

“Business and Human Rights” in Trade: EU’s Missed Chance to be a Global Leader?

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Abstract

As corporations are amongst the major players in global trade, this blog post examines the role of the EU in promoting business and human rights instruments: bilaterally, in its trade agreements; and at the international level, in the context of the recent UN negotiations over a binding treaty on business and human rights. We argue that, while important steps are on their way, the EU’s contribution to this respect is far from satisfactory.

Introduction

A longstanding asymmetry characterises the rights of corporations to carry out commercial activities on the one hand, and their obligations and accountability for human rights violations on the other. When corporations are amongst the major players in global trade [1], the inclusion of ‘business and human rights’ instruments into trade agreements could contribute to fill the “governance gaps” for human rights violations by businesses (Ruggie 2008; Cassell and Ramasastry 2016). As the only global actor in trade that is mandated to pursue human rights in its external policies, the EU could lead the way by integrating ‘business and human rights’ instruments in its trade agreements and contribute to a rules-based trade order that works for human rights. The aim of this blog post is to examine how the EU engages in the promotion of business and human rights instruments at the bilateral and international level. We find that the EU’s ambitious rhetoric for its role as a leader in business and human rights is not reflected in practice in its free trade agreements (FTAs); nor in its participation in the recent negotiations at the UN on a Binding Treaty on Business and Human Rights.

The EU aims to be a leader in the promotion of responsible business conduct and has indeed implemented a mix of voluntary and binding regulatory measures, at European and national level [2]. In 2006, the EU Commission expressed its ambition for the EU to become a ‘pole of excellence on corporate social

responsibility' (European Commission, 2006). Some years later, in 2010, the European Parliament was calling for a systematic inclusion of CSR clauses and reference to the OECD Guidelines in trade and investment agreements (European Parliament, 2010). The Council voiced the same demands, adding to the OECD Guidelines a series of other relevant 'business and human rights' instruments [3]. Against this background, we ask: how and to what extent does the EU promote 'business and human rights' instruments in the external dimension?

1. A loose link to 'business and human rights' in EU FTAs

A look at the new generation of EU trade agreements shows that the link to 'business and human rights' instruments and practices is present, yet still at an embryonic stage. Most recent EU trade negotiations have targeted other industrialised countries, which together with the EU, can be considered the principal hubs of corporations: Korea (EU-Korea FTA), Canada (CETA) and Japan (EUJEPA). These agreements approach the business and human rights linkages through a reference to corporate social responsibility (CSR). Three main weaknesses are identifiable at the outset: the voluntary nature of commitments addressed to States; the limited number of business and human rights mentioned; and the lack of remedies for victims of human rights abuses by businesses.

First, the typology of 'business and human rights' in the EU-Korea FTA, CETA the EUJEPA comprises: *cooperation activities*, particularly in relation to labour; *encouraging* the enterprises to adopt CSR mechanisms; and *facilitating and promoting* trade in goods under CSR schemes (Peels and others, 2016). To the exception of the EU-South Korea FTA, they are mostly to be found under the trade and sustainable development (TSD) chapters. The language is hortatory, and creates no obligations per se, neither for the parties nor for transnational corporations. Second, while the EU endorses a series of international 'business and human rights' instruments as benchmarks for responsible corporate behaviour, its FTAs exclude most of them (see Table below). Third, as commitments are voluntary, no real remedies exist for victims of human rights abuses by corporations. Furthermore, the TSD chapters are omitted from the scope of dispute resolution chapter of the FTAs; and even there, the agreements

do not provide for private party enforcement in domestic courts, and in particular direct effect (Fahey, 2017).

Table of Business and Human Rights instruments in the New Generation EU Trade Agreements [4]

2. The EU's reluctance to a UN Binding Treaty on Business and Human Rights

Not only is the EU mandated to promote human rights in its external trade, but it is also expected to contribute to the development of international law [5]. Yet also in this case there seems to be a mismatch between the rhetoric of promoting responsible business behaviour on the one hand, and the EU's reluctance to take part and provide support to the recent negotiations for an international binding treaty on business and human rights.

Conceived at the UN, the “Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises” (TBHR) is the latest effort towards imposing binding obligations on transnational corporations. Negotiations on the TBHR began on 6 July 2015. A first draft, also known as the “Zero Draft”, was released in July 2018; while a “Revised Draft” has recently been released, on 16 July 2019 – the next session will take place in October 2019 in Geneva. A comparison of the two drafts shows that the *revised draft* has removed provisions that brought trade and investment agreements under the purview of human rights obligations, under the preceding the *zero draft* [6]. While the final text of the TBHR will be ascertained in due course, we see a regression on the envisaged commitments from the *zero draft* to the *revised draft* in respect of the trade and investments, essentially highlighting a preference for voluntary, cooperative action.

Initially, the EU forcefully opposed the TBHR, together with other industrialised countries [7]. The main concern for the EU was that such a binding treaty would introduce a new, competing framework to the UN Guiding Principles on Business and Human Rights (UNGPs) [8]. Despite initial reluctance, the EU has eventually engaged in the deliberative sessions. Regarding the trade dimension more specifically, however, the EU's contributions to the deliberations did not demand to establish the primacy of human rights obligations over trade partnerships.

Conclusion

Today, corporations operate in a spaghetti bowl of jurisdictions which make it possible for them to leverage their incorporation and transnational structures to circumvent human rights obligations under domestic laws. The EU could play a role at both the bilateral and international level. As the EU negotiates trade agreements with other industrialised countries, the inclusion of obligations on responsible corporate behaviour would be a step towards filling the governance vacuum for human rights violations. Despite some recent developments – which are welcome – much more is yet to be done. The EU should channel its normative and global actorness to introduce provisions for the regulation of business behaviour in its trade agreements and promote them at the international level. There is still a window of opportunity for the EU to be a global leader in this respect.

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Endnotes

[1] According to the UN, most global trade is controlled by TNCs see Eril Leaver and John Cavanaugh, 2019.

[2] The EU claims to have acted as a leader in this field, by adopting, for instance, National Action Plans for the implementation of the UN Guiding Principles, or by integrating the latter into national CSR strategies The Commission Working document on the implementation of the UN Guiding principles also lists a series of successes see *European Commission (2019)*.

[3] The UN Global Compact; the UN Guiding principles on business and human rights (UNGPs); the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; ISO 26000 see Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019 at pp. 23-24.

[4] Excluded so far: UNGPs, the UN Global Compact, the ISO 26000 guidance standard on social responsibility, or the OECD due diligence guidance for responsible business conduct. The Tripartite ILO Declaration has only been

included in EUJEPa see Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019 at pp. 23-24.

[5] Article 3(5), TEU.

[6] Remarkably, the *zero draft* provided that '[...] future trade and investment agreements [...] shall not contain any provisions that conflict with the implementation of this Convention and shall ensure upholding human rights [...]'. Furthermore, the text states that '[...] all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under this Convention [...]']'.

[7] Other countries such as the United States, Japan and South Korea see Martens J and Seitz K (2016) at p. 17.

[8] The relationship between the TBHR and UNGPs has been regarded as conflicting by some states and complementary by some. According to the latter perspective, TBHR is just one of several approaches to regulating the area of business and human rights, all of which must receive continued attention see *Expert Round Table on Elements of a Possible Binding International Instrument on Business and Human Rights* (2017).

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