legal requirement to carry out HRIAs, the Ombudsman of the European Union pointed out that it

¹³⁸ See introduction of this thesis.

¹³⁹ Jiménez Sánchez, C., EU, Trading and Human Rights: Consistent Framework, *The Age of Human Rights Journal* Vol.17 2021, p.245f.

¹⁴⁰ *Ibid.*, p.246.

¹⁴¹ Micara, A., Human Rights protection in the new generation's free trade agreement of the European Union, *The International Journal of Human Rights* Vol.23 No.9, p.1449f.

¹⁴² See chapter II subsection 2 of this thesis.

¹⁴³ see Kassoti, E., Wessel, R.A., EU Trade Agreements and the Duty to Respect Human Rights Abroad, Centre for the Law of EU External Relations, *CLEER Papers* 2020/1, p.8f.

¹⁴⁴ Micara, A., Human Rights protection in the new generation's free trade agreement of the European Union, *The International Journal of Human Rights* Vol.23 No.9, p.1454.

¹⁴⁵ *Ibid.*, p.1458.

¹⁴⁶ *Ibid.*

would be in conformity with the spirit of the legal provisions mentioned above to carry out a human rights impact assessment. The recommendation of the Ombudsman to carry out an impact assessment without further delay was rejected by the European Commission.¹⁴⁷ While the EU first initially seemed to be reluctant against the legal requirement to conduct HRIAs as part of the process of the conclusion of trade agreements, the EU, in its renewed Action Plan for the years 2015-2019, declares its commitment to continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements, in ex ante, impact assessments sustainability, impact assessment, and ex post evaluation.¹⁴⁸ This aim of the European Union to develop legally binding requirements in the field of business and human rights is necessary because the UNGP is a guideline that is considered a non-legally binding and, therefore, soft law instrument. Even if the EU would not have changed its approach to the conduction of HRIAs under international law, there exists a clear requirement arising from the UNGP for states to conduct HRIAs. This requirement is implemented in the Principles 17-22.¹⁴⁹

The European Ombudsman has furthermore confirmed the EU's obligation to carry out HRIAs in case 1409/2014/MHZ. The case before the Ombudsman concerned the EU- Vietnam FTA that was concluded on 30 June 2019 and entered into force in 2020.¹⁵⁰ This case is noteworthy because it was one of the first individual agreements concluded between the EU and an ASEAN member state. To the knowledge of the author of this thesis, the only case where a non-EU government claimed violation before a European Institution, which in this particular case was the European Ombudsman. The Ombudsman is an institution of the EU following Art.228 TFEU. The EU parliament elects the Ombudsman as an independent and impartial body of the EU that holds the EU institutions and agencies accountable and promotes good administration. The Ombudsman helps people, businesses, and organisations that face problems with EU institutions.¹⁵¹ On 03.09.2014, the European Ombudsman received a complaint from the International Federation for Human Rights and the Vietnam Committee on human rights concerning Case 1409/2014/MHZ with regard to concerns about the negotiations of the EU-Vietnam FTA. The complaints claim that the European Commission has failed to conduct a human rights impact assessment during the process of negotiating the

¹⁴⁷ Ibid., p.1458f.

¹⁴⁸ Ibid., p.1460f.

¹⁴⁹ See Bohoslavsky, J.P., Guiding Principle on human rights impacts assessment of economic policy reforms, *The International Journal of Human Rights* Vol.24 No.9, p.1419ff.

¹⁵⁰ European Commission, EU-Vietnam Trade Agreement and Investment Protection Agreement, last visited 11.02.2023, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en

¹⁵¹ European Ombudsman, last accessed 12.02.2023, <https://www.ombudsman.europa.eu/en/our-strategy/home/en>

EU-Vietnam FTA. The applicants argue that a human rights impact assessment is necessary for the European Commission to conclude such an FTA. The commission argued that a human rights impact assessment is not necessary because in the year 2009, during the process of negotiating an EU-ASEAN FTA, a sustainability impact assessment has been carried out, which was sufficient for the commission in order to be able to negotiate the EU-Vietnam FTA.¹⁵² According to the applicants, the requirement for the European Commission to conduct such a specific human rights impact assessment is based on public international law as well as EU primary law requirements and the Strategic Framework and Action Plan on Human Rights and Democracy of 25 June 2012.¹⁵³ Because of that, according to the applicants, the EU has an obligation to protect human rights abroad. Furthermore, they argue that in contrast to the European Commission's argumentation, the earlier impact assessment does not sufficiently cover human rights issues.¹⁵⁴ The Ombudsman concludes that although there is no legally binding requirement for the European Commission to carry out a human rights impact assessment concerning the Vietnam FTA, it would be in the spirit of Art. 21 (1) and (2) TEU to carry out such a human rights impact assessment. The earlier conducted impact assessment is therefore not sufficient enough to be considered a proper substitute for a human rights impact assessment. The Ombudsman concluded that the European Commissions' refusal to conduct a human rights impact assessment constitutes an instance of maladministration.¹⁵⁵

5.3 Access to Remedy of Victims of Extraterritorial Human Rights Violations through EU Trade Agreements in EU Courts

The question of standing before EU courts is important because access to an effective remedy for human rights violations is a crucial obligation for states. The question, therefore, is, if the EU links its external trade to the promotion and protection of human and fundamental rights, does the EUCFR possess an extraterritorial scope? In contrast to some human rights instruments, the EUCFR does not contain a clause that defines its scope.¹⁵⁶ The only references to the territorial scope of the Charter can be found in Art.52 TEU and Art.355 TFEU, which both refer to the EU member states territory on which both the TEU and TFEU apply. Kassoti furthermore seems to disagree with Moreno Lax and Costello's interpretation of the extraterritorial applicability and agrees with Ryngaerts view that the effective control

¹⁵² European Ombudsman, Case 1409/2014/NHZ Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, p.1.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid., p.6f.

¹⁵⁶ Kassoti, E., The Extraterritorial Applicability of the EU Charter of Fundamental Rights: some reflections in the aftermath of the Front Polisario case, European Journal of Legal Studies Vol.12 No.2 2020, p.122.

test developed by the ECHR can only apply in cases of military activities abroad for which it has been designed initially.¹⁵⁷ The author of this thesis has to disagree with this argument. Because of the effects of globalisation, actions of multinational enterprises under EU jurisdiction can have similar effects on the societies of another state as military activities. The fact that the EU promotes business activities outside of its territory establishes a further link between the actions of these enterprises and the EU. Therefore it cannot be said that there is no such link as it is the case for military actions. Kassoti then researches the question if the Art. 51(1) binds the EU's institutions and member states when implementing EU law.¹⁵⁸ This is a further interesting argument as the EU trade agreements are negotiated by the European Commission. As Kassotti points out in this context, the question is if this applies only in such cases where the EU has the competence to act on behalf of the member states, which will be addressed in the following subsection of the thesis. Even if the extraterritorial applicability of the EUCFR is denied, the remaining question is, does the EU's action to conclude trade agreements with provisions that relate to the international human rights instruments and the European instrument can be seen as a case of territorial extension.¹⁵⁹ Especially in the case of trade agreements, Bartels partly seems to agree that the EU courts have some arguments to assume they might have jurisdiction.¹⁶⁰

For a long time in this regard, the CJEU was criticised for its adherence to the strict interpretation of the standing criteria of Art. 264 TFEU, the court developed in the Plaumann case of 1963.¹⁶¹ In this case, the CJEU decided that Plaumann, who was a German importer of clementines who complained against a decision of the European Commission directed against Germany to refuse the authorisation to lower its duty on the imports of clementines. In this case, the court held that in order to have the right to bring an action for annulment of a decision that is not addressed to them, the applicants must show that they are individually concerned by the decision.¹⁶² According to this so-called Plaumann-Test, this would be the case if the decision

*affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually*¹⁶³

¹⁵⁷ See Ibid., p.126.

¹⁵⁸ Ibid., p.130.

¹⁵⁹ See Scott, J., Extraterritoriality and Territorial Extension in EU Law, The American Journal of Comparative Law Vol.62 2014, p.111ff.

¹⁶⁰ Bartels, L., The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects, The European Journal of International Law Vol.25 No.4, p.1090f.

¹⁶¹ CJEU Case Plaumann v. Commission Case 25/62 of 1963.

¹⁶² Birnat, E., The Locus Standi of Privat Applicants under Art.230(4) EC and the Principle of Judicial Protection in the European Community, Jean Monet Working Paper 12/02, 2003, p.7.

¹⁶³ CJEU Case Plaumann v. Commission Case 25/62 of 1963, Para 197.

The Plaumann and the Venezuela¹⁶⁴ judgement of the CJEU in combination could be a legal basis for natural or legal persons of third countries to be able to complain before EU courts if their economic or human rights are violated as a consequence of the EU foreign economic policy that has been according to many authors who have been cited in this paper, aggressively implemented in European trade and investment agreements. Furthermore, this change by the EU courts follows the access to remedy requirement as the UNGP demands. The only possible scenario where it would make sense for a third country to challenge the EU before its courts would be if the EU uses the conditional human rights clauses it implements in its economic agreement to unilaterally terminate the agreement, which would be a possible use of these clauses. However, states sometimes seem to favour these agreements with the EU as it allows them to gain access to one of the biggest markets, as described above. Therefore, it seems more plausible that foreign NGOs or businesses use the access to European courts to complain about violations of their rights per the EUCFR, such as the right to adequate payment, access to food, access to education, and freedom from hunger as secured under the Declaration on the Right to Development.

5.4 Collective Access to Remedy in the EU for Victims of Extraterritorial Human Rights Violations in the Context of EU Trade Agreements

After the European Commission announced a legislative initiative for mandatory human rights and environmental due diligence on 29 April 2020, several publications have been published on mandatory due diligence. A study by the European Commission on due diligence through the supply chain showed that the European civil society considered access to remedy as one of the most important reasons to introduce mandatory due diligence as a legal standard, as a report of the European Law Institute points out.¹⁶⁵ The cited study makes an important distinction. Speaking of access to remedy would allow two separate conclusions. First, the UNGP allows direct remediation for human rights violations. However, as the report points out, this is not unproblematic, as it would give the violator of human rights the power and responsibility to remedy the damages it caused. Therefore, the second possibility included in the UNGP is important: access to the judicial system of the country, which has jurisdiction over the company that has violated human rights.¹⁶⁶ This is further proven in the next chapter of the cited study, which shows that the UNGP, in its third pillar, provides that states are required to take measures that ensure effective access to remedy in line with their

¹⁶⁴ CJEU Judgement in the Case of Venezuela v. Council C-872/19P from 22 June 2021.

¹⁶⁵ European Law Institute, *Business and Human Rights: Access to Justice and Effective Remedies with Input from the EU Agency for Fundamental Rights*, Vienna 2022, p.16.

¹⁶⁶ *Ibid.*, p.24f.

international law obligations under their domestic jurisdiction.¹⁶⁷ This, the cited paper points out, would also include taking appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights violations, including reducing legal, practical, and other relevant barriers that otherwise could hinder access to remedy.¹⁶⁸ According to them, this would also include the introduction of ways to seek collective remedies. It is especially important in cases where the human rights of a whole group of people are violated¹⁶⁹, e.g., all company workers or all female workers. The cited paper shows that an empirical mapping that FRA did in 2019 has shown that EU companies had been involved in severe human rights incidents within and even outside EU territory in the period of the implementation of the UNGP. Of the 155 collected cases, 45 took place outside of the EU. All the cases collected by FRA concerned persons who have attempted to achieve some form of redress, even if it was unsuccessful.¹⁷⁰ A further study by the EU Parliaments Sub-Committee on Human Rights of 2019 concluded that from the early 2000s until 2019, only 40 foreign direct liability cases were brought before European courts against European companies concerning alleged harm committed abroad. From the 35 examined cases, 20 were civil claims for compensation, and only two of these claims resulted in a positive judicial outcome, the cited paper shows further.¹⁷¹ According to the cited paper, this low number of successful claims of transnational business human rights cases involving EU companies proves

the existence of major barriers for the access of judicial procedures and remedy for overseas victim-claimants,

the paper concludes.¹⁷² The present statement proves the argumentation from an earlier section of this paper.¹⁷³ The cited findings of two independent studies by two major EU institutions lead to a discussion about promoting collective redress mechanisms in the EU. It happened in two waves. First in 2013, after the European Commission's recommendation to the member states concerning this topic, and then again in 2018, due to an EU legislative proposal for a harmonised EU consumer collective redress, which was adopted in law by the EU Consumer Representative Actions Directive.¹⁷⁴ However, as the name suggests, this directive aims to provide better collective rights for consumers. The effect of this policy does

¹⁶⁷ Ibid., p.28.

¹⁶⁸ Ibid., p.29.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid., p.32.

¹⁷¹ Ibid., p.33.

¹⁷² Ibid.

¹⁷³ See for example the discussion of legal uncertainty for victims of extraterritorial human rights violations in chapter I section 6 and chapter II section 4.

¹⁷⁴ European Law Institute, Business and Human Rights: Access to Justice and Effective Remedies with Input from the EU Agency for Fundamental Rights, Vienna 2022, p.33.

not include overseas employees. EU businesses could, therefore, not be affected by this directive. The cited paper shows that the problem of the limit of collective redress mechanisms was also proven by a further FRA study published in 2020. The study covered 32 cases from eight EU member states, 21 cases concerned collective damages. The collective remedy was only used in four of these cases. The main reason for this, the FRA study showed, was the limitation of collective redress mechanisms to consumer protection law and certain aspects of environmental law. In addition, the cited paper shows that various procedural criteria further hindered collective redress claims of victims of extraterritorial rights violations in most member states.¹⁷⁵ The cited paper concludes in line with the opinion of the author of this thesis that

Consumer Collective Redress procedures are grossly inadequate to secure access to remedy, which is demanded by the third pillar of the UNGP,

*which clearly specifies that access to remedy must be available to all right-holders, not just EU Consumers.*¹⁷⁶

As the cited paper points out further, this practice is not in accordance with the provisions of the UNGP third pillar and with the Art.47 of the EU Charter that provides that everyone whose rights and freedoms under the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.¹⁷⁷

¹⁷⁵ Ibid., p.33f.

¹⁷⁶ Ibid., p.34.

¹⁷⁷ Ibid., p.34.

Chapter III The Right to Development as an International Human Rights Obligation in the Context of the EUs Foreign Policy Actions

1. Introduction to the Right to Development

After the end of the cold war, the UN saw the need to deal with a new set of problems that did not have significant priority when the UN Charter and the Universal Declaration of Human Rights were adopted. As a result of this process, the Declaration of the Right to Development was proclaimed in the General Assembly Resolution 41/128 in 1986. Because of the politically charged debate following the adoption, the implementation process was slowed down for several years. Starting with the sole dissenting vote of the USA on the original resolution and lasting until the reaffirmation of the RTD at the second UN World Conference on Human Rights in 1993.¹⁷⁸ It is essential to point out the link between the RTD and the right to self-determination of societies. Although it was a new declaration, it affirms that the Right to Development has been part of all previous human rights documents, none as the international bill of human rights.¹⁷⁹ Even if the Right to Development is not yet a legally binding instrument itself, it draws its foundation from legally binding instruments such as the UDHR, the ICCPR, and the ICESCR.¹⁸⁰ Whereas the RTD is a soft law, it can be described as universally accepted by the world community. It differs from most parts of traditional human rights since it applies to individuals and groups and contains aspects that can form part of CIL if their application suggests that.¹⁸¹ The responsibility to fulfill the obligations contained in these legal documents and, therefore, indirect in the Right to Development applies to all states. According to Kirchmeier,¹⁸² other states are responsible for providing assistance¹⁸³ if the state cannot comply with its duty.¹⁸⁴ This could indicate a possible link between the RTD and the Right to Protect (R2P) of business, according to Forrer and Seyle et al., affirmed in the UNGP. According to Kirchmeier, developing countries claim that the international economic and political order constitutes an obstacle to their citizens' enjoyment of the

¹⁷⁸ Sengupta, A., Right to Development as a Human Right, *Economic and Political Weekly* Vol.36 No.27 2001, p.2527.

¹⁷⁹ See Arts, K., Atabongawung, T., The Right to Development in International Law: New Momentum Thirty Years Down the Line?, *Netherlands International Law Review* No.63 2021, p.231.

¹⁸⁰ Schrijver, N., A new Convention on the human right to development: Putting the cart before the horse?, *Netherlands Quarterly of Human Rights* Vol.38 Issue 2 2020, pp.86.

¹⁸¹ Kirchmeier, F., The Right to Development-Where do we stand? State of the debate on the Right to Development, Friedrich Ebert Stiftung, *Dialogue on Globalization, Occasional papers* No.23, Geneva July 2006, p.11.

¹⁸² *Ibid.*, p.11f.

¹⁸³ As described above it is possible that the Right to Development provides an obligation for states to claim a violation of other states if they fail to provide development friendly conditions. See introduction of this thesis.

¹⁸⁴ For example in cases where multinational enterprises with a greater GDP as the state in which they are operating, do not comply with the state's policies as argued in the introduction of this thesis.

RTD¹⁸⁵, which Bunn also describes.¹⁸⁶ Bunn further points out that unilateral corrective measures¹⁸⁷ are considered a further obstacle to the realisation of the RTD. Therefore according to her, states should refrain from the unilateral implementation of corrective economic measures and extraterritorial application of domestic laws, which run counter to the principles of free trade and hamper the development of developing countries.¹⁸⁸ Another obstacle from the perspective of developing countries for their development can be seen in unfair trading rules, as Bunn further notes. These are rules which include social clauses into the trade agreement that demand the fulfillment of an internationally recognised standard for the protection of workers' rights, which on the one hand, seems to be a legitimate goal, on the other hand, gives countries the possibility to allow to enact duties against imports when the goods were not produced following the standard requirements. This practice is known as social dumping and undermines the developing country's competitive advantage, which is primarily due to labour costs.¹⁸⁹

In this context, it is also noteworthy that until now, the African Charter on Human and Peoples' Rights is the only regional human rights instrument that recognises the RTD and gives it a legally binding effect.¹⁹⁰ Igbiniedion describes the development as the expansion of the real freedoms that people enjoy. That contains the possibility to make rational choices relative to their preferences, peculiarities, and prejudices. It further includes the reduction of poverty, unemployment, and societal inequality from high levels to controllable heights.¹⁹¹ The responsibility contained in the RTD and the Sustainable Development Goals (SDGs) for the developed countries to change their way of acting regarding external policy and economics is also confirmed by the LSE (London School of Economics and Political Science) working paper on the RTD.¹⁹²

¹⁸⁵ Kirchmeier, F., *The Right to Development-Where do we stand? State of the debate on the Right to Development*, Friedrich Ebert Stiftung, Dialogue on Globalization, Occasional papers No.23, Geneva July 2006, p.11.

¹⁸⁶ Bunn, I.D., *The Right to Development: Implications for International Economic Law*, American University International Law Review Vol.15 Issue 6 Article 8 2000, p.1475f.

¹⁸⁷ Such as for example, the conclusion of Trade Agreements under the condition of the integration of human rights conditional clauses implementing a possibility of the assessment of the protection of human rights through the EU.

¹⁸⁸ Bunn, I.D., *The Right to Development: Implications for International Economic Law*, American University International Law Review Vol.15 Issue 6 Article 8 2000, p.1459.

¹⁸⁹ *Ibid.*, p.1463.

¹⁹⁰ Igbiniedion, S.A., *Finding value for the right to development in international law*, African Human Rights Law Journal, Vol.19 2019, p.396.

¹⁹¹ *Ibid.*, p.397f.

¹⁹² Salomon, M.E., *Legal Cosmopolitanism and the Normative Contribution of the Right to Development*, LSE Working Paper 16/2008, p.13f.

1.1 Legal Obligations under the Right to Development

Art.1 No 1 of the 1986 Declaration on the Right to Development confirms the status of the RTD as

*inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*¹⁹³

Art.1 No.2 emphasises that

*the human right to development implies the full realization of the right of people to self-determination, which includes, subject to the relevant provisions both international Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*¹⁹⁴

Art. 2 No.1 places the human being in the centre of the Right to Development. No.2 states that all human beings are responsible for their development individually and collectively.

Art.3 No.1 contains the responsibility of states to create favourable conditions for the realisation of the Right to Development on the national and, more importantly, in the context of this paper, on the international level. Art. 3 No.3 provides the requirement for states to *realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, independence, mutual interest and co-operation among all states [...].*¹⁹⁵

Art. 5 requires resolute steps to eliminate the violation of human rights of people affected by, for example, foreign domination, colonialism, and foreign interference. Art. 8 provides the responsibility of states inter alia to take the necessary measures for the realisation of the RTD. This includes access to essential resources, education, health services, food, housing, and fair distribution of income. Art. 8 No.1 in sentence 3 provides further that

appropriate economic and social reforms should be carried out with a view to eradicate all social injustices.

This breve overview of the convention on the RTD already shows clear links to a responsibility to respect the Right to Development and its social and economic rights. It furthermore establishes a connection to business-related activities in the country. It is very similar to the wording of the R2P that is mainly drawn from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which, like the Right to Development, also includes legal obligations inter alia. Suppose there is a similarity between the R2P and

¹⁹³ Art.1 No.1 of the Declaration on the Right to Development UN General Assembly Resolution 41/128 from 1986.

¹⁹⁴ Ibid., No.2.

¹⁹⁵ Ibid., Article 3 No.3.

the RTD in the form that both address the international community of states inter alia. In that case, the assumption that the RTD, just like the R2P, has become a part of the obligations of businesses and their host countries following the UNGP does not seem improbable. This assumption is not an entirely new idea, as the article by Bunn where she proved that the responsibility of businesses to promote the RTD had been addressed by the UN Secretary General already in 1979.¹⁹⁶

Because the quoted convention is considered to be relatively vague in accordance with Shrijver and Teshome, the UN is currently in the process of drafting a new convention on the Right to Development which was discussed as Draft Convention on the Right to Development A/HRC/WG.2/21/2, or including commentary on the provisions of the convention as A/HRC/WG.2/21/2/Add.1, both from 2020.¹⁹⁷

1.2 The Fight Against Poverty and the Right to Development

This was the title of a book published in 2021 that describes the fight against poverty as a central element in development debates.¹⁹⁸ The editors of the volume then draw their attention to the events of the Rwanda genocide, which led to human rights based approach to development and the fight against poverty on the UN level in 1997.¹⁹⁹ The editors describe further although the fight against poverty evolved into a central concern for policymakers, scientific data shows that the world's poor

have become and keep becoming relatively poorer.

Consequently, that led, they describe further, scholars of moral and political philosophy like, Thomas Pogge to claim a human right on the freedom from poverty as well as for the recognition of the rich countries' collective responsibility for violating the human rights of the world's poor.²⁰⁰ The editors describe the human rights law debate, which the UN internationally led in 2012, which led to the Guiding Principle on Extreme Poverty and Human Rights.²⁰¹ Additionally, they describe the collective efforts of human rights lawyers and scholars, which influenced the adoption of the Maastricht Principles on Extraterritorial Obligations of States in the area of economic, social, and cultural rights by the Commission of Jurists in 2011, which contain a set of disputed but influential doctrinal interpretations of the

¹⁹⁶ Bunn, I.D., The Right to Development: Implications for International Economic Law, American University International Law Review Vol.15 Issue 6 Article 8 2000, p.1441f.

¹⁹⁷ Teshome, R.G., The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right, Human Rights Law Review Vol.22 2022, p.1.

¹⁹⁸ See Andenas, M., Perelman, J., Scharling, C., The Fight Against Poverty and the Right to Development : General Report in Andenas, M., Perelman, J., Scharling, C.(Editors), The Fight Against Poverty and the Right to Development, Ius Comparatum – Global Studies in Comparative Law Vol.52 2021, p.3.

¹⁹⁹ See Ibid., p3.

²⁰⁰ Ibid.

²⁰¹ Ibid., p.4.

ICESCR.²⁰² With the end of colonialism and the acceptance of the former colonies as UN members, these newly accepted countries tried to build alliances with the aim of claiming a New International Economic Order (NIEO) with the intention to link political liberalisation and self-determination with economic emancipation based on the sovereign use of natural resources. Furthermore, they plan to reconfigure the North-South Power structure inherited from colonisation and the Bretton-Woods system by writing a new set of rules for the globalised economy, which include the legal version of a collective Right to Development in the international legal framework.²⁰³ This was the starting point of the RTD described above. The adoption of the UN Declaration on the Right to Development led to several controversies around the RTD, as cited editors further point out. The first relates to the link between the RTD and the right to self-determination and asks if the RTD would qualify as *jus cogens*. An argument against the RTD was the possible use as an excuse for governments of developing countries to justify repressive human rights policies. The main worry, however, concerned the protection of property rights and contractual relationships, the editors of the book point out.²⁰⁴ Then they show further that there has been a dispute on the doctrinal nature of the question if the RTD is a right addressed to people, states, or individuals and if it is a group right, an individual right, or both.²⁰⁵ Scholarly debates accompanied this on the related indeterminacy and unenforceability of this right, the book further shows. Some scholars even describe it as a synthetic umbrella right with both individual and collective dimensions. The question was also raised if it would even go further as a normative framework for a global north-south redistribution.²⁰⁶ Beyond those discussions that primarily concern the RTD's relation with the ICESCR, the editors of the cited book show that there have been other discussions on relevant issues for the fight against poverty. In the first position, they name the subject of trade and human rights, followed by human rights and investment and the field of business and human rights as to which both of the former topics belong,²⁰⁷ which is the main focus of this thesis. For all those reasons, the editors argue, which is also one of the research questions of this thesis, that the RTD and the business and human rights fields are interconnected.²⁰⁸ These observations show the importance of RTD for developing countries that have experienced colonialism. What the global west or developed countries see as a potential threat or

²⁰² Ibid.

²⁰³ Ibid., p.5.

²⁰⁴ Ibid.

²⁰⁵ See introduction of this thesis.

²⁰⁶ Andenas, M., Perelman, J., Scharling, C., *The Fight Against Poverty and the Right to Development : General Report* in Andenas, M., Perelman, J., Scharling, C.(Editors), *The Fight Against Poverty and the Right to Development, Ius Comparatum – Global Studies in Comparative Law* Vol.52 2021, p.6.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

instrument without legal value, for the global south or developing countries, is maybe one of the most important legal instruments that provide them with opportunities to reinvent the international order in a way that benefits them to achieve better recognition of their voice on the international level and therefore more recognition of their needs as sovereign states. Therefore, it is unsurprising that most scholarly contributions in favour of the RTD are from the countries that developed it. As the developed world, due to technological progress, is increasingly in need to access to special minerals, metals, or other natural resources for the production of, e.g., electronic devices, microchips, and solar panels, it is not surprising that the developed countries are more critical towards the recognition of the RTD, as e.g, the USA have expressed. It has by the time writing this thesis not come to the attention of the author that the EU had voiced similarly strong concerns against the RTD. However, one can assume that the EU would not be in favour of a human right that could limit its access to the described groups of natural resources in developing countries. Furthermore, from the economic perspective, the EU cannot be interested in the appearance of new competitors in the intentional market. As it would not only decrease its own access to products from these countries but also limit its own ability to play out its advantages as an economic power and trading block on which it relies until today, as this thesis argues.

1.3 The Right to Development in the Context of the Sustainable Development Goals

In addition to being recognised as an inherent right in the International Bill of human rights, as it was discussed above, the RTD has been mentioned in several resolutions and other UN documents over the last few years. Therefore, it is unsurprising that the UN also included the Right to Development in its Sustainable Development Goals.²⁰⁹ The UN furthermore confirmed the importance of the RTD and sustainable development in the 2030 Agenda for Sustainable Development that was adopted in 2015.²¹⁰ The RTD binds states to promote human well-being within their territory and even beyond.²¹¹ Following the above argumentation on states' accountability for extraterritorial human rights violations by business enterprises, states are accountable if businesses violate human rights enshrined in the Declaration on the Right to Development. The 2030 Agenda for Sustainable Development proclaims in its Preamble that the participating states are determined to end poverty and

²⁰⁹ Li, Y., Uribe, D. and Danish, The International Discourse on the Right to Development and the Need to Reinvent its Implementation, South Center Research Paper 149 08.March 2022, p.8.

²¹⁰ Scholz, I., Reflecting on the Right to Development from the Perspective of Global Environmental Change and the 2030 Agenda for Sustainable Development in Kaltenborn, M., Krajewski, M., Kuhn, H., (Eds.), Sustainable Development Goals and Human Rights, Interdisciplinary Studies in Human Rights Vol.5 2020, p.192.

²¹¹ Ibid.

hunger in all their forms and dimensions and ensure that all human beings can fulfill their potential in dignity, equality, and a healthy environment.²¹² The United Nations Declaration on the Right to Development states under Art.1 Para.2 full sovereignty of peoples over their natural wealth and resources, according to the cited author, allows people to use these resources to reduce their poverty.²¹³ The author of this thesis agrees with the cited publications that a link exists between RTD and Sustainable Development Goals (SDG).

2. Interim Conclusion

While the EU acts extraterritorially, it might be held accountable for human rights violations committed abroad. Furthermore, the EU could also be held responsible for human rights violations concerning the extraterritorial effects of its extraterritorial policies to link external trade with human rights. EU courts have confirmed the duty of the EU to respect human rights. The obligation was also part of the ToL, Gammage writes,²¹⁴ in conformity with the findings in this part of the thesis. The accountability of the EU for extraterritorial human rights violations in accordance with the external European policy cannot only be derived from the fundamental principles of the EU itself. Still, it can also be derived from the UNGP, as the EU is concluding the trade and investment agreements with other countries on behalf of its member states and profits from them in total. Respect for human rights is a general norm in human rights and a specific requirement in the context of the UNGP, including the RTD, which today is understood as an inherent right of developing countries based on the ICCPR and the ICESCR, as well as the UDHR. This seems to contradict the legitimacy of the practice of including mandatory human rights clauses in trade agreements, which might give the EU, through its economic strength, the power to unilaterally terminate agreements with developing countries if they do not fulfill the EU's expectations on the protection of human rights. Such limits the developing countries and their citizens' right to economic, social, and cultural development protected under international human rights law.

²¹² *Ibid.*

²¹³ *Ibid.* p.193f.

²¹⁴ See Gammage, C., A critique of the extraterritorial obligations of the EU in relation to human rights clauses and social norm in EU free trade agreements, *Europe and the World: a Law Review* Vol..2(1) 2018, p.4.

Chapter IV Case Study on the Impact of EU Trade Agreements on the Protection of Human Rights in Asia

1. Introduction

This thesis has introduced the legal RTD in the context of business and human rights, which is particularly important for developing countries. The thesis has also introduced the EU's external policy approach to link its external trade policy with human rights obligations in the form of human rights clauses as a condition for the conclusion of these agreements, described in the first chapter of this work. In a further chapter, this thesis has introduced the concept of business and human rights, which was created to establish accountability of multinational businesses and their host states for extraterritorial human rights violations of these businesses. Therefore the main legal instrument which the UN developed is the UNGP. The UNGP is a set of requirements for businesses and their host states. Although it is a soft-law instrument it is based on the obligations of the UDHR, the ICCPR, and most importantly, the ICESCR. Through this link, it developed human rights due diligence obligations and established a CSR for businesses and host states. Due to the fact that there is a continuing discussion of the accountability of host states of multinational businesses for human rights violations outside of their territory, but under their jurisdiction, accountability for the violations could be established. If states are accountable for extraterritorial human rights violations by third parties, they could all the more be accountable for human rights violations linked to their actions. That could be the case if FTAs or other bilateral trade agreements are drafted in such a way that leaves no other possibility as to enact legislations that can contribute to a deterioration of the protection of human rights for individuals or groups protected under the RTD. Because of the fact that the EU negotiated and concluded the agreements that could lead to this effect, this thesis is more concerned with the EU than its member states. To evaluate the impact of the EU's trade agreements on the protection of human rights secured under the RTD, in a first step, this thesis will compare the protected fundamental and human rights. The second part of this case study will look into the trade agreements each of the selected countries currently negotiate with the EU and analyse two more aspects. The first one is: do the agreements contain human rights obligations in the form of non-trade issues, and do they affect the protection of human rights? The second question that will be analysed is: how do the trade-related matters in the concluded agreements influence human rights? For example, the right to receive adequate payment to secure a dignified life, including children's right to education. The previously mentioned will lead to the conclusion if the European trade

policy to include human rights in their agreements can be justified or if this policy even violates human rights, as some cited authors have pointed out.

1.1 Human Rights in Asia

According to the Asia-Pacific Human Rights Information Centre (Hurights Osaka), Asia is a region with diverse cultures. Furthermore, according to them, this is coupled with equally diverse political, social, and economic situations around the regions. This has resulted in discussions if international concepts, such as human rights, that can relate meaningfully to the cultural values present in the region. Over recent years some governments have even argued for introducing an Asian human rights instrument. This is justified by the cultural factor.²¹⁵ While the western, liberal concept of human rights is based on individual human rights, Asian countries practice a human rights approach that is based on group rights. These different approaches to the concept of human rights are legally protected under the 1993 Vienna Declaration, which states that

*All human rights are universal, individual and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural system, to promote and protect all human rights and fundamental freedoms.*²¹⁶

For the Asia Pacific Human Rights Information Centre, this provision is a formal basis for the assumption that the states in the Asia-Pacific region accept the universality of human rights because it can relate to the specific situation of countries. Furthermore, in their conclusion, Asian-Pacific- Human Rights Information Centre seems to be in favour of a compromise that would promote the universal character of human rights while respecting cultures. According to them, that requires a deeper understanding and clarification of the meaning of human rights to people and communities with varying histories and contexts. They point out that a reconciliation would be necessary, including a dialog with and between different cultures.²¹⁷ The author of this thesis agrees with this suggestion.

²¹⁵ Asia-Pacific Human Rights Information Centre, Human Rights and Cultural Values: A Literature Review, <https://www.hurights.or.jp/archives/database/hr-cultural-values.html> last entered 25.01.2023.

²¹⁶ 1993 Vienna World Conference on Human Rights, Vienna Declaration and Program of Action Section 1 No.5.

²¹⁷ Asia-Pacific Human Rights Information Centre, Human Rights and Cultural Values : A Literature Review, <https://www.hurights.or.jp/archives/database/hr-cultural-values.html> last entered 25.01.2023.

2. Protection of Human Rights in Asia

Now that this thesis has developed an insight into the discussions concerning human rights in the context of different cultural backgrounds in Asia, in this part. In the absence of a regional human rights instrument in Asia, the thesis will provide a brief overview of the different national human rights instruments if the countries have their own instrument.

2.1 Protection of Human Rights in India

2.1.1 Fundamental Rights

One of the essential documents for the protection of fundamental and human rights in India is the constitution of India which provides an overview of the rights protected in the form of fundamental rights. It has to be noted that the Indian constitution has been amended 105 times. The last of these amendments happened in August 2021.²¹⁸ This is a sign that the Indian constitution was adapted to the different developments in the country's history. Furthermore, it has to be noted that India is a democratic country.²¹⁹ After this declaration, the preamble of the Indian constitution provides fundamental principles which are secured for all citizens. These are

*social, economic and political justice, liberty of thought, expression, belief, faith and worship and equality of status and opportunity.*²²⁰

Then the constitution promotes

*fraternity assuring the dignity of the individual and the unity of the nation.*²²¹

Part three of the Indian constitution provides fundamental rights. The first is in No. 14, equality before the law. This is formulated in the form of a negative obligation for the state not to deny

*to any person equality before the law or the equal protection of the laws within the territory of India.*²²²

The importance of equality within the Indian constitution is furthermore proved by the following provision under No.15, which is drafted in a further negative obligation, the prohibition of discrimination on the grounds of religion, race, caste, sex, or place of birth, which declares in (1) that

the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

²¹⁸ Government of India Ministry of Law and Justice Legislative Department, Amendment Act No.35 of 2016, <https://legislative.gov.in/amendment-acts>, last visited 25.01.2023.

²¹⁹ See Constitution of India Version from May 2022, Preamble according to the 42 Amendment of 1976.

²²⁰ Constitution of India Version from May 2022, Preamble.

²²¹ Ibid.

²²² Constitution of India Version from May 2022, Part 3, No.14.

In (2), the constitution provides a list of places and facilities in the public to which access or use should not be denied.

No.16 constitutes the state's duty to provide equal opportunities in matters of public employment. No.17 further proves that Indian society adapted to changes by abolishing untouchability. It is recognisable that the constitution still references the castes but abolish the untouchability or Dalit, which according to Encyclopaedia Britannica, in traditional India referred to any member of a wide range of low-caste Hindu groups and any person outside the caste system. The persons who were declared untouchable faced social exclusion and discrimination.²²³ In part 3 No.19, the freedom of speech is protected. No.20 contains the provision that no one should be convicted if the conviction does not follow the law. Paragraph (2) provides the prohibition of double punishment. No.21 protects the rights to life and personal liberty. No.21 A constitutes the right to education for all children. The next important provision in the context of this thesis is No.23, protection from traffic in human beings and forced labour. No.24 prohibits the employment of children below the age of fourteen in mines, factories, or other hazardous employment. It would be interesting to see how this is handled in different European countries. In No.41, once more, the right to work and to education is confirmed, which raises the question of how the right to education is balanced with the possibility of working from the age of 14. However, it seems to be the case that under the Indian constitution, the right to education exists until the age of 14. From then, it is a question of choice and most likely economic situation to continue the education or start to work. The Indian Government seemed to have been aware of this problem. It, therefore, enacted the child and adolescent labour (prohibition and regulation) act 2016, which prohibits the employment of children and youths independent of their age.²²⁴ Interestingly the state's duty to secure a social order that contributes to the welfare of the people has been integrated into No.38. No.42 states the provision for just and humane conditions for work and maternity. In the following regulation, No.43, the living wage for workers is secured, among other rights.

From this short overview, at least three things can be noted. First, as it was pointed out above, the Indian constitution has been adapted in accordance with social and cultural development and, therefore, can easily be compared to the ECHR, which has been described as a "living Instrument."²²⁵ The second noteworthy assumption that can be made is the amount of social,

²²³ Britannica, The Editors of Encyclopaedia "untouchable", Encyclopaedia Britannica, 27 Oct. 2022, <https://www.britannica.com/topic/untouchable>, accessed 26 January 2023.

²²⁴ Indian Ministry of Law and Justice Legislative Department, The Children Labour Prohibition and Regulation Amendment Act from 30 of July 2016 No.5.3.(1), The Gazette of India Extraordinary Part II, p.2.

²²⁵ Letsas, G., The ECHR as a Living Instrument: Its Meaning and its Legitimacy, 15 March 2012, p.2ff., available at SSRN: <https://ssrn.com/abstract=2021836> or <http://dx.doi.org/10.2139/ssrn.2021836>

economic, and cultural rights which are protected under the Indian constitution. That can be linked to a third observation, which is that the constitution is crafted carefully because it has to conclude all the minorities and social classes living in India. This focus on detail can hardly be seen in European constitutions. To give an example, the German constitution only provides nineteen fundamental rights.

2.1.2 International Human Rights Instruments in India

On the international level, India has signed and ratified CEDAW and CERD.

India has ratified but not signed ICESCR and CRC. Furthermore, India has signed and ratified both additional protocols to the CRC and the CRPD. In addition, India ratified the ICCPR. India has also signed but never ratified CAT and CED.²²⁶

Now that this thesis has provided an overview of a country known for its cultural diversity, with the majority being Hindu²²⁷, it will turn to the only Christian nation in Asia, the Philippines.²²⁸

2.2 Protection of Human Rights in the Philippines

2.2.1 Fundamental Rights

As in the case of India, the Philippines constitution of 1987 proclaimed in its preamble the Philippines to be a democratic country. Similar to the Indian constitution, the Philippine constitution provides in its preamble constitutional principles that shall be protected, which are: truth, justice, freedom, love, equality, and peace.²²⁹

Section nine of Art.2 contains several duties that the state has to fulfill in the form of positive obligations. These are: to promote a just and dynamic social order, free the people from poverty, and improve the standard of living and the quality of life for all.²³⁰

In Art.2 Section 10, the constitution contains the duty of the state to promote social justice in all phases of national development.²³¹ Section 11 provides that

*the state values every human person and guarantees full respect for human rights.*²³²

²²⁶ UNOHCHR United Nations Human Rights Treaty Bodies UN Treaty Body Database: India, last entered: 27.01.2023, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN

²²⁷ Sahgal, N., et al., Religion in India: Tolerance and Segregation, Pew Research Center 29.June 2021, p.6.

²²⁸ Republic of the Philippines, Philippine Statistics Authority, Philippines: Additional Three Persons per Minute, 18 February 2003 last entered: 27.01.2023, <https://psa.gov.ph/press-releases/id/3422>

²²⁹ Constitution of the Philippines from 1987, Preamble.

²³⁰ Constitution of the Philippines from 1987, Preamble.

²³¹ Constitution of the Philippines from 1987, Art.2 Section 10.

²³² Constitution of the Philippines from 1987, Art.2 Section 11.

Section 12 contains respect for family life. Section 14 recognises the equality of men and women.²³³ Section 15 guarantees the right to health.²³⁴ In Section 19, the constitution states that

*the state shall develop a self-reliant and independent national economy effectively controlled by Filipino.*²³⁵

Section 20 contains a further provision that protects the national economy and the private sector and encourages private enterprises.²³⁶ Sections 21 and 22 provide additional links to the RTD.²³⁷ In Art.3, the Constitution provides an even greater set of rights. This Article recognises the right to life, liberty, and property, all in Section 1.²³⁸ Sections 2 and 3 protect the right to privacy.²³⁹ In Section 4, the constitution protects the freedom of speech and the right to assembly.²⁴⁰ Section 5 constitutes the freedom of religion, exercise, profession, and worship without discrimination or difference.²⁴¹ Sections 11 to 21 contain provisions concerning a fair trial.²⁴²

2.2.2 International Human Rights Instruments in the Philippines

On the international level, the Philippines ratified CAT and the optional protocol to CAT. Furthermore, the Philippines have signed and ratified the ICCPR and the Second Optional Protocol to the ICCPR. They neither signed nor ratified CED. They have signed and ratified CEDAW, CERD, ICESCR, CMW, and CRC, including both optional protocols and the CRPD.

2.3 Protection of Human Rights in Indonesia

2.3.1 Fundamental Rights

Now that this thesis has shown the differences but, more importantly, the similarities of the constitutions concerning the protection of fundamental rights, this thesis will look into a third Asian country. This country is Indonesia, a state with the largest Islamic population. Nevertheless, according to its constitution, Indonesia is not a Muslim nation.²⁴³

²³³ Constitution of the Philippines from 1987, Art.2 Section 14.

²³⁴ Constitution of the Philippines from 1987, Art.2 Section 15.

²³⁵ Constitution of the Philippines from 1987, Art.2 Section 19.

²³⁶ Constitution of the Philippines from 1987, Art.2 Section 20.

²³⁷ Constitution of the Philippines from 1987, Art.2 Section 21 and 22.

²³⁸ Constitution of the Philippines from 1987, Art.3 Section 1.

²³⁹ Constitution of the Philippines from 1987, Art.3 Section 2 and 3.

²⁴⁰ Constitution of the Philippines from 1987, Art.3 Section 4.

²⁴¹ Constitution of the Philippines from 1987, Art.3 Section 5.

²⁴² Constitution of the Philippines from 1987, Art.3 Section 11-21.

²⁴³ See Statista, Share of Indonesian population in 2010, by religion last visited 28.01.2023, <https://www.statista.com/statistics/1113891/indonesia-share-of-population-by-religion/>

The Indonesian constitution is the oldest of the three constitutions, which will be compared in this case study. It was drafted in 1945 and reinstalled in 1959, with the last amendments in 2002. Furthermore, it is the constitution of the three constitutions with the most vital link to independence and the abolition of colonialism because of its incompatibility with humanity and justice, as the Indonesian constitution declares in the first sentence of its preamble. Like the other two, the Indonesian constitution provides some constitutional principles: independence, unity, justice, and prosperity.²⁴⁴ In addition, the preamble states the following as further principles: to improve public welfare and education and to participate in a world order based on freedom, peace, and social justice. Furthermore, the constitution declares Indonesia a democracy that establishes a just and civilised humanity.²⁴⁵ Art. 27 Para 1 of the constitution promotes the equality of all citizens before the law, and Para. 2 protects the right to work and for a humane income.²⁴⁶

The Indonesian constitution is the only of the three constitutions that make an apparent reference to human rights beginning with Art. 28: freedom to assembly and the freedom of opinion.²⁴⁷ Directly followed by the right to life in Art. 28A²⁴⁸ and the protection of the family in Art. 28B Para 1 and the right of children to live, grow and develop and to be protected from violence and discrimination in Para 2.²⁴⁹ In Art. 28C Para 1, the constitution refers to the individual components of the RTD through the fulfillment of basic needs. Furthermore, this Paragraph protects the right to education, the right to enjoy and benefit from culture, science and technology to improve the quality of the personal life and the welfare of the human race.²⁵⁰ In Art. 28 Para 2, the constitution provides an additional link to the RTD.²⁵¹

Art.28 D Para.1 protects the rights of a fair trial and equal treatment before the court. Para 2 constitutes the right to work and receive fair and proper remuneration and fair treatment at work.²⁵² Art.28 E Para 1 protects the freedom to choose and practice a religion, education, employment, citizenship, and place to live and to relocate. Para 2 protects the freedom of belief and expression. Para 3 confirms once more the freedom to associate and assemble.²⁵³ In Art. 28 F, the constitution contains the right to communicate and contain information

²⁴⁴ Constitution of Indonesia with amendments from 2002, Preamble.

²⁴⁵ Constitution of Indonesia with amendments from 2002, Preamble.

²⁴⁶ Constitution of Indonesia with amendments from 2002, Art.27 Paras.1-2.

²⁴⁷ Constitution of Indonesia with amendments from 2002, Art.28.

²⁴⁸ Constitution of Indonesia with amendments from 2002, Art. 28A.

²⁴⁹ Constitution of Indonesia with amendments from 2002, Art 28B.

²⁵⁰ Constitution of Indonesia with amendments from 2002, Art. 28C Para.1.

²⁵¹ See Constitution of Indonesia with amendments from 2002, Art. 28C Para.2.

²⁵² Constitution of Indonesia with amendments from 2002, Art. 28D Paras.1-2.

²⁵³ Constitution of Indonesia with amendments from 2002, Art. 28E.

which is for the third time connected to the RTD.²⁵⁴ The constitution protects everyone and the family, honour, dignity, and property in Art. 28 G Para 1.²⁵⁵ Para 2 states the freedom from torture and inhuman and degrading treatment and to obtain political asylum.²⁵⁶ Art. 28 H Para 1 provides the right to live in prosperity, have a home and a healthy environment, and as well as to obtain medical care. Para 2 secures the right to get states' support in order to have equal opportunities in one's life. Para 3 provides the right to receive social security, and Para 4 secures the right to property.²⁵⁷ Art. 28 I protects the freedom from torture, freedom of thought and conscience, religion, slavery, the right to be recognised as a person before the law, and the right not to be trailed without the existence of a lawful legal provision are protected in form of non-derogable human rights. Para 2 states no one shall be discriminated against, and everyone has the right to be protected from discrimination. Para 3 references the responsibility to protect and respect cultures. Para 4 provides the duty of the government to protect human rights.²⁵⁸ The human rights chapter of the constitution closes with the obligation for everyone to protect and respect other person's human rights.²⁵⁹ Furthermore, the constitution guarantees the right to education for every citizen.²⁶⁰

2.3.2 International Human Rights Instruments in Indonesia

On the international level, Indonesia has signed and ratified CAT but neither signed nor ratified the optional protocol to CAT. Indonesia ratified but did not sign the ICCPR without signing or ratifying the optional protocol to the ICCPR. Furthermore, Indonesia signed but did not ratify CED. Indonesia has signed and ratified CEDAW. It has ratified CERD and ICESCR. It has signed and ratified CMW, CRC, and both optional protocols to the CRC. Furthermore, Indonesia signed the CRPD.

3. Protection of Human Rights in the ASEAN Human Rights Declaration

The Philippines and Indonesia are member States of ASEAN, which in addition to the nationally protected fundamental and human rights, created its own human rights declaration. The ASEAN Human Rights Declaration was adopted on 19 November 2012. Since then, it has existed as an ASEAN counterpart to the ECHR. In the second paragraph of its preamble, the ASEAN states declare their adherence to the respect, promotion, and protection of human rights and fundamental freedoms, as well as the principles of democracy, good governance,

²⁵⁴ Constitution of Indonesia with amendments from 2002, Art.28F.

²⁵⁵ Constitution of Indonesia with amendments from 2002, Art.28G Paras.1.

²⁵⁶ Constitution of Indonesia with amendments from 2002, Art.28G Paras.2.

²⁵⁷ Constitution of Indonesia with amendments from 2002, Art.2H.

²⁵⁸ Constitution of Indonesia with amendments from 2002, Art.28I Paras.1-4.

²⁵⁹ Constitution of Indonesia with amendments from 2002, Art.28J Paras.1-2.

²⁶⁰ Constitution of Indonesia with amendments from 2002, Art.31-32.

and the rule of law. Furthermore, the preamble affirms their commitment to the UDHR, UN Charter, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN member states are parties.²⁶¹

The preamble is followed by chapter I on General Principles. The first paragraph has similarity to the wording of Art. 1 UDHR and states that:

*All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.*²⁶²

Paragraph 2 of the General Principles contains the prohibition of discrimination or deprivation of the rights contained in the declaration for

*reasons such as race, gender, age, language, religion, political or other opinion, natural or social origin, economic status, birth, disability, or other status.*²⁶³

Para. 3 provides equality before the law.²⁶⁴ Para.4 contains a provision for special protection for the human rights of women, children, elderly persons, persons with disabilities, migrant workers, and vulnerable and marginalised groups.²⁶⁵ Para. 6 links the enjoyment of human rights to everyone's duties toward other individuals in the community and the society as a whole.²⁶⁶ Superficially considered, this seems to be a distinction from the European concept of human rights because the ASEAN countries not only see human rights as individual rights but also understand them as rights connected to the duties of society as a group. This way of linking freedom to duties in society, however, is not that different from our western understanding of rights and duties as one of the most known quotes that are attributed to former US Supreme Court Judge Oliver Wendell Holmes Jr.:

*Your liberty to swing your fist ends just where my nose begins,*²⁶⁷

shows. More importantly, the link of individual rights and freedoms to everyone's duties in society was recognised in the UDHR Art. 29 (1) and 30.²⁶⁸ As argued above, Asia is a continent with various cultures, which, because European countries mostly colonised them, did not have a say in the drafting process of the UDHR. In order to have a legal document that represents the unique circumstances in Asia more appropriately in addition to the international

²⁶¹ See ASEAN Human Rights Declaration 2012, Preamble.

²⁶² ASEAN Human Rights Declaration 2012, General Principle Para.1.

²⁶³ ASEAN Human Rights Declaration 2012, General Principle Para.2.

²⁶⁴ ASEAN Human Rights Declaration 2012, General Principle Para.3.

²⁶⁵ ASEAN Human Rights Declaration 2012, General Principle Para.4.

²⁶⁶ ASEAN Human Rights Declaration 2012, General Principle Para.6.

²⁶⁷ This quote most of the time is attributed to former US Supreme court judge Oliver Wendell Holmes Jr, without the existence of a proof that he really said or wrote that, although there are others who could also have said something similar.

²⁶⁸ See UDHR Art.29(1) and 30.

human rights documents, ASEAN countries decided to draft the ASEAN Human Rights Declaration.²⁶⁹

Para.7 of the ASEAN Human Rights Declaration confirms that

all human rights are universal, indivisible, interdependent and interrelated.

But regarding their realisation, the declaration refers to cultural diversity by making it dependent on

*regional and national contexts as well as different political, economic, legal, social, cultural, historical and religious backgrounds.*²⁷⁰

Furthermore, the declaration contains chapters named after the corresponding international human rights instrument, starting with a chapter on civil and political rights. The second provision in this part of the declaration contains the right to life followed by the right to liberty and security, prohibition of slavery and human trafficking, prohibition of torture and inhuman and degrading treatment, freedom of movement, right to seek and receive asylum in other states, right to property, right to a nationality including the right to change it, which cannot be denied, and the protection of the family life. Next, this chapter provides rights for persons charged with criminal offenses, of which the first is that persons have to be presumed innocent until they are proven guilty following the law in a fair trial. Furthermore, the declaration prohibits punishments not in accordance with national law and prohibition of multiple punishments for the same crime. The right to privacy follows this, the freedom of thought, the freedom of opinion, and assembly.²⁷¹ The next chapter contains economic, social, and cultural rights, including the right to work, which demands decent and favourable work conditions. Followed by the prohibition of economic and social exploitation of children and youths. Furthermore, it addresses the right to an adequate standard of living, including access to affordable food and the freedom from hunger, to clothing, adequate and affordable housing, access to medical care and social services, access to safe drinking water and sanitation, and a clean, save and sustainable environment.²⁷² Among others, this part also contains a provision for the right to social security, special protection of mothers after the birth of a child, the right to education, right to enjoy and participate in cultural life.²⁷³ Lastly, the declaration contains an individual chapter for the Right to Development.

²⁶⁹ See Renshaw, C.S., The ASEAN Human Rights Declaration 2012, Human Rights Law Review Vol.13 Issue 3 2013, p.559ff.

²⁷⁰ ASEAN Human Rights Declaration 2012, Civil and Political Rights, Para.7.

²⁷¹ ASEAN Human Rights Declaration 2012, Civil and Political Rights, Paras.11-25

²⁷² ASEAN Human Rights Declaration 2012, Economic, Social and Cultural Rights, Paras.27-28.

²⁷³ ASEAN Human Rights Declaration 2012, Economic, Social and Cultural Rights, Paras.30-32.

4. Interim Conclusion

As shown in the introduction to this chapter, Asian society is shaped by cultural diversity. In addition, all three countries have in common that European countries have colonised them. India was a colony of Great Britain, the Philippines was a colony of Spain, and Indonesia was a colony of the Netherlands. This subsection has shown that this common past has influenced the constitutions of these three countries in a way that they all protect a national, independent economy that helps to protect the development of the country and its society. This chapter also shows how important it is to protect the own cultural identity through the right to education. Both of these findings prove the findings from the literature analysis of this thesis, which leads to the following conclusion from the study: all three of the constitutions have adopted in their drafting processes or at least through development over time, some of the major principles and concepts of international law and human rights such as the right to life, human dignity, freedom, the right to a fair trial, freedom from discrimination and more. Sometimes the constitutions extend even beyond the protected rights in European countries. However, this should not hide the fact that in all of these countries still exist human rights violations, as the annual reports of NGOs such as Amnesty International and HRW show. Likewise, the same reports indicate that human rights violations happen in western democracies. This raises the question if the EUs CCP's aim to promote human rights through its external trade policy is even necessary and, therefore, lawful. The aforementioned is especially the case when one recognises the importance of economic development and cultural protection for these countries. To further analyse the legality of European foreign trade policy, this thesis will now examine the provisions' outcome with a connection to the human rights of each relevant trade and investment agreement between the EU and one of the three states. Because in the case of all three countries chosen for the case study, the negotiations are still ongoing, the thesis will also consider relevant framework agreements if they exist. For the analyses of the influence on the protection of human rights in the chosen countries, this part of the thesis will rely on relevant literature such as articles and studies by research institutions and civil society organisations.

Chapter V Analysis of EU-Asia Trade Agreements Concerning their Effect on Human Rights

1. India

1.1 Strategic Partnership

Since 1990, European governments have started to be concerned about human rights violations in the Indian border regions Kashmir and Punjab, and Assam, which the Indian government did not deny. Therefore, there have been discussions regarding this situation. However, the Indian government also points out that India has an open society with a free press and an independent judiciary. In this situation, Jain points out, human rights were discussed for the first time between the EEC, the EU's predecessor, and India.²⁷⁴ During the talks, European foreign ministers assured that

they were fully aware, that they spoke to a partner who, like them, was a full-fledged democracy and requested the Indian understanding that they spoke as partners and not in any sense with a desire to patronise, to lecture or to appear intrusive into the legitimate concerns of a sovereign government,

Jain writes further.²⁷⁵ These first conversations were then developed into EU-India summits during the early 2000s years. At these summits, the importance of human rights was pointed out. Furthermore, human rights and democracy were discussed, and the importance of civil, political, social, economic, and cultural rights have been mentioned, Jain summarises.²⁷⁶

In 2004 the European Commission expressed interest in extending the human rights dialogue in a mutually respectful and constructive manner in the format of a strategic partnership. For India, a strategic partnership means a

partnership between equals and not one where one side is prescriptive, or one side is intrusive and the other side is, in a sense, a passive partner,

Jain cites.²⁷⁷ The first trade agreement that contained a human rights provision in the form of an essential element clause was the Cooperation Agreement on Partnership and Development which was concluded in 1993. So even before the integration of such clauses became a key tool in the external policy of the EU through the ToL.²⁷⁸ In Art.1.1, the treaty points out: *Respect for human rights and democratic principles is the basis for the cooperation between*

²⁷⁴ Jain, R.K. India, the European Union and Human Rights, India Quarterly Vol.73 No.4 2017, p.411.

²⁷⁵ Ibid., p.412.

²⁷⁶ Ibid., p.412.

²⁷⁷ Ibid., p.413.

²⁷⁸ Ibid., p.414f.

*the contracting parties and for the provisions of this agreement, and it constitutes an essential element of the agreement.*²⁷⁹

1.2 Bilateral Investment and Trade Agreements

In 2007, negotiations between the EU and India over the conclusion of the Bilateral Investment and Trade Agreements (BITA) started. During the negotiations, the European Parliament argued in favour of including legally binding clauses on human rights and social and environmental standards in the agreement and enforcement measures in cases of infringement. The matters the EU wanted to include in the negotiation were weapons of mass destruction, child labour, environment, human rights, and democracy, Jain shows.²⁸⁰ Because by the time the two parties negotiated a trade agreement, the Indian government rejected this as

unacceptable as FTA negotiations in the view of India were not an appropriate place to discuss these issues and [that] there is no possibility of such references to be accepted, Jain shows this in her article.²⁸¹ Even more irritated, as in the case of human rights, according to Jain, the Indian government was when the EU wanted to discuss terrorism, especially since the human rights issues at the border with Kashmir have been resolved. India criticises the EU for practicing double standards concerning terrorism by, on the one hand, negotiating with practitioners of terrorism while, on the other hand, demanding inner political changes in countries facing terrorism. India understands terrorism as a direct violation of human rights, particularly basic human rights such as the right to life and liberty.²⁸² It is essential to point out that the negotiations have been terminated probably because of the discussions concerning the integration of non-trade issues in the agreement. After some years of break, both parties agreed to continue the negotiations on June 17 of June 2022.²⁸³ However, there have already been some voices that make some critical remarks, as described below.

²⁷⁹ Cooperation Agreement between the European Community and the Republic of India on partnership and development, 20 December 1993.

²⁸⁰ Jain, R.K., India, the European Union and Human Rights, India Quarterly Vol.73 No.4 2017, p. 415.

²⁸¹ Ibid.

²⁸² Ibid., p.418.

²⁸³ European Commission, EU trade relationships by country/region: India, EU-India Free Trade Agreement, Investment Protection Agreements and Geographical Indications Agreement, last visited 30.1.2023, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement_en#:~:text=On%2017%20June%202022%2C%20the,on%20Geographical%20Indications%20\(GIs\).](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement_en#:~:text=On%2017%20June%202022%2C%20the,on%20Geographical%20Indications%20(GIs).)

1.3 Human Rights Issues in the EU-India FTA Negotiation Process

1.3.1 Lack of Transparency

As shown in the business and human rights part of the thesis, human rights due diligence plays a crucial role in the UNGP.²⁸⁴ As knowledge is an essential part of due diligence processes to detect potential human rights risks, the criticism voiced by some civil society organisations concerned with a lack of transparency is irritating. The previously mentioned is because it complicates assessing human rights impacts for businesses and civil society groups.²⁸⁵ Furthermore, concerns were raised that the lack of transparency could be used to integrate conditions more favouring companies. Therefore, the negotiations would discriminate against social society groups and their interests. The aforementioned does not only concern the EUs side but also the Indian.²⁸⁶ The EU trade policy could also impact specific parts of the Indian economy.

1.3.2 Influence of an EU - India FTA on the Indian Agriculture and Dairy Sector

The Indian dairy sector, which includes raw milk production and value-added products like butter and cheese, has to deal with rising demand. The increased demand makes it possible to produce competitive products, especially with the low production costs. Furthermore, many of the overall 90 million workers in the Indian dairy sector are landless. The EU dairy producers targeted the Indian dairy market. These EU dairy producers can offer their products for lower prices than the Indian producers. These low prices for agricultural and dairy products could seriously impact the competitiveness of Indian products due to cheaper European imports. The EU producers could offer such cheap prices because they heavily subsidise and protect them. The problem in this context is that the Indian producers have no choice but to reduce personal costs to an amount that potentially negatively influences the enjoyment of humane life or even terminate employment contracts. Both lead to increasing poverty and influence the enjoyment of the rights linked to the RTD. India is known for its strong defensive agricultural interests to protect the means of support of weaker parts of its population. In addition, the dairy sector was not even included in the risk assessment.²⁸⁷ From the human rights perspective, this seems to indicate several things. First, the EU could have failed to comply with the due diligence obligations to assess potential human rights risks in their business operations by not including the Indian agriculture and dairy sector in a human rights

²⁸⁴ See chapter II of this thesis.

²⁸⁵ See Wouters, J., et. al., Some Critical Issues in EU-India Free Trade Agreement Negotiations, Leuven Centre for Global Governance Studies Working Paper No.102 February 2013, p.16f.

²⁸⁶ Ibid., p.17.

²⁸⁷ Ibid., p.13.

impact assessment. However, as the FTA is still under conclusion, the EU could resolve this issue. That is directly linked to the second result the FTA could have with regard to human rights in India. If European exports would lead to the Indian dairy producers not being able to compete against European imports, it could force Indian producers to close their businesses, which would expose these 90 Million workers to unemployment and even increase their poverty. Consequently, that leads to a violation of the Right to Development of India as a country and the Indian society. Although the EU-India FTA negotiations are taking place behind closed doors, as described above, some facts and documents were leaked and analysed by the Corporate Europe Observatory in cooperation with the India FTI watch. The analysis of the leaked information indicates other human rights influences if the FTA would come into being. According to the analyses of the leaked documents, one issue discussed during the negotiations was the opening of the Indian market for risky financial products. Another demand of the EU was the removal of regulations that limit the foreign ownership and size of banks.²⁸⁸ This could, according to the authors of the cited analysis, destabilise the Indian financial system. Still, more importantly, in the context of this thesis, it could reduce access to banking services in rural areas. Which would especially affect the poor and [once again] agricultural production.²⁸⁹ As this paper has already shown, the agricultural and dairy sector is of great importance to the Indian economy and serves as a food provider for society. At the same time, it is highly dependent on landless and assumable mostly poor people. So the effect of a lack of access to banking services could not only manifest the poverty of people in rural areas but would also contribute to creating even more poverty, which once again contradicts India's and the Indian society's RTD. A further critical point in the FTA negotiations between the EU and India is the tariff reductions India would have to implement. For India, the result would be a major loss of tax revenue. Furthermore, the abolition of protective tariffs could lead to an increase in cheap imports from the EU. That could have a negative impact on employment and working conditions, the authors of the analysis write.²⁹⁰ From the human rights perspective, the reduction of tax revenue can have a negative impact on human rights. Most states use the tax revenue to finance public infrastructure such as schools, streets, fountains, etc. Reducing this revenue could therefore limit the possibility of financing public infrastructure. If the Indian government had less tax revenue, financing public schools would be even harder. From the short discussion of the right to go to school in India integrated above in this thesis, it was visible that the state can only provide financial support until the children

²⁸⁸ Eberhardt, P., Kumar, D., Trade Invaders, How big business is driving the EU-India free trade negotiations, Corporate European Observatory, India FDI Watch Brussels, Delhi 2010, p.34.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

reach the age of 16, while further education must be paid for privately by the families. A reduction in tax revenue could further limit the availability of funds for public schools. Which again is a problem, especially for rural areas with lower numbers of public schools. A negative effect on employment and conditions could, from the human rights perspective, mean a reduction of salary under the human-worthy minimum, which would again limit the enjoyment of the right to education for children and access to health, food, etc. for their families. Furthermore, it could force the company to lower worker protection standards for employees, violating workers' rights. The cited analysis assumed that the implementation of the currently discussed EU-India FTA regulations would affect approximately 92% of India's 475 million employees in the informal sector with no job guarantees and a small income.²⁹¹ Another example the authors of the analysis provide is the Indian fisheries sector. This sector is another powerful guarantor of income and employment within the rural, marginal population of India.²⁹² The consequences for this group of people would be the same that have been already described. Cheap European imported fish would conquer the Indian market, making it impossible for small local businesses to compete with the European fish. As previously mentioned, it would force them to shut down their business, leading to more poverty and unemployment. This thesis so far has demonstrated the effect of the European external trade policy on three examples. According to the analysis, the same effects would be visible throughout the agricultural sector.²⁹³ According to the cited analysis, the EU has set up a 500 Million € strong European estate to compensate for these job losses. This is used to develop land agriculture into corporate-owned farms and farms into factories.²⁹⁴ The just mentioned could, according to the authors of the cited analysis, lead to a further disadvantage of marginalized groups such as Dalits and women to own land,²⁹⁵ which is not only a violation of the Indian constitution through the European Union and its business but also violates fundamental principles of human rights and therefore is a further violation of EUs human rights due diligence obligations when acting outside its own territory. Furthermore, according to the authors of the analysis, liberalising land and its natural resources could increase the existing struggles, like privatising land and waters through European businesses. Which could lead to the displacement of thousands of tribal people in the central and eastern parts of India, as the cited analysis describes further.²⁹⁶ Another topic that, according to the authors of the analysis, has been discussed was the aim of the EU to ban Indian export

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

restrictions for raw materials. This is an important issue for the EU because India is the world's largest exporter of minerals needed as an ideally cheap supply in European industries. But the EU not only wants to ban export restrictions for minerals, but it has also shown an interest in the ban of the protection of goods like rice, which the Indian government protects to provide food security, as rice is a basic food, especially in poorer areas.²⁹⁷

1.4 Interim Conclusion

In the ongoing negotiation process for an EU India FTA, the Indian government was reluctant to add non-trade issues into the FTA. It will be interesting to observe the further negotiation process and if the EU's economic interests in the conclusion of the FTA with India outweigh the EU's interests in integrating human rights clauses into the treaty. If the EU and India would conclude this treaty in the future, it would worsen the human rights situation of poor rural and tribal society groups even more. In addition, it would negatively affect various legal areas such as workers' rights, right to health, food, water, education, and human dignity. The reports that the EU published on the content of the three rounds of negotiations that took place until now are written so vague that it is impossible to draw a conclusion on the discussed problems in the areas that have been discussed. However, the report's language suggests that there must have been some disagreement on regulations that the EU has proposed as the EU had to give detailed explanations on some of its proposed regulations, as the second report shows. Furthermore, this report shows that India made some own suggestions, which the Indian negotiators feel that it was necessary.²⁹⁸ The third report makes the impression that the EU is relieved after two rounds of explanations of several discussed issues, and the actual negotiation process will finally start.²⁹⁹ The decision to negotiate behind closed doors, with a minimum of publically accessible information on the discussed regulations, suggests that the criticism of the existence of a lack of knowledge is legitimate. Knowledge about potential human rights impact is crucial in order to be able to carry out a human rights impact assessment. The lack of knowledge, therefore, could be considered a further violation of the EU's duty to comply with the obligations of the UNGP, which would point to a direct or at least indirect liability of the EU for all the above-listed human rights violations.

²⁹⁷ Ibid., p.36.

²⁹⁸ See European Commission, Report of the Second Round of Negotiations of a Free Trade Agreement between the European Union and India from 03.-07. October 2022 in Brussels, access: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents_en

²⁹⁹ See European Commission, Report of the Third Round of Negotiations of a Free Trade Agreement between the European Union and India from 28 November -02. December 2022 in New Delhi, access: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents_en

2. The European Trade Policy in ASEAN States

2.1 Introduction

Now that this thesis has given a short overview of the consequences of an EU-India FTA, this part will discuss the implications of an EU Philippines agreement. The Philippines is a member of the Association of South-East Asian Nations (ASEAN), an international organisation aiming to accelerate economic growth, social progress, and cultural development in south-east Asia. Furthermore, the organisation seeks to promote peace and security within the region.³⁰⁰ The EU started the negotiation process for a trade agreement with ASEAN as a whole in 2007. The aim of this negotiation, once more, was to aggressively pressure ASEAN countries to lower their trade barriers for EU exports. The negotiations would have even gone beyond the market access that can be achieved through the WTO.³⁰¹ Most likely, the author of the cited paper refers to the rules and principles contained in the WTO GATT 1947.³⁰² For example, under Art.16 of GATT, negotiations in the area of market access to non-agricultural products have been launched. It can be said that the WTO, through the adoption of GATT 1947, provides an instrument to balance the trade-related interests of developing countries with those of developed countries through a neutral platform.

After negotiations for an EU-ASEAN trade agreement were suspended in 2009, the EU decided to conclude bilateral trade agreements with individual ASEAN member states instead.³⁰³ Accordingly, individual negotiations have been launched since 2010.³⁰⁴

2.2 Human Rights in the EU-ASEAN Relations

Although the EU and ASEAN states had a long tradition of economic and political relations starting from 1972, the topic of human rights and the different approaches have since led to tensions between the two organisations.³⁰⁵ This was especially the case when the European countries from 1991 started to put an emphasis on adherence to human rights and social standards.³⁰⁶ One starting point of this shift could be seen in the Tiananmen Square massacre in Beijing in 1989, followed by diplomatic and economic sanctions against China. A sign that sends a clear message from the European states to the ASEAN states that the EU was only

³⁰⁰ Moon, C., "ASEAN" Encyclopedia Britannica, December 27 2022, <https://www.britannica.com/topic/ASEAN>

³⁰¹ Baracol Pinhão, D., The ASEAN-EU Free Trade Agreement: Implications for Democracy Promotion in the ASEAN Region, International Institute for Democracy Promotion in the ASEAN Region 2009, p.4.

³⁰² WTO GATT 1947, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

³⁰³ Binder, K., The negotiations between the EU and ASEAN member states, European Parliamentary Research Service Briefing PE 659.337 of November 2020, p.1.

³⁰⁴ Ibid., p.2.

³⁰⁵ See Manea, M.G., Human rights and the international dialogue between Asia and Europe: ASEAN-EU relations and ASEM, The Pacific Review Vol.21 No.3 2008, p.370.

³⁰⁶ Loewen, H., Democracy and Human Rights in the European-Asian Dialogue: A Clash of Cooperation Cultures?, German Institute of Global and Area Studies Working Paper No.92 December 2008, p.13.

ready to continue with development and economic cooperation if the ASEAN countries would fulfill the criteria that the EU indicated, Loewen writes.³⁰⁷ He further describes that ASEAN states rejected this as an unacceptable interference in domestic affairs. Furthermore, they pointed out the culturally specific and historically influenced understanding of human rights in the ASEAN countries.³⁰⁸

These discrepancies in the different approaches to human rights indicate this thesis's underlying hypothesis: that the EU is politicising human rights through its trade power. The aforementioned argumentation is based on the described EU's foreign policies to link trade with human rights and, therefore, potentially interferes with Asian sovereignty and thus hinders Asian states from fulfilling above mentioned legal obligations under the Declaration on the Right to Development and therefore restricts the Asian society's Right to Development. The EU aims to make development dependent on the acceptance of *the moral leadership in a broader sense in the post bipolar world in general and with regards to[...] Asia in particular.*³⁰⁹

Moral or morality defines what is considered to be right or wrong by the major part of society. What is seen as right or wrong can change over time and is influenced by society and culture.³¹⁰ If morality is influenced by society and culture, the often described aim of the EU to be a moral leader through the, in the context of this work described Brussels effect, has to be interpreted in a way that the EU's aim would not comply with the international societies obligation under the Declaration of the Right to Development. The objective of the EU to be the world's leading power in terms of values like human rights has been, as the thesis has shown, declared in Art. 6 TEU.

3. Philippines

3.1 EU-Philippines Framework Agreement on Partnership and Cooperation

The EU-Philippines Framework Agreement on Partnership and Cooperation was signed on 22 December 2017³¹¹ and builds the basis for the conclusion of further agreements between the Philippines and the EU. Before this work continues to analyse the framework agreement, it must be noted that the Philippines is possibly the one country in this case study with the most similarity regarding values with the EU. This should not be surprising as the EU and the Philippines share the same religious influences regarding the drafting process of the

³⁰⁷ Ibid.

³⁰⁸ Ibid., p.14.

³⁰⁹ See Ibid., p.13.

³¹⁰ Maviş SevİM, Ö., What is Morality?: The Concept of Morality from Prospective Teachers Perspective, Bulletin of Education and Research Vol.43 No.1 2021, p.136.

³¹¹ EU-Philippine Framework Agreement on Partnership and Cooperation, L.343/3 from 22.12.2017, Official Journal of the European Union, Art.1 Para.1.

constitution. A Report by The U.S. Department of State shows that the Philipinian Government accused the members of religious groups of being members of separatists or terroristic groups or having links to the Philippian Communist Party. This led to arrests and even human rights activists being killed.³¹² In the opinion of the author of this thesis, this is shocking and needs to be condemned, and it requires proper investigation by the Philipinian authorities. But this is precisely one of the points the author of the thesis wants to make. Before claiming religious freedom violations in other cultures, one needs to be aware of violations of religious freedoms in European countries, such as the ongoing process of limiting the freedom of religion for Islamic Minorities in European countries.³¹³ The point of the author of this thesis is not that the limitation of the freedom of religion that exist in European countries is comparable to the killing of religious minorities as has happened in the Philippines. The point is that if the EU, on the one hand, demands respect for human rights through the integration of human rights conditionality clauses, European countries, on the other hand, should ensure that they comply with the human rights they are concerned about within Asian countries. If one demands adherence to human rights while having issues with the protection of the same rights, human rights risking to become a solely political phrase without legal value, which everyone can use as a mean to gain power in bilateral negotiations with other countries without complying with the agreed human rights principles in the first place.

Therefore it is surprising that the framework agreement does not only open with a short reference to human rights like in the case of the Trade and Cooperation Agreement of the European Union with India from 1993, but instead in Art. 1 Para.1 provides a set of regulations concerning the protection of human rights. These are:

*respect for democratic principles and human rights, [...] and the rule of law [...] [which] constitutes an essential element of this agreement*³¹⁴.

Such clauses are the provisions wildly criticised by legal, policy, and economic scholars. The aforementioned is because they give the EU the power to terminate the agreement if the EU thinks the partner, in this case, the Philippines, does not comply with the clause in the way that the EU expects it to comply. This unilateral termination of economic agreements would affect the Philippine economy negatively as it needs foreign trade to strengthen its economy,

³¹² U.S.Department of State, Office of International Religious Freedom: Philippines, 02 June 2022, <https://www.state.gov/reports/2021-report-on-international-religious-freedom/philippines/>

³¹³ See for example: Rehman, J., The Sharia, Freedom of Religion and European Human Rights Law, Irish Studies in International Affairs, Vol.22 2011, p.44 or Kuhelj, A, Religious Freedom in European Democracies, Tulane European & Civil Law Forum Vol.20 2005, p.5ff.

³¹⁴ EU-Philippines Framework Agreement on Partnership and Cooperation, Official Journal of the European Union L 343/4 of 22.12.2017, Art.1 Para.1.

which produces a dependency on the EU.³¹⁵ Because of the EU's insistence on integrating human rights conditionality clauses in the trade agreements, there is a dependence on the European Union's assessment of the human rights situation in the Philippines. If this assessment leads to a conclusion that would justify the termination of the agreement through this clause, this could conflict with the Philippines RTD.³¹⁶ As both the EU and the Philippines share a similar set of values that is based on Christianity, as this thesis has argued, the integration of such a clause seems to be at least slightly inappropriate as both the EU and the Philippines respect and protect human rights in their constitution and through international law. This clause is then accompanied by a sustainable development clause following the internationally agreed documents on sustainable development and good governance. Furthermore, the parties agree to respect the domestic laws, rules, and regulations of each other.³¹⁷ In title III of the agreement, the parties included regulations concerning trade and investment. In Art.12 Para. 2, Sentence 2 of this part contains an agreement to undertake steps to achieve improved market access conditions by working towards removing obstacles to trade, in particular non-tariff barriers.³¹⁸ As this thesis will describe in the next paragraph, reducing tariff barriers in the Philippines seems to be favourable from an economic perspective. It would allow the Philippines, one of the EU's biggest exporters of fishery products in the European market, to be more competitive. From a human rights perspective, a reduction of trade barriers that aim to protect the national economy and help it to develop, however, seems less favourable. This is even more the case because the reduction of trade barriers in the agreement is linked with the promotion of market diversification.³¹⁹ For the Philippines, this link could potentially have the same impact as described in the context of this thesis for a potential EU-India FTA.

³¹⁵ See Kolsky Lewis, M., Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?, Loyola University Chicago International Law Review Vol.12 No.1 2014, p.21 f.

³¹⁶ For the necessity and adequacy as well as for potential problems with the integration of human rights conditionality clause see: Bartels, L., A Model Human Rights Clause for the EU's International Trade Agreements, German Institut for Human Rights, Misser 2014, p 26ff.

³¹⁷ EU-Philippine Framework Agreement on Partnership and Cooperation, L.343/3 from 22.12.2017, Official Journal of the European Union Art.1 Para.2.

³¹⁸ EU-Philippine Framework Agreement on Partnership and Cooperation, L.343/3 from 22.12.2017, Official Journal of the European Union, Title 3 Art.12 Para.2 Sentence 2.

³¹⁹ Economic diversification is defined by the UNFCCC as follows: *Economic diversification is the process of shifting an economy away from a single income source toward multiple sources from a growing range of sectors and markets. Traditionally, it has been applied as a strategy to encourage positive economic growth and development.*

3.2. Negotiations of a Potential FTA

The negotiation process of the EU - Philippines FTA started in 2015.³²⁰ This was one year after the EU granted the Philippines the GSP+ status.³²¹ The GSP+ is a further EU program that grants incentives to states that fulfill certain requirements of the EU, for example, the condition to ratify 27 international conventions and 15 international human and labour rights documents. Furthermore, countries that want to be eligible for the GSP+ status have to agree with the European Commission to monitor the implementation of these conventions.³²² The described FTA negotiations should further strengthen the economic ties between the EU and the Philippines. When India worries that reducing tariffs for imports from the EU could harm its economy, the Philippines are concerned because of the high tariffs for fishery products imported to the EU. The difference lies in the importance of the fisheries sector for the Philippine national economy as a whole. Therefore the Philippines fear that these tariffs by the EU can influence the competitiveness of the Philippines' fishery products.³²³ Although it is expected that an EU - Philippines FTA will help further strengthen the Philippines economy, some authors share the concern with regard to the bargaining power described above.³²⁴ Although a study that analyses the effect of an EU-Philippines FTA concludes that the overall impact on the Philippines' agricultural sector would be positive, the study results also suggest that Filipino Customers would face rising prices as an effect of the increased competition because of the European exports.³²⁵ As this thesis has argued in the case of India, increased costs because of higher competition will affect the poor through the fact that they might not be able to pay the inflated prices, which will influence their right to access food as it is enshrined in the ICESCR Art. 11³²⁶ and the Declaration of the Right to Development. The just cited study finds a negative impact on agricultural subsectors in the Philippines; these are cattle, chicken, and hog farmers, as well as raw rubber producers. This result is caused by the same consequences described in the case of India, which is the lack of competitiveness with

³²⁰ Binder, K., The negotiations between the EU and ASEAN member states, European Parliamentary Research Service Briefing PE 659.337 of November 2020, p.8.

³²¹ Puruggnan, J., Duterte has forfeited the Philippines' EU Trade Privileges, Southern Social Movements Newswire 12 October 2020, <https://www.cetri.be/Duterte-has-forfeited-the?lang=fr>

³²² European Commission, Development and Sustainability, Generalised Scheme of Preferences, last entered 03.02.2023, https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en

³²³ See Israel, D.C, The Potential Impacts of a Free Trade Agreement with the European Union on the Philippine Fisheries Sector, Philippine Institute for Development Studies Discussion Paper Series No.2014-03, January 2014, p.15.f.

³²⁴ See Medalla, E.M., Mantaring, M.C., On Free Trade Agreements (FTAs): the Philippine Perspective, Philippine Institute for Development Studies, Discussion Paper Series No.2009-35; 2009; p.10 f.

³²⁵ Briones, R.M., Galang, I., Myka, R., Prospects for a Philippines-European Union Free Trade Agreement: Implications for Agriculture, Philippine Institute for Development Studies, Discussion Paper Series No.2014-05, 2005, p.19.

³²⁶ See United Nations Economic and Social Council, Committee on Economic Social and Cultural Rights, General Comment No.12 on ICESCR Art.11, The rights to adequate food.

the subsidised products from the EU. That will increase poverty. An increase in poverty could once again be considered a violation of the Right to Development of the Philippines.

4. Impact of the Potential EU Indonesia CEPA

4.1 Partnership and Cooperation Agreement

Although the EU and Indonesian relationship was established in the 1980s, it was not always constructive. However, they started to improve in the 1990s when Indonesia elected a new democratic government that attempted to strengthen political relations. In 2009, both parties established a political exchange containing trade negotiations, as confirmed by signing a Partnership and Cooperation Agreement (PCA) in the same year.³²⁷ In 2010 Indonesia was among Vietnam and Malaysia one of the first ASEAN countries that expressed interest in concluding a trade agreement with the EU.³²⁸

As argued in the case of the negotiations with India, one thing that was criticised about the negotiations process with Indonesia was the lack of transparency, as pointed out in a briefing paper by the Centre for Research on Multinational Corporations, SOMO, and the Transnational Institute.³²⁹ These left no opportunity for civil society organisations and those who are affected by this treaty to have a voice in the drafting process, the paper points out. This, as the authors of the cited paper argue, would even include the Indonesian parliament. The paper, therefore, concludes that

*this lack of transparency and democratic security violates fundamental human rights, most significantly the human right of every citizen to take part in the conduct of public affairs as established in Art. 25 (a) of the ICCPR.*³³⁰

Further, it points out the political impact of trade and investment agreements on various basic human rights.³³¹ In addition, the authors conclude that the impact assessment that the EU conducted does only consider particular groups of rights, such as social rights, and therefore cannot be considered a sufficient human rights impact assessment.³³²

³²⁷ Sicurelli, D., External conditions for EU normative power through trade, The Case of CEPA negotiations with Indonesia, Asia Europe Journal Vol.18 Issue 1 2020, p.60.

³²⁸ Ibid., p.61.

³²⁹ Hertanti, R., Aravena, S.A., Human Rights as a key issue in the Indonesia-EU Comprehensive Economic Partnership Agreement, downloadable: <https://www.somo.nl/human-rights-key-issue-indonesia-eu-comprehensive-economic-partnership-agreement/>, p4.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid., p.5f.

4.2 Human Rights Impacts of a Potential EU - Indonesia CEPA

Although Indonesia welcomed the EU's willingness to conclude a CPA, the country raised concerns that compliance with the high European sustainability standards in the palm oil industry would be very hard to achieve, in particular, Indonesian civil society organisations were concerned, as Sicurelli writes.³³³ Another issue the Indonesian government criticised was the EU's position regarding sustainable biofuel. Therefore it condemned the corresponding EU - Parliament's resolution and complained about the EU's intention to achieve greater coverage of issues like environment and labour, which are sensitive issues for ASEAN states.³³⁴ Along with the certification issues concerning palm oil which could lead to a decline in the welfare of palm oil farmers, Indonesian politicians also criticised the European Parliament's position on the integration of child labour, although Indonesia already enacted clear enough rules regarding child labour.³³⁵ In an open letter to the Indonesian president, civil society organisations expressed their concern that the trade agreement with the EU represents a potential threat not only to Indonesian economic development but also to its communities' social and economic rights because of the limitation of the policy space of the state.³³⁶

4.2.1 Palm Oil Industry Related Issues

A coalition of Indonesian and European NGOs 2018 wrote a position statement *to address their concerns about the possible consequences of incorporating palm oil into the CEPA between the EU and Indonesia, with the inclusion in the CEPA to be based on certification schemes such as RSPO and ISPO.*³³⁷

The cited paper concludes that the identified concerns are related to weak certification standards and poor governance. Companies that have been certified with these standards still violate the standards imposed by the certification schemes. Furthermore, the study shows that RSPO and ISPO have failed to conduct proper monitoring and implement sanctions on members who commit violations.

The RSPO was found to be ineffective in addressing land-grabbing practices in the palm oil sector. Many of the RSPO members have been found to be involved in a land conflict with local communities. Instead of preventing land grabbing, RSPO has been found even to facilitate this practice regardless of conflicts on land and other resources. RSPO also was found ineffective in addressing violations of labour rights among their members, the study

³³³ Sicurelli, D., External conditions for EU normative power through trade, The Case of CEPA negotiations with Indonesia, Asia Europe Journal Vol.18 Issue 1 2020, p.66.

³³⁴ See Ibid., p.67.

³³⁵ See Ibid.

³³⁶ Ibid., p.68.

³³⁷ Kusumaningtyas, R., External concerns on the ISPO and RSPO Certification Schemes, Profundo Amsterdam 2018, p.1.

further concludes. The study further finds serious human rights violations such as forced labour, child labour, and salary below the minimum wage occurring among RSPO members. Furthermore, workers of RSPO members have been exposed to abuse and highly hazardous chemicals. Even such that have been banned in the EU. RSPO members have been found discriminating against female workers and rejecting workers' unions. For this and other reasons, the cited study concludes that the RSPO certification would not guarantee the sustainability of the palm oil of its members and therefore act as a shield that deflects greater scrutiny of its members.³³⁸

The second certification scheme the study analysed was the ISPO. Here the study concludes that the standards were even lower than in the case of the RSPO. As ISPO, in contrast to the RSPO, is an Indonesian certification scheme, it only considers Indonesian legislation, which is often more general and does not provide essential detailed guidance. According to the study, ISPO fails to recognise community rights, such as those considered in the Free Prior and Informed Consent Consultation Requirement (FPIC) enshrined in the Declaration on the Rights of Indigenous Peoples. For this reason, the study considered ISPO to fail to protect the basic customary rights of local and indigenous communities. Furthermore, the study found ISPO fails to protect the rights of workers, women, children, and smallholders. The study concludes that it lacks basic and human rights indicators in its criteria and standards. ISPO also does not clearly provide a prohibition of forced and child labour. The indicators used by ISPO also do not contain criteria that specify work policies or human rights policies and procedures concerning temporary workers. Furthermore, Indonesian society considers ISPO as not important. This might also be why it is not distributed much among Indonesian palm oil producers. According to the study, even the Indonesian Chamber of Commerce and Industry complained that ISPO lacks sufficient resources to provide certification for all palm oil companies.³³⁹

For the purpose of this thesis, the cited findings of the study can only lead to the following conclusions. The implementations of both certification schemes do not offer any reliability for the European customer that the palm oil they consume in whatever form has been produced following European standards regarding worker security and rights as well as human rights. The certificates do not have an effect on the prevention or protection of human rights violations. Regarding accountability, one of the topics addressed in this thesis the cited study indicates that the EU, at least in the case of the RSPO, could be aware of the concerns regarding the human rights policy of this certification scheme. The finding that ISPO certified

³³⁸ Ibid.

³³⁹ Ibid., p.2 f.

palm oil producers structurally violate the labour rights of their workers is also approved by another study conducted by the SOMO Centre for Research on Multi National Cooperation and CNV International. The study instead suggests alternative certification schemes such as this by the RSPO from the Netherlands,³⁴⁰ which the author of this thesis would still contradict for above described reasons.

Concerning the ISPO, the EU should gain knowledge through an impact assessment. As this thesis shows, in accordance with other cited authors, a sustainable development impact assessment and human rights impact assessment are necessary requirements under the UNGP. Carrying out an adequate impact assessment would have helped to eliminate the human rights impacts described in this part which are, for the most part, summarised under the Declaration of the Right to Development or provided by other international human rights law instruments, as the author of this thesis argues. Consequently, the execution should lead to the result of not implementing these two schemes into the agreement as an instrument for evaluating compliance with human rights and sustainability standards. The cited study is from 2018, so there is a chance that in the final treaty, the parties would not adopt these schemes. However, if they would still hold on to this plan, the effects on the protection of human rights would be adverse.

4.2.2 Other Human Rights Issues

Because the EU needs minerals and other raw materials, for example, as parts of electric devices, to guarantee the supply of EU businesses, the EU wants to include specific regulations that minimise barriers to trade and investment of these materials into its trade agreements. This was also one of the aims of the EU in the Indonesian agreement. The aim of the EU to obtain unrestricted access to its partner countries' national resources conflicts with Indonesians' own policy choice, Hertanti and Aravena Sønna write.³⁴¹ According to them, the Indonesian constitution requires that the state must manage Indonesians' national resources for the greatest prosperity of its people. The Indonesian government's right to enact legislation restricting access to its resources, according to the authors of the cited paper, was confirmed in the Indonesian constitutional courts' decision No.10/PUU-XII/2014.³⁴² If the agreement at the end of the negotiation process still contains such a clause, the EU would interfere with the national sovereignty of Indonesia.

³⁴⁰ Kiezebrink, V., *Palming of responsibility-Labour rights violations in the Indonesian palm oil sector case studies of Murimi Sam Sam and Aneka Persada*, Somo, CNV international 2017, p.30.

³⁴¹ Hertanti, R., Aravena, S.A., *Human Rights as a key issue in the Indonesia-EU Comprehensive Economic Partnership Agreement*, downloadable: <https://www.somo.nl/human-rights-key-issue-indonesia-eu-comprehensive-economic-partnership-agreement/>, p.4.

³⁴² *Ibid.*, p.8.

A further potential issue was the integration of the Bilateral Investment Protection Agreement (BITs) in the CEPA. BITs can be negotiated in the form of an individual agreement or, as in the case of the EU-Indonesian CEPA, as a chapter containing regulations concerning BITs. The integration of BITs is a general part of all EU trade agreements. The aim of the inclusion of this chapter in the trade agreements of the EU is to provide better opportunities and protection for foreign investors linked to a dispute settlement mechanism.³⁴³ That was also the case in the CEPA with the EU, which this thesis discusses in this part. This agreement is under negotiation at a time when Indonesia expressed the wish to terminate all its current BITs in 2014 because those agreements would contradict Indonesian development interests. It was no longer willing to accept the infringement on its sovereign policy space through the Investor-State Dispute Settlement mechanisms (ISDS) in the BITs.³⁴⁴ Indonesia and other leading developing countries are concerned that the far-reaching and through ISDS enforceable rights granted by the BITs could severely limit governments' freedom to align foreign investments to their development policies. Consequently, they fear such actions would expose them to multimillion-dollar claims from foreign investors if they would try to subject them to stricter regulations.³⁴⁵ However, according to the cited paper, it seemed to be the idea of the EU to implement such a BIT in the CEPA agreement with Indonesia against the expressed concerns of the government.³⁴⁶ Therefore, the authors of the cited analysis are concerned that the CEPA with the EU again would restrict the Indonesian government's policy space and thus affect its efforts to regulate in the public interest, to respect and promote human rights and protect the environment.³⁴⁷ This can be considered an interference with the Indonesian government's sovereign rights to regulate the national resources in Indonesia. Furthermore, it could lead to the Indonesian government violating the described duty under the Indonesian constitution and the Declaration of the Right to Development. Therefore, this would conflict with the EU's due diligence obligations under the UNGP and its obligation inter alia under the Declaration of the Right to Development. Human rights violations can also occur in connection with trade and investment activities. In the case of Indonesia, this concerns, in particular, the mining sector.³⁴⁸ This, according to the

³⁴³ See Cornell Law School, Legal Information Institute, Bilateral Investment treaty, last visited: 08.02.2023, https://www.law.cornell.edu/wex/bilateral_investment_treaty#:~:text=Overview%3A,one%20country%20to%20another%20country.

³⁴⁴ Knottnerus, R., The EU-Indonesia CEPA negotiations, Responding to calls for an investment policy reset: are EU and Indonesia on the same page?, Indonesia for Global Justice, SOMO, Transnational Institute 2018, p.4.

³⁴⁵ Ibid., p.4.

³⁴⁶ Ibid., p.5.

³⁴⁷ Ibid.

³⁴⁸ Hertanti, R., Aravena, S.A., Human Rights as a key issue in the Indonesia-EU Comprehensive Economic Partnership Agreement, downloadable: <https://www.somo.nl/human-rights-key-issue-indonesia-eu-comprehensive-economic-partnership-agreement/>, p.8f.

cited paper, includes land grabbing and displacement of indigenous communities. Another reason the cited article points out another potential source for human rights violations can be infrastructure development projects such as the building of airports. These projects could negatively impact the environment and enjoyment of social and economic rights for the local communities.³⁴⁹ A further source of impact can be the liberalisation of services, for example, in the healthcare sector. This can be caused by the fact that the EU is the biggest exporter of pharmaceutical products. For Indonesia, therefore, liberalisation in the healthcare sector, as it is the aim of the EU, could impact the affordability of public healthcare services,³⁵⁰ which could mean a violation of the right to health and affordable treatment.

³⁴⁹ Ibid., p.10.

³⁵⁰ Ibid., p.11.

Conclusion

This thesis aims to analyse the potential human rights impact in Asia in accordance with the EU foreign policy with special attention on the Right to Development that relies on the conclusion of trade and investment agreements with third states. The European Union has developed over recent years. The same is true for the European self-conception, which has changed from a union that is focused on economic cooperation to a union that placed itself in the centre of the fight for strengthening democracy and fundamental rights around the world through its external foreign policy. To achieve this, the EU links its foreign economic policy with human and fundamental rights conditionality clauses in the trade agreements it concludes. In the context of this thesis, the author was unable to find a legal basis in the European treaties that provide the European Union with the legal power to act in the field of human rights on behalf of the member states. The Council of the European Union has the task of observing the member states' compliance with human and fundamental rights and can even sanction member states for their non-compliance. But this is different from concluding agreements with human rights links as part of the foreign policy, as the criticism by some authors on this European practice shows. The author of this thesis has to agree with this criticism. Trade and human rights should not be combined in one treaty. If the European Constitution would not have failed, the result would potentially be different. Still, as this was the case, the EU remains an international organisation that has to respect the rules that apply to international organisations and can only act in accordance with their constitutional treaties. This practice of linking trade with human rights has achieved some criticism from various fields. In the public policy field, it was criticised to be not consistent. That is because the EU renounced the conclusion of a human rights conditionality clause, even if the country violates international human rights. The aforementioned indicates that the EU is more interested in concluding the trade agreement, while in some instances, the EU insists on the inclusion of this clause as a necessary condition, even if the countries have a democratic government and the cases of human rights violations are comparable with the instances in EU countries. Economic scholars furthermore criticise this EU practice because they would be an obstacle for trade and the businesses involved in these overseas trade operations. Then some scholars argue that the EU's supremacy is problematic for developing countries who wish to diversify their market and wish to export products to the EU market, which sometimes leaves them with no option but to agree to whatever the EU suggests without having an equal opportunity to make their wishes have been recognised in the treaties. This can be related to what has been described as the Brussels Effect. From a legal perspective, this is problematic for several reasons. The potential access of the country to its national resources could be limited in

accordance with the wishes of the EU, which potentially hinders the execution of the country's sovereign rights to exercise jurisdiction over its natural resources and its described duties concerning the Right to Development. One example of this is the Indonesian Constitution which provides the requirement to regulate its national wealth and resources in such a way that it serves the development and well-being of the Indonesian people. The described violation of the Right to Development limits Indonesian people's opportunity to access these resources as part of their job. Restricting access to resources, therefore, could mean limiting their chance for personal development, likewise included in the Declaration of the Right to Development. Another problematic point described is that the imbalance of bargaining power could give the EU the power to implement conditions unilaterally, which will circumvent what has been internationally agreed in the GATT as conditions for free trade on the WTO level, as shown in the case study above. Tariffs on foreign imports have played an important role in the economic development of the countries described. The abolition of these tariffs, as demanded by the EU in the ongoing negotiations, might positively impact some business sectors and some companies. However, the cited papers and studies indicate that overall it would have a negative impact on the situation of poor and rural parts of the concerned societies. This will further hinder their access to the most basic needs which are necessary for the enjoyment of a life that is worthy of a human being, like access to food, freedom from hunger, access to clean drinking water, and access to education, at least, if the government does not subsidise it. The lack of access to these rights can be directly linked to child labour, trafficking in human beings, forced work, and slavery. These are often the only remaining options for poor families to collect enough money to be able to pay for the absolute minimum of what they need for their own lives and their families. This is directly linked to the second aspect on which this thesis is focussed, the European Union's accountability for actions related to their external foreign policy. That is especially important if one considers the described influence of the EU foreign trade policy. In order to hold businesses and their host states accountable for human rights violations, the United Nations adopted the UNGP on business and human rights, which demands the protection of human rights, respect for human rights, and the prevention of business-related human rights violations. The accountability of the European Union for extraterritorial business-related human rights violations can be determined by the described duties of states and international organisations mentioned above. In accordance with the European Unions' founding treaties, the EU has some control to regulate the businesses of its member states. Furthermore, the EU has the power to conclude external trade agreements on behalf of its member states. The policies enacted by the EU and the trade agreements have an effect on how business operations are conducted inside the

European borders and abroad. In a widely criticised decision, the ECtHR concluded that membership in an international organisation could not cover the individual states' accountability for human rights violations. This has a protective effect on the EU. The author of this thesis agrees with the voiced criticism of why the EU should enjoy protection from human rights responsibility while the member states are responsible. As the EU is negotiating the trade agreements, which can lead to the described human rights impacts on behalf of its member states, the author of the thesis argues that the violations would not happen if the EU would not have negotiated on behalf of the member states which give the EU countries interests more weight. Therefore the EU has to be at least partly responsible, especially since multinational enterprises may not only be linked to one member state. This would make sense in the opinion of the author of the thesis. However, to the knowledge of the author of the thesis, this view is not reflected in the European courts' jurisdiction due to the protection from the ECtHRs judgement described above, which covers the EU. Although it can be argued that in the economic area, it has a lot of influence and rights that it uses to regulate and equalise its common market. One key aspect of the prevention of business related human rights violations that the UNGP demands are the execution of human rights impact assessments in the context of actions that can have an adverse impact on the enjoyment of human rights. Although the EU points out the importance of fundamental rights as one of its founding principles and the existence of judgements like *Front Polisario v. Council* that demand a development-friendly external policy, the recently concluded EU-Vietnam FTA proves that the EU does not take fundamental rights and international law obligations as serious as it claims in public, at least in extraterritorial cases. Despite the fact this thesis focuses on countries where the trade agreements are still under negotiation, the analysis based on the available materials shows that even if the EU would have conducted a human rights impact assessment, it does not seem to consider the expectable impact on the poor, rural and indigenous parts of the community in these countries. At least, this seems to be the case in negotiations with India and Indonesia. As the Philippines appears to be the country of the three chosen countries most favouring the conclusion of the agreement, fewer resources were available that point out the potential human rights impacts. However, the fact that the European demands are the same for all three countries proves that it can be assumed that the results for the poor are equal as in the other two analysed cases. The aforementioned leads to the next aspect discussed in this thesis, which is access to remedy in the European Union. This is something that even has been criticised by European research institutions. Access to remedy is a further demand by the UNGP for all states. Although in recent years, the EU has introduced some initiatives to improve access to remedy in the European Court, the introduced changes do not support the

access for human rights violations in relation to extraterritorial business activities as described above. Considering the influences of a European foreign trade policy which has often been described as aggressive in combination with the EU's own lack of compliance with some regulations of the UNGP, it is understandable that the Asian states seem reluctant to conclude agreements that contain mandatory human rights conditionality clauses. The aforementioned, even if these countries expect to benefit from access to the European market, is proven by the fact that the negotiations have been ongoing for several years in all three of the chosen countries. Some of these countries, like India, even publicly expressed their rejection of discussing human rights in the context of trade and voiced their opinion that they have a sufficient level of protection of fundamental and human rights in their constitution and the internationally agreed human rights instruments. This argumentation led to a comparison of the protected fundamental and human rights in the three countries selected for the case study. This case study has extensively compared the three constitutions regarding this question and has cited the constitutional and sometimes even human rights protected under each constitution. A comparison of the legal practice was impossible due to the lack of knowledge of the official language of the three countries covered in this thesis, combined with the limited amount of space. Further study and analysis must be conducted to compare the three countries' legal practices. This comparison can only prove that the level of protection of fundamental rights granted in the constitution is not so different from what is protected in European treaties and national constitutions, as people sometimes seem to believe in Europe. However, it still seems possible to argue about the main difference, the connection of rights and obligations in the Asian understanding of human rights. Nonetheless, if this argument is analysed in greater depth, in that case, it does not appear to be that different from what in Europe is summarised as ethics, which also provides moral-legal obligations to everyone to limit personal freedom and builds the basis for our criminal law. The ASEAN states, which include Indonesia and the Philippines, in addition to the national constitutions and recognised international human rights law instruments, even have an ASEAN human rights constitution which includes similar rights to the ECHR. Even if India is not a member of ASEAN, it protects internationally agreed human rights in the same way as the Philippines and Indonesia. The difference is that, to the knowledge of the author of the thesis, there is not yet an ASEAN court of human rights. The comparison of the constitutions has furthermore shown that some of the covered countries value the Right to Development so much that they protect it in the form of fundamental or even human rights in their constitutions. This fact does not seem to be recognised in the negotiations with the EU. That can be proven by the fact that the EU demands political actions, which would clearly be in contradiction to the described provisions

of the Right to Development. While one of the central conditions for the EU is the acceptance of a human rights conditionality clause that is explicitly integrated with the expressed aim to strengthen the European idea of human rights, described as European values, like democracy, human rights, and the rule of law. With all that in mind, it suggests that the EU tries to “lecture” Asian countries on the topic of human rights. The author of this thesis can only agree with the Indian representative cited in this thesis, who expressed his concern that this has nothing to do with an economic partnership based on mutual respect and equality. That assumption that the EU is somehow trying to “lecture” its former colonies on the topic of human rights is furthermore proven by the speech of the top European foreign policy official Josef Borell, who, during a public event on the 13 of October in Brussels described

Europe as a beautiful garden that is superior to the vast majority of the countries on Earth and compared it with most of the world, which he described as a jungle. He further says that

the world needs Europe because it is a beacon that must civilise the rest of the world,
in his view

*the enlightened western gardeners have to go to the jungle because of the fact that the supposed barbarians are not tamed.*³⁵¹

Of course, a statement like this by one of the highest European representatives conducting European foreign policy is noticed in the countries where the EU is trying to conclude a trade agreement that includes human rights conditionality clauses. Given European history as a continent of colonising powers that have claimed to have the legal authority over international law, which was described as

law of civilised nation

that gives them the right to claim colonies in the uncivilised world, as the former Russian-Estonian Professor for International Law, Friedrich Fromhold (Fyodor Fyodorovich) Martens, called it among other legal scholars of his time.³⁵² The three Asian countries also remember this, which influences their perspective on international law and human rights. The described comparison of the three constitutions could prove one of the main arguments. This is the fact that the three countries remember well how it was as they have been colonised until recently by the same European states, which, on the one hand, describe them again as the barbarian jungle that needs to be tamed, possibly by means of what EU accept as international law. On the other hand, taking advantage of their nations' resources and exploit them once more, which exposes parts of their civilisation to increasing poverty. This conclusion can be drawn

³⁵¹ Norton, B., In neocolonial rent, EU says Europe is a ‘garden’ superior to to the rest of the world’s barbaric ‘jungle’, MRonline, 19 October 2020, <https://mronline.org/2022/10/19/in-neocolonial-rant-eu-says-europe-is-garden-superior-to-rest-of-worlds-barbaric-jungle/>

³⁵² Müllerson, R., F.F. Martens-Man of the enlightenment: Drawing Parallels Between the Martens’ Time and Today’s Problems, The European Journal of International Law Vol.25 No.3 2014, p.832

from the described way the EU uses international law and human rights to secure its aspiration to be a global economic power and a leading power in the global protection of human rights. In the introduction, the author of this thesis argues that both seem impossible at once. This thesis shows that this is partly true if countries, regions, or international organisations do not fully comply with business and human rights regulations like the UNGP, GATT, and other internationally recognised documents in the field. Suppose the EU wants to achieve more credibility about its aspirations as a leading power in protecting human rights. In that case, it should start by working to fully realise the rights under the UNGP for all people who are affected by its foreign trade policy, even if they are not present in the European Union. The previously mentioned would comply with the UDHR that in Art. 1 points out that all human beings are born free and equal in dignity and rights. This also means that the enjoyment of human rights should not be hindered by the extraterritorial actions of an international organisation or its member states. This requirement would follow the provisions for the international community under Art. 3 and 4 of the Declaration of the Right to Development. First, being a supreme power in protecting human rights requires countries to take human rights seriously everywhere inside their territory and, more importantly, concerning their extraterritorial actions. This is due to the people outside of the jurisdiction of the violator being much more vulnerable because of the missing access to remedies in the country that violates their human rights. The lack of credibility, together with the described experiences of Asian countries, is not only hindering the conclusion of new agreements but also leads some Asian countries to seek stronger economic relations with BRICS countries, as this thesis has further shown. The European foreign policy approach to aggressively demand market access and human rights could, therefore, even decrease the European Union's economic position and influence to demand human rights integration in trade agreements. The ongoing Russian-Ukrainian war proves to these Asian countries that if necessary to achieve what it wants, the EU is willing to use its economic power through unilateral sanctions. In the case of trade agreements, that could indicate that noncompliance with the European understanding of human rights leads to the termination of the agreements, which would mean a loss of money through trade and investments. Among all the other things described above, this thesis's main focus was further researching the link between the UNGP and the RTD. A thesis like this with a limited amount of space possible is not long enough to fully archive this goal. Therefore further research on this topic has to be carried out in the future. Another point this thesis was trying to conduct was a comparison of the impacts of trade agreements which was not as fruitful as the author would have anticipated. The present was because the concerned agreements are still under negotiation. Therefore, further research is needed to

compare the findings of this thesis with the actual outcomes of the trade agreements once they have been concluded. By proving that the level of protection of fundamental rights in the three considered Asian countries is equivalent to the protection in European countries, the author of this thesis in no way tries to relativise or excuse the fact that human rights violations are happening in these countries. In contrast, the thesis tries to argue that respect for human rights, first of all, requires respect for human rights if European governments want to point to violations happening in other regions of the world. It further argues that respect for human rights also includes respect for different concepts of human rights as long as they are based on the same concepts, like dignity and freedom. In the author's opinion, the mentioned human rights violations are not merely related to a lack of human rights protection in the covered Asian countries. Instead, they are related to poverty, which leads to corruption and hinders access to human rights protection. Other scholars also prove this, as it was shown. Therefore the international community should undertake serious efforts to decrease global poverty.

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