

HUMAN RIGHTS PROVISIONS IN THE FORTHCOMING INDIA-EU FREE TRADE AGREEMENT

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Trade has played a vital role in the evolution and development of the human race. Human rights on the other hand, though considered universal and inherent, were formally recognized much later in human history. Even today much is left to be desired regarding the implementation of these rights. One way in which few nations believe it can be implemented is by including such provisions in trade agreements. This paper focuses on the importance of the emerging trend of including human rights clauses in free trade agreements ('FTAs'). The effectiveness of such provisions is limited as has been seen in the past because countries are reluctant to enforce such provisions as they are mostly loosely worded. We give a general outline of this emerging trend and lay emphasis on the upcoming European Union (EU)- India FTA where the EU wants to include such provisions but India is opposing it. We argue that India, which is likely to benefit in several sectors from this agreement, may accept certain minimum standards for human rights, but this needs to be carefully negotiated and drafted to avoid becoming a trade weapon for the EU and a disguised form of protectionism.

I. INTRODUCTION

Trade has been an important tool for human interaction for several centuries. People belonging to different parts of the world came in touch with each other through trade and this resulted in the mixing of cultures and greater spread of technology and knowledge 'resources'. In the twenty first century, international trade has become essential for all nations as no country is fully self-sufficient. Globalization to a great extent has been caused by economic integration brought about by trade.

Human rights, on the other hand, are considered to have been in existence since the birth of civilization as they are inherent in nature. According to the United Nations Office of the High Commissioner for Human Rights ('OHCHR'), 'human rights' are "rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin,

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colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible”.¹ These rights could be found in national legislations, customary international law, treaties etc. The right to life,² equality,³ non-discrimination,⁴ shelter, economic, social, educational and cultural rights form part of some of the most fundamental human rights.⁵ All activities taken up by mankind in the modern age are supposed to respect these rights.⁶ Of late, there also seems to be a growing view that there is a hierarchy among these rights.⁷ This view was mooted in *the Case Concerning Barcelona Traction, Light and Power Company, Limited*.⁸ Nevertheless, authors like Theodore Meron are of the view that such a hierarchy still does not exist since there are no clear legal principles to determine how certain rights may take precedence over others.

Despite trade being essentially an economic activity and human rights an inherent aspect of humanity, the two are being increasingly merged in modern times. Certain nations, mostly developed, have harped on including human rights provisions in their trade agreements for implementing these rights as there have been several instances of flagrant violations of these rights even in the twenty first century. Such nations opine that putting economic pressure on nations may help in attaining the desired respect for these rights. The inclusion of human rights provisions in FTAs between nations is the central theme of this paper. It is important to note that the concept of human rights clauses is a species within the larger genus of ‘social protection’. Many trade agreements may merely include environmental protection or animal protection clauses, which cannot be said to have a direct bearing on human rights. The emphasis of this paper is more on the human rights clauses specifically rather than social protection clauses generally. Our paper is divided into three parts. The first part gives a brief description of FTAs, how human rights clauses are linked to FTAs, how these clauses are included in FTAs and their enforceability. The second part focuses on the trends observed in various FTAs with regard to human rights clauses, their nature and the patterns observed in the EU trade agreements. This part also sheds light on the stance adopted by India in this sphere. The next part is devoted to an analysis of the EU-India FTA with regard to human rights provisions and gives insights into the intricacies of the same.

¹ OHCHR, *What are Human Rights?*, September 17, 2010 available at <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx> (Last visited on September 17, 2010).

² International Covenant on Civil and Political Rights (‘ICCPR’), Art. 6(1): Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

³ ICCPR, Art. 14.

⁴ ICCPR, Art. 24.

⁵ ICCPR, Part III.

⁶ OHCHR, *supra* note 1.

⁷ See Theodore Meron, *On a Hierarchy of International Human Rights*, 80 A.J.I.L. 1 (1986).

⁸ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ. Reports 1970, p.3, ¶ 33.

The paper concludes with a roadmap of what India's approach should be with respect to the trade pact.

II. FTAs AND HUMAN RIGHTS

A. THE LINK BETWEEN FTAs AND HUMAN RIGHTS

In principle, free trade implies the free movement of goods, services, capital and workers across borders.⁹ In practice, it refers to the national policy and regulatory objectives which put fewer restrictions on the import and export of goods between nations. This concept has evolved through the years. During the beginning of the nineteenth century, free trade as seen in the American context meant a tariff below 20 percent.¹⁰ Later on, in the late nineteenth century and mid-twentieth century, it was slated at rates below 40 percent and 50 percent respectively.¹¹

An FTA can be simply defined as an arrangement between countries through which preferential market access is facilitated between them. FTAs formed between countries allow them to trade without tariffs, taxes, quotas and similar burdens which are imposed on trade.¹² Apart from the lifting of these burdens, tax reductions, subsidies and other measures protecting domestic producers are also done away with.¹³

The general policy of World Trade Organisation ('WTO') and previously the General Agreement on Tariffs and Trade, 1947 ('GATT'),¹⁴ has been to ensure non-discrimination between its member states.¹⁵ Art. XXIV, GATT,

⁹ WALTER GOODE, *DICTIONARY OF TRADE POLICY TERMS* 145 (2003).

¹⁰ *Id.*, 145.

¹¹ *Id.*, 145- 146.

¹² *See* GATT, 1947, 1947 55 U.N.T.S. 194, Art. XXIV.

¹³ *See e.g.*, FTA between the Government of the People's Republic of China and the Government of the Republic of Singapore, Arts. 6 and 7, available at <http://www.bilaterals.org/spip.php?article13911> (Last visited on November 19, 2010); FTA between the Government of the United States of America and the Government of Australia, Section B, Art. 2.3, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> (Last visited on November 19, 2010).

¹⁴ GATT, *supra* note 12.

¹⁵ GATT, Preamble: Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, Art. 1: With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and

however, allows WTO members to form free trade areas which enable the nations forming such areas to eliminate duties and other restrictive regulations on almost all the trade aspects between the parties.¹⁶

Towards the end of World War-II, the US started its efforts to persuade nations across the world to liberalize their trade regimes.¹⁷ The establishment of GATT between 23 countries during the same period initiated a whole new process of countries coming together and negotiating their trade policies for mutual benefit.¹⁸ In 1993, the WTO became the official successor to GATT and this triggered off the start of FTAs.¹⁹ FTAs are mostly created between a number of countries, which are perceived as constituting 'trading blocs'.²⁰ Examples of trading blocs include the North American Free Trade Agreement ('NAFTA'), Association of Southeast Asian Nations ('ASEAN'), European Union ('EU'), Mercado Comun del Sur ('MERCOSUR'), Southern African Development Community ('SADC') etc. The biggest criticism of FTAs is that they result in the creation of regional trading blocs and increase rivalry between different regions.²¹ This is because once an FTA is created between certain nations and the status of Most Favoured Nation (MFN) is conferred upon them, all other countries outside it are subjected to unequal tariffs and taxation.

Although FTAs were initially formed within trading blocs, this trend is slowly changing. Now, more emphasis is laid on bilateral FTAs. This phenomenon is increasingly seen in South Asia.²² Bilateral FTAs are seen as

with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

¹⁶ GATT, Art. XXIV (5)(b): A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Arts. XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories; GOODE, *supra* note 9, 146.

¹⁷ *Free Trade Agreements and Trading Blocs*, September 15, 2010, available at <http://www.referenceforbusiness.com/management/Ex-Gov/Free-Trade-Agreements-and-Trading-Blocs.html> (Last visited on September 16, 2010).

¹⁸ *Id.*

¹⁹ Susan Ariel Aaronson, *Is the Wedding of Trade and Human Rights a Marriage of Convenience or a Lasting Union?* 10 HUMAN RIGHTS & HUMAN WELFARE 1 (2010).

²⁰ *Supra* note 17.

²¹ Aaronson, *supra* note 19.

²² See Martin Khor, *Bilateral/Regional Free Trade Agreements: An Outline Of Elements, Nature And Development Implications*, September 10, 2010, available at www.twinside.org.sg/title2/par/mk005.doc (Last visited on September 11, 2010); Free Trade Agreement Between the Government of the People's Republic of China and The Government of the Republic of Singapore, available at <http://www.bilaterals.org/spip.php?article13911> (Last visited on November 19); Indo-Sri Lanka Free Trade Agreement, November 19, 2010 available at <http://commerce.nic.in/ilfta.htm> (Last visited on November 19, 2010).

being disadvantageous to developing countries since they put them in a weaker position due to their lack of bargaining power.²³

The primary link between trade and human rights is that trade increases human welfare in general through the betterment of the economy.²⁴ This 'mutual supportiveness'²⁵ of trade and social protection, however, could be termed as 'ambiguous' at best. This is because of the two extreme results that increased trade could bring about in any economy. For instance, though enhanced trade may lead to an increase in employment opportunities in general, it may also lead to a sharp decline in employment in certain inefficient sectors during the initial period.

The inclusion of social protection clauses comprising human rights provisions in FTAs is a very recent move propelled by developed nations especially the US, Canada and the EU towards the end of the 20th century.²⁶ It can in no way, however, be said that the idea of incorporating social protection within trade agreements is a new phenomenon. Even in biblical times, the merits and demerits of coming into contact with strangers through sea was understood.²⁷ Much later, the ban imposed by the US through the Tariff Act, 1890 (§51) on goods produced by convict labourers encouraged countries like Canada, Australia and Britain to adopt similar laws. The first FTA to include explicit human rights clauses was the NAFTA.²⁸ But the real motivating force behind the inclusion of human rights clauses in trade agreements were the two Lome Conventions (1975 and 1989).²⁹ The trend triggered by the US, EU and Canada has attracted developing countries as well. This, however, is not to say that all developed countries have straightaway taken up this idea. Countries like Japan have given a very cold response to the idea.³⁰

It is unlikely that this trend has been triggered only by the benevolent and altruistic concerns of developed nations. Rather it appears to be an economic and political step taken by these governments. Another reason for the

²³ Khor, *supra* note 22.

²⁴ Lorand Bartels, *Social Issues, Labour, Environment and Human Rights*, in *BILATERAL AND REGIONAL TRADE AGREEMENT: COMMENTARY, ANALYSIS AND CASE STUDY 2* (Simon Lester & Bryan Mercurio eds.) (Forthcoming), September 5, 2010, available at <http://ssrn.abstract=988639> (Last visited on September 10, 2010).

²⁵ *Id.*

²⁶ See e.g., NAFTA entered into force in 1992, USA-Jordan FTA entered into force in 2000, EU-Mexico FTA entered into force in 2000, Australia-United States FTA entered into force in 2005.

²⁷ Aaronson, *supra* note 19, 1.

²⁸ *Id.*

²⁹ See generally ACP-EEC Convention signed at Lome on February 28, 1975; 4th ACP-EEC Convention signed at Lome on December 15, 1989, Official Journal L 229, 17/08/1991 P. 0003-0280 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21991A0817%2801%29:EN:HTML> (Last visited on November 19, 2010).

³⁰ Bartels, *supra* note 24, 4.

inclusion of human rights clauses in FTAs is the motive of leaders of developed countries to use these provisions as campaign propaganda, public displays of sincerity, assurance of ideals and peddling information.³¹

This can be inferred from the fact that enforcement mechanisms of such protectionist clauses are weak and in the past have been implemented in very rare circumstances (as will be seen subsequently). Also, the US and the EU- the two economic powerhouses that can be credited with pioneering this trend, focus on vastly different types of rights.³² While the US insists on protection of labourers and children in their bilateral trade agreements,³³ the EU traditionally has mainly protected citizenship, fundamental rights and freedoms including freedom against torture, abuse, political or military coups etc.³⁴ Unlike the US, they have mostly ignored cultural and social rights.³⁵ Moreover, the bargaining power of developed nations over the inclusion of human rights protection clauses becomes minimal when negotiating with a stronger economy. For example, Australia is circumspect in discussing the subject of human rights while negotiating an FTA with China even though Australia has expressed concerns over racism and other human rights issues, especially with respect to Tibet.³⁶ As trade with China is very important for the Australian economy, especially the agricultural and dairy sectors, human rights issues have been put on the back burner.

The inclusion of specific human rights provisions is endorsed and demanded by domestic interest groups like labour unions and social welfare institutions.³⁷ Such groups, especially NGOs, constantly monitor and report human right abuses and ensure that they receive widespread media attention. These interest groups pressurise national governments to incorporate human rights protection in trade agreements. Social justice movements in these nations have made the population more educated and vocal about social protection in trade and therefore they insist that their leaders recognize this link in new trade agreements.³⁸ Therefore, the activities and demands of NGOs and

³¹ Emilie M. Hafner Burton, *Coercing Human Rights: Why Preferential Trade Agreements Regulate Repression*, available at http://web.mit.edu/polisci/research/wip/imposing_justice.pdf (Last visited on September 2, 2010).

³² *Id.*

³³ *See, e.g.*, US-Chile FTA, June 6, 2003, Chapter 18; US-Singapore FTA, May 6, 2003, Chapter 17; US-Morocco FTA, June 15, 2004, Chapter 16.

³⁴ Chimugwuanya Nwobike, *Beyond Conditionality: Human Rights in EU Development Partnership with Developing Countries*, 19 SRI LANKA J. INT'L L. 387 (2007).

³⁵ Aaronson, *supra* note 19.

³⁶ *See* ABC News Australia, *Human Rights 'Not on Table' in China FTA*, June 19, 2005 available at <http://www.bilaterals.org/spip.php?article2127> (Last visited on September 3, 2010); AAP, *Human Rights Could Hurt China FTA*, May 18, 2005 available at <http://www.bilaterals.org/spip.php?article1922> (Last visited on September 3, 2010); ABC Online Australia, *Chinese Trade Will Weather Trade Disagreements: Government*, April 11, 2008 available at <http://www.bilaterals.org/spip.php?article11780> (Last visited on September 3, 2010).

³⁷ *Id.*

³⁸ Bartels, *supra* note 24, 365.

other interest groups receive a high degree of public support and the national governments have to yield to their demands. Such clauses, thus, end up being utilized as a political tool by developed nations to achieve foreign policy objectives and boost the popularity of the national government.

On the other hand, a more optimistic justification of this trend can be the broader changes in international law that recognize the utilization of international law as a means to regulate social matters.³⁹ The inclusion of human rights protection clauses has a moral argument in that low wages and poor labour standards are the causes of human rights violations in developing countries and combating it requires association of trade and human rights.⁴⁰ Advocates of these provisions argue that such provisions will help improve respect for fundamental rights and lessen wealth disparity in developing countries.⁴¹ Therefore, human rights offer a framework for substantially reorienting trade policies of nations to attain these objectives.⁴² Such rights are considered to be universal, indivisible and interdependent. States have committed to observe and promote human rights and fundamental freedoms at conventions like the Vienna World Conference on Human Rights⁴³ and United Nations Declaration on the Right to Development.⁴⁴ Nevertheless, flagrant violations of such rights are witnessed far too often in developing and economically weak countries. Therefore, trade policies carrying economic benefits for contracting parties, if structured along the lines of protecting human rights, may act as an incentive to attain what the conventional human rights implementation organizations have failed to achieve effectively. Hence, such provisions merely acknowledge the international obligation of nations to promote human rights and attain social justice for all.

Developed countries also use these clauses in order to ensure that developing countries do not arbitrarily reduce labour and other human rights standards in their pursuit of gaining entry into the developed countries' markets.⁴⁵ Views have also been expressed to the effect that human rights clauses are a means to level the playing field between developed and developing

³⁹ *Id.*

⁴⁰ Mansoor Farkhanda Zia, *Trade versus Peace: A Contextual Analysis of Core Labour Standards in the Global Trading Community*, 5 *ASPER REV. OF INT'L. BUS. & TRADE L.* 133, 139 (2005).

⁴¹ Hogan Marianne, *DR-CAFTA Prescribes a Poison Pill: Remediating the Inadequacies of Dominican Republic- Central American Free Trade Labour Provisions*, 39 *SUFFOLK UNIV. L. REV.* 511, 517 (2005-2006).

⁴² Andrew Lang, *Rethinking Trade and Human Rights*, 115 *TUL. J. INT'L & COMP. L.* 335, 389 (2006-2007).

⁴³ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (July 12, 1993).

⁴⁴ United Nations Declaration on Right to Development, G.A. Res. 41/128, U.N. GAOR 41 (December 4, 1986).

⁴⁵ Marley S. Weiss, *Architectural Digest for International Trade and Labor Law: Regional Free Trade Agreements and Minimum Criteria for Enforceable Social Clauses 4* (University of Maryland Legal Studies Research Paper No. 2006-2, 2005).

countries. While hardened advocates of the free trade approach would want a complete liberalization of the market without any trace of protectionism, their opponents would want proper protection in places to ensure the interest of the less fortunate parties involved. It is also to be noted that with the reach of FTAs being extended to several new sectors, the pressure to acquire labour in this front would increase drastically, which could result in the dilution of labour standards. The inclusion of human rights clauses in such a scenario gains much importance.

The most popular and widely-discussed reason for the inclusion of certain human rights clauses like labour regulation in FTAs is protectionism. It is perceived that developed nations insist on incorporating such provisions to protect their economic interests by shielding locally manufactured products. By the late twentieth century, as a result of globalization taking root, workers in developed nations like the US were harshly affected by the decrease in international demand caused by the strong dollar and a large trade deficit.⁴⁶ Foreign competition was causing severe losses in the local markets of the developed nations.⁴⁷ Therefore, organized labour forces vocally opposed the reduction of trade barriers and started pushing for the inclusion of such provisions in international trade agreements.⁴⁸ For instance, in earlier FTAs like the US-Israel FTA, 1985 there were no such clauses, whereas the FTAs of the US that entered into force after the turn of the century like the NAFTA, US-Jordan FTA, US-Singapore FTA and US-Chile FTA include similar labour standards. Interestingly, in most of these FTAs labour right groups were directly involved with initiation and drafting of the labour provisions.⁴⁹

It has been asserted by many authorities on the point that these clauses are mainly included with the aim of creating a market-friendly atmosphere in developing countries with which developed countries trade.⁵⁰ Domestic industries in developed nations fear that FTAs will lead to stiffer competition in the face of cheap imports.⁵¹ Restrictions in the form of labour standards can weaken the competition from developing nations. Competitive advantage in labour and other human rights standards can be attained as it will increase

⁴⁶ Alisa Dicaprio, *Are Labour Provisions Protectionist: Evidence From Nine Labour Augmented US Trade Agreements*, 26 *COMPARATIVE LABOUR L. & POL'Y J.* 1, 18 (2004-2005).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See generally, Burton, *supra* note 31; Stephen J Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements*, September 5, 2010, available at SSRN: <http://ssrn.com/abstract=1115298> (Last visited September 6, 2010).

⁵¹ Andrea R. Schmidt, *New Trade Policy for America: Do Labour and Environment Provisions in Trade Agreements Serve Social Interests or Special Interests*, 19 *INDIANA INT'L. & COMP. L. REV.* 167 (2009).

the price of production of developing country competitors.⁵² Such protectionism through human rights clauses in trade agreements is sure to hamper trade in general and profits in particular.⁵³ Therefore, developing nations have been suspicious of such provisions due to fear of such disguised protectionism by a developed country.

The intention of the developing countries in adhering to the inclusion of human rights provisions is to retain access to the markets of industrially developed countries.⁵⁴ For a small developing country the allure of entry to a large market is powerful enough to bind them politically through their economic ties.⁵⁵ Fear of exclusion from the global economy can be an extremely powerful tool to reduce the bargaining power of a developing nation at the negotiating table and compel it to accept provisions that they would not have otherwise agreed to. The range of FTAs has exponentially grown and encompasses not just the removal of barriers to trade of goods but also services in science and technology, intellectual property, financial services, investment, telecommunications etc. Consequently, such agreements allow developing nations to access several global markets, which they would not otherwise have had access to, especially in the case of sensitive articles with higher tariffs, increases the competition that they would face.⁵⁶ Therefore, though they are initially reluctant, they end up agreeing to the inclusion of human rights clauses. It is therefore a result of both, deliberative policy choices and the lack of viable alternatives.⁵⁷

Thus, it is evident that there are many underlying reasons for why the inclusion of human rights clauses in FTAs becomes important. In the next section, we examine the general trends in which these clauses are included in FTAs.

B. MODES OF INCLUDING HUMAN RIGHTS CLAUSES IN FTAs

It is interesting to note that frequently trade agreements with social clauses do not specify the link between the trade agreement they have made and the social protection clauses. Most trade agreements follow the general practice of including the exception clause given in Art. XX, GATT 1994. At best, they make slight modifications to the GATT exception clause by including

⁵² *Id.*, See also Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999).

⁵³ Burton, *supra* note 31.

⁵⁴ Burton, *id.*, 6.

⁵⁵ Craig Freedman, *Old Wine in New Bottles-Are Free Trade Agreements the New Protectionism?*, 6 ASIA PACIFIC SOCIAL SCIENCE REVIEW 1 (2006).

⁵⁶ Bonapas Francis Onguglo, *Developing Countries and Trade Preferences*, in TRADE RULES IN THE MAKING 125 (1999).

⁵⁷ *Id.*

more exceptions.⁵⁸ They also fail to outline the mechanism of the implementation of such welfare clauses. On the other hand, agreements which show the link between the two are mainly of two kinds. The first kinds are those which try to give precedence to other existing international laws and treaties which uphold social objectives. Here, a direct link is absent. Nevertheless, by giving predominance to other social welfare legislations, they ensure that social protection clauses within the agreement are effectively implemented. The second category is that which either promotes or discourages social protection by including specific clauses in the agreement. An example would be a clause which curbs on the adoption of illegitimate tactics for uplifting trade. These clauses fall under the category of 'positive regulation' of social issues. Issues ranging from environment to indigenous rights are covered under the ambit of these 'positive regulation measures'.⁵⁹

C. ENFORCEMENT OF HUMAN RIGHTS CLAUSES- HOW FAR IS IT SUCCESSFUL?

Since the surfacing of the trend, free trade advocates, trade protectionists and economists have had heated discussions on the efficiency of human rights obligations in FTAs. Today such provisions are instituted in a vast majority of trade agreements. Yet debates continue on whether such provisions are mere aspirations or enforceable obligations.

Undoubtedly developed countries will not pursue strict enforcement of these regulations since the monetary implications of cancelling an FTA are huge. Historically, it has been seen that the implementation of human rights provisions depends on cooperation from the contracting parties. The US, EU and Canada have tended to observe a policy of initiating a dialogue if violations happen. This method fails to be efficient for the obvious reason that such cooperation will be absent in those circumstances where abuse of human rights occur.⁶⁰ Therefore, such provisions insisted upon by developed countries appear to be an empty rhetoric.

Earlier, FTAs focused on the enforcement of domestic labour laws to implement human rights provisions. This obligation was easy to circumvent as the government could easily modify domestic laws. Realizing this loophole, later agreements emphasized on the minimum standard set by international

⁵⁸ The exception clause includes those policy matters which will have a pre eminence over all other terms laid down in the agreement. For instance certain labour and environmental standards.

⁵⁹ Bartels, *supra* note 24, 4.

⁶⁰ Marise Cremona, *Human Rights and Democracy Clauses in the EC's Trade Agreements*, 126/127 LAW & JUST. CHRISTIAN L. REV. 105, 115 (1995).

organizations like the International Labour Organization.⁶¹ Certain FTAs contain penalties like trade sanctions in the event of violation of human rights provisions though they are rarely implemented. In spite of these clauses being binding on the face of it, the implementation mechanism is very weak and such commitment seems to have value only on paper.

In spite of cooperation being the means of implementation, there can be more bargaining power to demand implementation if financial assistance is provided by the country demanding human rights implementation.⁶² Moreover, in recent times trade agreements have tried to envisage new institutional mechanisms for the implementation of such measures and technical assistance to achieve the objective.⁶³ One such model is a mechanism by which individuals in developing nations receiving foreign investment through an FTA, be enabled to bring claims against foreign investors for human rights abuses by employees or agents operating in the host developing country.⁶⁴ Therefore, if nations are genuinely committed to the enforcement of human rights provisions, mechanisms can be implemented through careful planning. The general lack of such initiatives, however, supports the belief that developed countries are not interested in enforcing these provisions but instead incorporates them as a disguised form of protectionism and additional conditionality.

A landmark step taken by the US Government recently signals a change in the direction of taking concrete action to enforce human rights provisions. The US has launched a formal complaint against Guatemala under Chapter 16 (Labour) of the Dominican Republic-Central America-United States FTA on the ground that Guatemala failed to implement its labour laws following reports of labour related violence.⁶⁵ The US Trade Representative has argued that such violations harm its workers by forcing them to compete against sub-standard labour practices.⁶⁶ This is the first and only instance of a human rights dispute case under an FTA. This case is a paradigm shift from

⁶¹ Marley S. Weiss, *Architectural Digest for International Trade and Labour Law: Regional Free Trade Agreements and Minimum Criteria for Enforceable Social Clauses* 8 (University of Maryland- School of Law, Legal Studies Research Paper No. 2, 2006).

⁶² *Id.*

⁶³ Cleopatra Doumbia-Henry & Eric Gravel, *Free Trade Agreements and Labour Rights: Recent Developments*, 145 INT'L. LAB. REV. 185, 198 (2006).

⁶⁴ See Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 BOSTON COLLEGE INT'L. & L. REV. 429 (2004).

⁶⁵ See Bridges Weekly Trade News Digest, *Targeting Guatemala, US Launches First-Ever Labour Rights Dispute Under An FTA*, September 4, 2010 available at <http://ictsd.org/i/news/bridgesweekly/82084/> (Last visited on September 5, 2010); Jurist Legal News and Research, *US to File First Free Trade Labour Rights Case Against Guatemala*, July 31, 2010 available at <http://jurist.org/paperchase/2010/07/us-files-labor-rights-enforcement-case-against-guatemala.php> (Last visited on September 5, 2010).

⁶⁶ Press Release, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *USTR Announces Labour Rights Trade Enforcement Case Against Guatemala* (July 2010) at <http://www.ustr.gov/about-us/press-office/press-releases/2010/july/united-states-trade-representative-kirk-announces-lab> (Last visited on September 5, 2010).

the usual indifference of developed nations towards the enforcement of human rights provisions in FTAs.

III. GENERAL TRENDS IN THE FTAs OF THE EU AND INDIA

A. TRENDS SEEN IN THE EU'S FTAs VIS-À-VIS HUMAN RIGHTS CLAUSES

The EU is a voluntary, institutionalized integration of twenty seven European nations which has changed the economic landscape in Europe.⁶⁷ The EU epitomizes governance at a regional level having its own executive, legislative and judicial organs apart from several other committees and sub-committees. The most unique feature of the EU is its single market which enables goods, services, capital and people to move freely among member states thereby making national boundaries irrelevant for economic transactions.⁶⁸ The EU has its own foreign policy including trade policy and the strength of these policies has made EU the new global political and economic superpower.⁶⁹ It is the largest trading entity in the world today and excluding intra-EU trade, it still exceeds the trade of the US, China and ASEAN.⁷⁰

FTAs are an essential aspect of the EU's trade policy as can be seen by the number of such agreements that it has (as a bloc) entered into since the turn of the century and several more that are presently at the negotiating stages. The range of its FTAs includes Association Agreements with South-Eastern European States, Economic Partnership Agreements and finally, bilateral FTAs. The EU has entered into bilateral relations through FTAs with several developing nations like Chile, South Africa, Mexico, Egypt and Turkey. Unlike the US, however, it does not have a model FTA which acts as a framework while negotiating with trade partners.⁷¹

Respect for human rights is a fundamental principle on which the EU was founded.⁷² Apart from civil and political rights, social and cultural rights like eradication of poverty and rights of the child have become basic

⁶⁷ Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 *FORDHAM INT'L. L. J.*, 1118 (2007-2008).

⁶⁸ *Id.*

⁶⁹ See Symposium, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991).

⁷⁰ EU Trade Policy Study Group, *A Modern Trade Policy for the European Union*, Report to the European Commission (January, 2010), available at www.ecipe.org/A%20Modern%20Trade%20Policy%For (Last visited on September 17, 2010).

⁷¹ See Stephen Woolcock, *European Union Policy Towards Free Trade Agreements*, (European Centre for International Political Economy Working Paper Group, Paper No. 3, 2007).

⁷² Treaty on European Union, 29 July 1992, Official Journal C 191, Art. 2.

tenets of EU foreign policy.⁷³ Human rights clauses appeared for the first time in the EU's trade agreements in the fourth Lome Convention, 1991⁷⁴ which is a trade and aid agreement between fifteen European Community member states and seventy one African, Caribbean and Pacific countries ('ACP'). Since then human rights clauses have become a regular feature of the EU's trade agreements.⁷⁵ The Preamble and Art. 5 of the Lome Convention reaffirm the EU's respect for human rights which is envisaged in the Universal Declaration of Human Rights, 1948 ('UDHR') and European Convention on Human Rights, 1950 ('ECHR').

The FTAs of the EU, like its other international agreements, focus on human rights and fundamental freedom clauses which are enforceable. They provide for the suspension of the agreement in the event that a party violates these democracy clauses.⁷⁶ In the past the EU has held consultations over flawed electoral process with Togo and Haiti, over military coups in Ivory Coast, Niger, Fiji and other African nations and over violation of democratic processes with Liberia, Zimbabwe under the Lome Convention.⁷⁷

On the other hand, the EU has been more lenient toward issues like labour, poverty, culture and gender inequality where the enforcement mechanism is based on cooperation, entailing necessary financial and technical assistance from the EU which usually terms these rights broadly as 'fundamental social rights'.⁷⁸ Such weak implementation systems prevent human rights clauses from being considered an essential part of trade agreements. The favouring of certain human rights over others by the EU leads to a hierarchy amongst rights and weakens the belief that the EU considers the rights to be universal, inter-related and indivisible, which individual member states of the EU have upheld in various conventions and declarations.

The EU-Chile FTA,⁷⁹ in force since 2003, is considered by many scholars to be the most comprehensive and modern FTA of the EU covering all aspects of trade agreements.⁸⁰ The Preamble, Principles and Objective of this agreement reinforce the belief of both nations in the UDHR. Similar to other agreements, however, this FTA resorts to implementation by means of political dialogue for the civil and political rights.⁸¹ The form of political dialogue

⁷³ Treaty on European Union, Arts. 3(5) & 21(1).

⁷⁴ Agreement Amending the Fourth ACP-EP Convention Of Lome, November 4, 1995.

⁷⁵ See Cremone, *supra* note 60.

⁷⁶ Bartels, *supra* note 24.

⁷⁷ Nwobike, *supra* note 34.

⁷⁸ *Id.*

⁷⁹ EU-Chile FTA, available at <http://www.bilaterals.org/IMG/pdf/EU-Chile.pdf> (Last visited on November 17, 2010).

⁸⁰ See European Commission Enterprise and Industry, *International Affairs: Free Trade Agreements*, available at http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm (Last visited on September 5, 2010).

⁸¹ EU-Chile FTA, Part II, Article 12(2).

includes regular meeting between the Heads of the States and periodic meetings between other ministers.⁸² Social rights like human development, employment, labour welfare through collective bargaining, abolition of child labour, reduction of poverty and gender equality are to be achieved by cooperation.⁸³

A remarkable change can, however, be witnessed in the text of the EU-South Korea FTA,⁸⁴ which has recently been provisionally applied. Contrary to almost all existing FTAs of the EU, the agreement, instead of using the term ‘democracy’, uses the umbrella term ‘human rights’. The agreement contains probably the longest list of human rights among all commercial agreements of the EU.⁸⁵ It focuses on promoting labour policies like basic workers’ rights, freedom of association and elimination of forced labour,⁸⁶ as well as protection of privacy, freedom of individual and protection of fundamental rights.⁸⁷ The usual mechanism of enforcement is through government consultations and if further discussion is required a resolution can be asked by one Party from the Committee on Trade and Sustainable Development.⁸⁸ Apart from this measure, the States would also try to ensure compliance with the advice given by a panel of experts.⁸⁹ This advice, however, is only recommendatory in nature and will not be legally binding. Despite this, such a mechanism is a genuine attempt of the EU to give more teeth to its human rights enforcement mechanism and reflects a hardening of its stance on aspects of human rights which it earlier had virtually neglected.

Therefore, the highest form of enforcement utilized by the EU till date is formal dialogue in the situation that its trade partners blatantly disrespect human rights and behave in a manner inconsistent with the agreement. In the past, public statements signifying verbal protests and cancellation of meetings have been utilized by the European Council to express their dissatisfaction at human rights violation occurring in a trading partner’s territory. Cutting off trade relations and unilaterally withdrawing from an FTA, however, are measures almost never resorted to. Although it does not support the sanctions-based approach, the EU realizes the need for affiliating real enforcement mechanisms to the agreements. One such mechanism to address disputes human rights using FTAs can be through conciliation and arbitration utilizing detailed procedures

⁸² EU-Chile FTA, Part II, Art. 13.

⁸³ EU-Chile FTA, Part III, Art. 44.

⁸⁴ EU-Republic of Korea FTA, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en> (Last visited on November 17, 2010).

⁸⁵ Press Release, European Centre for International Political Economy, *What the EU-South Korea Free Trade Agreement Reveals About the State of EU Policy*, (January 7, 2010) available at <http://www.ecipe.org/blog/what-the-eu-south-korea-free-trade-agreement-reveals-about-the-state-of-eu-trade-policy> (Last visited on September 6, 2010).

⁸⁶ EU-Korea FTA, Art. 13.4.

⁸⁷ EU-Korea FTA, Art. 7.43.

⁸⁸ EU-Korea FTA, Art. 13.14.

⁸⁹ EU-Korea FTA, Art. 13.15.

capable of yielding binding legal decisions.⁹⁰ The effectiveness of such processes, however, cannot be predicted until they are implemented in the agreements and enforced in cases where a party undermines human rights.

B. TRENDS SEEN IN INDIA'S FTAs VIS-À-VIS HUMAN RIGHTS CLAUSES

The decades following Indian independence were witness to trade policies influenced by the *swadeshi* ideology, which encouraged production and trade within the country rather than on large scale cooperation with other countries.⁹¹ Liberalization measures, however, pioneered during the early 1990s led to the opening up of the Indian economy. Till date, India has signed FTAs with Sri Lanka,⁹² Thailand⁹³ and the ASEAN.⁹⁴ A number of other FTAs including those with China, Singapore and the EU are in the pipeline.⁹⁵ With the signing of an FTA with ASEAN, India plans to lift tariffs for Brunei, Indonesia and Malaysia by 2011 and for the Philippines, Cambodia, Laos, Myanmar and Vietnam by 2016. This shows the keen interest India has been displaying on the free trade front in the past two decades. Among the ongoing proposals, the one with the EU could be termed the most significant.⁹⁶ Negotiations with the EU have been continuing for more than three years and hit a roadblock mainly because of India's reluctance to accept the human rights clauses which the EU wants to include in the agreement. In this context, it is important to analyze the stance taken by India in this regard in its previous FTAs.

The first FTA to be signed by India was with Sri Lanka, which was entered into in 1998. In this agreement, India has not included any express social protection or human rights clause. Instead, it has, like most other nations, included a general exception clause as laid down under Arts. XX and

⁹⁰ See Edna Ramires Robles, *Political and Quasi-Dispute Settlement Models in European Union Free Trade Agreements: Is Adjudication a Trend or is it Just Another Model*, available at [http://www.reei.org/reei%2012/RamirezRobles\(reei12\).pdf](http://www.reei.org/reei%2012/RamirezRobles(reei12).pdf) (Last visited on September 6, 2010).

⁹¹ *Trade Agreements*, September, 15, 2010 available at <http://www.indianindustry.com/trade-information/trade-agreements.html>, (Last visited on September 15, 2010).

⁹² See Indo- Sri Lanka Free Trade Agreement, November 19, 2010 available at <http://commerce.nic.in/ilfta.htm> (Last visited on November 19, 2010).

⁹³ See Framework Agreement for Establishing Free Trade Area Between The Republic of India and the Kingdom of Thailand, November 19, 2010 available at <http://commerce.nic.in/thailand.htm> (Last visited on November 19, 2010).

⁹⁴ See Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, November 19, 2010 available at <http://www.aseansec.org/22563.htm> (Last visited on November, 19, 2010).

⁹⁵ Indian Export Import Portal, *Free Trade Agreement*, available at <http://exim.indiamart.com/free-tradagreement/relation> (Last visited on September 17, 2010).

⁹⁶ The Economic Times, *India-EU Trade Opening Pact likely this Year: Sharma*, July 10, 2010, available at <http://economictimes.indiatimes.com/news/economy/foreign-trade/India-EU-trade-opening-pact-likely-this-year-Sharma/articleshow/6232956.cms> (Last visited on September 14, 2010).

XXI, GATT.⁹⁷ A perusal of the text of the agreement gives no other hint of any social protection clause.⁹⁸ This is true in the case of the FTA with ASEAN too.⁹⁹ Under Art. 12 of the FTA, it is mentioned that each party retains its rights and obligations as under Art. XX, GATT and this will be incorporated *mutatis mutandis* into the agreement.¹⁰⁰ Thus it is seen that India has always shied away from incorporating any kind of social protection or human rights clauses in its trade agreements. Thus, India falls into the category of nations which have not still felt the need for imbibing social protection measures into its trade agreements and has displayed only the willingness to make passing reference to the GATT exceptions.

IV. INDIA-EU FTA

The EU has concluded FTAs with the rising economic powers of Asia. At present it is at various stages of negotiations with few nations including the Gulf Cooperation Countries ('GCC'), Malaysia, Singapore and India. While in the FTAs with countries like South Korea, human rights provisions are likely to be incorporated without any difficulty, such provisions are proving to be the main stumbling block for an agreement with India.

The EU and India have had longstanding trade relations though the significance of these relations is not the same for both sides. India is the EU's tenth largest trading partner while the EU is India's biggest trading partner and source of foreign direct investment.¹⁰¹ Moreover, India, a new entrant to the FTA race, has concluded FTAs mostly with its South-Asian neighbours and other developing countries having similar social problems and economic ambitions. On the other hand, though interested in concluding commercially relevant agreements in Asia including India, the EU is adamant on including its regulatory practices and attaching its non-trade goals to these trade

⁹⁷ Nothing in this Agreement shall prevent any Contracting Party from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value, as is provided for in GATT, 1994, Arts. XX and XXI.

⁹⁸ Free Trade Agreement between the Republic of India and the Democratic Socialist Republic of Sri Lanka, September 14, 2010 available at <http://commerce.nic.in/ilfta.htm#up> (Last visited on September 14, 2010).

⁹⁹ Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of South East Asian Nations and the Republic of India, September 14, 2010, available at <http://www.aseansec.org/22563.htm>, (Last visited September 16, 2010).

¹⁰⁰ Each party retains its rights and obligations under GATT 1994, Art. XX, which shall be incorporated *mutatis mutandis*, into and form an integral part of this agreement.

¹⁰¹ Bureau, *FTA Negotiations To Boost Trade and Investment Between EU, India*, September 16, 2010 available at <http://in.biz.yahoo.com/100915/50/baw97k.html> (Last visited on September 16, 2010).

agreements.¹⁰² Therefore, the incorporation of human rights provisions in an FTA was always going to be a sticking point that would be actively pursued by EU and opposed by India.

In 1991, the EU-India Co-operation Agreement on partnership and development came into existence focusing, among other areas, on trade between the two nations. Respect for human rights is a foundational principle of this agreement.¹⁰³ Since 2004, India has been a 'strategic partner' of the EU and the India-EU Joint Action Plan, 2005 aims to develop partnership in key areas.¹⁰⁴ This Plan, which is the legislative framework for cooperation,¹⁰⁵ also emphasizes on respect for human rights. This framework is developed and modified by annual summits and in 2006 the proposal for negotiating an FTA was floated.¹⁰⁶

The negotiations for a bilateral FTA began in 2007. The first round of negotiations took place in July, 2007 where the issue of human rights was not raised.¹⁰⁷ European NGOs, however, campaigned for human rights and democracy issues to be considered citing examples of violation of human rights and labour laws by Indian industry.¹⁰⁸ These demands intensified in 2008 in the wake of human rights abuses against Christians in India.¹⁰⁹ Till July, 2010 nine rounds of negotiation have taken place and the primary reason for the slow pace of the agreement has been the contention over human rights clause. While the EU has persistently insisted upon it, the Government of India has advocated that an extraneous issue like human rights should not be incorporated in the agreement.

The Indian Government is opposed to a human rights clause in the FTA for several reasons. First, there is no guarantee that this will not be utilized as a trade weapon by the EU especially since after the Lisbon Treaty

¹⁰² Razeen Sally, *Looking East: The European Union's New FTA Negotiations in Asia*, European Centre for International Political Economy (October, 2007) available at <http://docs.google.com/viewer?a=v&q=cache:wYAqpfju8AQJ:www.ecipe.org/publications/jan-tumlr-policy-essays/looking-east-the-european-union2019s-new-trade-negotiations-in-asia-1/PDF> (Last visited on August 27, 2011).

¹⁰³ Cooperation Agreement, 1994, Art. 1(1).

¹⁰⁴ European Commission Trade, India, available at http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/india/index_en.htm (Last visited on September 7, 2010).

¹⁰⁵ *Id.*

¹⁰⁶ Press Release, Europa, *EU: India Relations- General Background Note*, (June 21, 2010) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/265&type=HTML> (Last visited on September 7, 2010).

¹⁰⁷ Business Standard India, *EU May Not Put Human Rights Condition for FTA*, July 6, 2007, available at <http://bilaterals.org/spip.php?article8925> (Last visited on September 2, 2010).

¹⁰⁸ Kahbrein Info, *India Heading Towards Free Trade Agreement with EU*, October 24, 2007, available at <http://bilaterals.org/spip.php?article10073> (Last visited on September 7, 2010).

¹⁰⁹ See Agence France Presse, *EU MPs Back Trade Deal With India: Voice Religious Concerns*, September 25, 2008 available at <http://bilaterals.org/spip.php?article13276> (Last visited on September 7, 2010).

the European Parliament has been given more power of supervision in trade-related aspects than the Commission.¹¹⁰ The European Parliament, with regard to the FTA, has raised concerns over the inadequate handling of issues like bonded labourers among the *dalit* and *adivasi* communities, persecution of religious minorities, insecurity and violence in Kashmir, and the use of child labour by the Indian Government.¹¹¹ Therefore, though such provisions are presented to be a mere formality by the European Commission which is the EU body negotiating the agreement, the European Parliament can use this to unilaterally withdraw from the agreement or manipulate India. Second, if India incorporates such non-trade issues in its FTA, it will be compelled to take a similar stance at the multilateral WTO negotiations.¹¹²

Developed groups like the EU may want to achieve harmonization of policies that are uniformly beneficial to all nations but this may not be in the best interests of a growing economy like India. Developed and developing countries will naturally disagree on minimum wage levels, worker safety issues and on the merits of permitting voluntary child labour.¹¹³ Such protectionism forces them to elevate their labour and other social standards interfering with their domestic social and human rights policies.¹¹⁴ Therefore, the unwillingness of a developing country like India to accept such clauses seems justified. The Indian Government maintains that such issues can be discussed at appropriate international forums and not in a trade agreement.¹¹⁵ Hence, the case is not that India is avoiding its international human rights obligations but is of the opinion that such an issue does not belong in a market opening agreement.

Proponents of the inclusion of human rights provisions, however, are of the view that the move to exclude social standards from the agreement reflects the influence of corporate interests and will aggravate inequality and poverty. A new report published jointly by Indian and European public interest groups, titled "*Trade Invaders- How Big Businesses is Driving the EU-India Free Trade Negotiations*", reveals the access being given to corporate interests to policymakers from both sides thereby allowing them to set the agenda while the voices of other interest groups (like labour unions, human rights groups, farmers, trade unions, women's groups) not just goes completely unheard but

¹¹⁰ Business Standard, *Hope Floats for India-EU Free Trade Pact Talks*, April 13, 2010, available at <http://www.business-standard.com/india/news/hope-floats-for-india-eu-free-trade-pact-talks/391740/> (Last visited on September 7, 2010).

¹¹¹ See European Parliament Resolution, *An EU-India Free Trade Agreement*, (2008/2135(INI)) (March 26, 2009).

¹¹² Business Standard, *supra* note 110.

¹¹³ Pravin Krishna, *The Economics of PTAs in BILATERAL AND REGIONAL TRADE AGREEMENTS-COMMENTARY AND ANALYSIS* 26 (2009).

¹¹⁴ Marianne, *supra* note 41, 517.

¹¹⁵ The Hindu, *Non Trade Issues Not Hamper Trade Talk With EU*, May 4, 2010, available at <http://beta.thehindu.com/business/Economy/article421773.ece> (Last visited on September 7, 2010).

they are also denied access to information.¹¹⁶ According to this report, human rights issues find no place in the agenda of the consultations with corporate lobbyists.¹¹⁷ The entry of European corporate giants in the retail and agricultural sectors is likely to threaten the livelihood of street traders, small retailers, small-scale farmers, fisherfolk and other small enterprises.¹¹⁸ The absence of human rights and social standards provisions will aggravate the losses of the poor as there will be no forum to address their grievances based on the social injustice that will be meted out to them.

The dilemma that India faces is not an easy one to resolve. On one hand, elevating labour and other social standards to bring parity with EU standards will be difficult to enforce and hence may become a trade weapon for the EU, while on the other hand, an FTA with the EU has vast potential for India and is needed to boost its ambitions of becoming an economic superpower.

Human rights provisions in this agreement will have some positive aspects for India as well. It may provide a forum for addressing the grievances of segments of the population which though affected by such an FTA, have not been given a voice during the negotiations. Therefore, workers and other groups seem to benefit from such provisions.

The stakes involved for the Indian Government and business interests by such provisions are high enough to cause harm to their interests. Despite more power being concentrated in the hands of the European Parliament than before, the Commission retains more authority in comparison to the Parliament and it is unlikely that the Commission will take any drastic measure to enforce human rights provisions. Moreover, unlike the US, where labour rights violations have the potential of erupting into a trade dispute, for the EU such violation will at the most lead to consultations and examination by expert panel (as reflected in the EU-Korea Treaty).¹¹⁹ Therefore, if cooperation is the enforcement mechanism of such clauses, it is unlikely that the FTA will become a powerful trade weapon for the EU. Hence, India may accept such provisions.

As a further precaution to prevent any adverse effect on Indian trade interests by allowing disguised forms of conditionality, the standards of human rights that India agrees to enforce should be more like a floor than a ceiling. This entails that the standards should be a basic minimum that both

¹¹⁶ Press Release, Corporate Europe observatory & India FDI watch, *Trade Invaders- How Big Businesses is Driving the EU-India Free Trade Negotiations* (September 1, 2010) available at <http://www.corporateeurope.org/global-europe/content/2010/09/eu-india-trade-invaders> (Last visited on September 7, 2010).

¹¹⁷ *Id.*

¹¹⁸ *Id.*, See also Corporate Europe Observer/ India FDI Watch, *Corporate Lobbyists Set Agenda for India-EU Trade Deal*, September 1, 2010, available at <http://bilaterals.org/spip.php?article18024> (Last visited on September 7, 2010).

¹¹⁹ Aaronson, *supra* note 19.

nations need to follow that would help achieve the objectives of such provisions but also be flexible enough to achieve these standards taking local factors as well as other obstacles for enforcement into consideration.

The India-EU FTA seems to be the first comprehensive FTA that India will enter into and hence its importance cannot be understated. Such a wide-ranging FTA will touch upon new aspects that have not been seen in previous Indian FTAs. Such provisions in the India-EU FTA can benefit the Indian population. It, however, needs to be carefully drafted to prevent it from serving the EU's protectionist interests. The burden on the shoulders of Indian negotiators in this respect is immense to ensure that the FTA benefits India not just on the economic front but also on the social welfare front so that it becomes the comprehensive FTA that it envisages being.

V. CONCLUSION

The reasons that motivate a developing and a developed nation to sign an FTA with provisions on human rights protection are very different. This trend has recently started and globalization may have been the triggering factor. Developing nations are rightly wary of such agreements as being a form of disguised protectionism for the developed nation. It is, however, also true that human rights violations in developing countries are often a ground for the public in developed nations to decry trade relations with developing nations. Hence developed nations pursue such inclusions in trade agreements. The enforceability of such provisions is limited though gradually a change is being noticed.

The purpose of including explicit human rights provisions given that such rights are part of general international law and their wide inclusion in the national constitution have given them the status of general principles of law recognised by civilised nations. Thus, even if countries do not explicitly include such provisions in trade agreements, international human rights obligations will continue to bind them by virtue of Art. 31(3)(c) of Vienna Convention of Law of Treaties.

The EU is a very important trading partner for India. In all of its recent FTAs, the EU has incorporated measures of human rights protection like the ones it is pursuing in its FTA with India. India on the other hand is still new to the signing of bilateral FTAs outside of its South-Asian neighbours. The FTA with the EU has ample benefits for India in several sectors. It seems to be the most comprehensive FTA India will sign and may even boost India's international image as a global economic powerhouse. Given the potential of this FTA, India should not delay signing it. India should, however, maintain caution and negotiate tactfully the provisions on human rights protection, especially the clauses on its implementation. The redressal mechanism for violating these rights should be on the lines of dialogue and conciliation rather than unilateral

withdrawal from the agreement. The provision should be so drafted that it helps in increasing respect for labour standards, abolition of child labour and other human rights but should not become a trade weapon for the EU.

