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EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions

Lore VAN DEN PUTTE & Jan ORBIE^{*}

Surprisingly, labour provisions in EU bilateral trade agreements have widened and deepened over the past decade. One would have expected the opposite, given the coming to power of centre-right governments in the early 2000s and a stronger liberalization agenda since 2006. This article addresses this rather remarkable development. First of all it dismisses the argument that protectionist motives underlie the stronger social clauses in EU trade agreements. Instead, drawing on the theory of the life-cycle of norms, it suggests that social trade has become an unobjectionable norm within the EU. The article then offers several explanations for why the social-trade nexus has been barely disputed, and indeed has further expanded through subsequent trade arrangements. These include the stronger influence of the European Parliament, path-dependencies stemming from the EU's previous template, and the need to gain public support in the face of criticism of free trade agreements. Most importantly, it stresses that the framing of core labour rights as part of a broader 'sustainable development' agenda has contributed to their unobjectionable status. While this framing has helped to forge a consensus with regard to the social trade agenda, giving equal status to labour and environmental provisions under the sustainable development umbrella might also have adverse consequences for the concept of labour provisions.

1 INTRODUCTION

The European Union (EU) is, together with the United States (US), the biggest proponent of linking trade and labour provisions.¹ With the failure to include labour standards in the multilateral rules of the World Trade Organization (WTO), the EU has attempted to incorporate them into its bilateral trade

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¹ We use the terms 'labour provisions', 'social provisions', 'social clause', 'core labour rights', 'labour standards', 'social trade provisions', 'social rights' and 'social issues' interchangeably. While these terms have a slightly different substance, in this article they all refer to the labour provisions included in EU trade agreements.

agreements with third countries. In terms of content, judicialization and governance, these labour provisions have been widened and deepened over the past decade. This article examines why this has happened. This development is puzzling because one would have expected the opposite. Indeed, while centre-left governments in Member States were conducive to the rise of the social clause in the 1990s, one might have expected that the coming to power of more centre-right governments in the early 2000s *and* the stronger liberalization agenda since 2006 would be associated with lower social ambitions. However, labour provisions have continued to be included and increasingly widened and deepened.

This article aims to understand this increasing social ambition despite less favourable conditions. Methodologically, we build on a comparative analysis of EU trade agreements, including our previous research,² as well as secondary literature and official documents from the EU institutions. Theoretically, our main explanatory argument draws on the literature on the life-cycle of norms.

The first section gives an overview of the social content of EU trade agreements and argues that these more ambitious social provisions cannot be dismissed *a priori* as cheap rhetoric. It puts forward the argument that this increasing relevance of labour standards is indeed intriguing because one might have expected them to be set aside, given the demise of the centre-left dominance and the radicalization of the EU's free trade agenda. The second section seeks an explanation for this apparent paradox. It dismisses the thesis that protectionist motives underlie the stronger social clauses in EU trade agreements. Instead, we suggest that social trade has become an unobjectionable norm for the EU. We consider several factors to explain why the social-trade nexus has been barely disputed, and indeed has even further expanded in the EU's trade arrangements. These factors include the stronger influence of the European Parliament (EP), path-dependencies stemming from the EU's previous template, and the need to find public support in the face of criticism of free trade agreements. Most importantly, we stress that the framing of core labour rights as part of a broader 'sustainable development' agenda has contributed to their unobjectionable status. The conclusions reflect on the potential and pitfalls of this framing in terms of sustainable development.

² See, L. Van den Putte, F. Bossuyt, J. Orbie & F. De Ville, *Social Norms in EU Bilateral Trade Agreements: A Comparative Overview*, in *Linking Trade and Non-Commercial Interests: The EU as a Global Role Model* 35 (T. Takacs, A. Ott & A. Dimopoulos eds, TMC Asser Institute 2013).

2 THE RISE OF LABOUR PROVISIONS

Over the past two decades the EU has concluded numerous trade agreements, each of them including labour provisions. Although there is significant variation in the way and extent to which labour provisions feature in these agreements, we notice a widening and deepening since the mid-2000s. This section will first assess this rise of labour standards based on three indicators, and subsequently argue why this is testimony of increasing social ambition in EU trade agreements.

2.1 A STRONGER TRADE-LABOUR LINKAGE

Comparing the social ambition of EU trade agreements, we can make a basic distinction between two periods.³ During the first period, ranging from the EuroMed agreements until the agreement with Chile (1990s–2003), we notice a limited but gradually increasing social ambition. During the second period, starting with the CARIFORUM agreement and continuing⁴ with the ‘Global Europe’ free trade agreements (since 2008), the labour provisions have significantly deepened and widened. This can be discerned from three analytically distinct indicators (see Table 1).⁵

³ *Ibid.*

⁴ At the time the CARIFORUM EPA was seen as containing the strongest labour provisions of all trade agreements concluded by the EU. This could be explained by the strong provisions already agreed between the Dominican Republic and the US. See, B. Kerremans & M.M. Gistelincx, *Labour Rights in EPAs: Can the EU-CARIFORUM EPA be a guide? Beyond Market Access for Development: EU-Africa Relations in Transition* 310 (G. Faber & J. Orbie eds, Routledge 2009). However, it has meanwhile become clear that the EU-CARIFORUM was not an exception: since then all EU trade agreements contain similarly strong labour provisions.

⁵ The distinction between the two generations largely corresponds with the database of Kohl, Brakman & Garretsen. See, T. Kohl, S. Brakman, & J.H. Garretsen, *Do Trade Agreements Stimulate International Trade Differently? Evidence from 296 Trade Agreements*, *The World Economy* (2015 forthcoming). This database rates the EU-Mexico and EU-South Africa Agreements as not enforceable, the EU-Chile Agreement as medium enforceable, and the EU-CARIFORUM as highly enforceable. Exceptions are the EU-Israel, EU-Tunisia and EU-Morocco agreements which are highly enforceable according to Kohl et al., but it should be noticed that the enforceability concerns only limited and technical labour standards.

Table 1 Deepening and Widening of Labour Provisions in EU Trade Agreements

AGREEMENT ⁶	CONTENT		JUDICIALIZATION		GOVERNANCE	
	Social Policy Norms	ILO Core Labour Standards	Government Consultations	Panel of Experts	CSR	Civil Society Forum
Tunisia (1995)	XX		X			
Israel (1995)	XX		X			
Morocco (1996)	XX		X			
Jordan (1997)	XX	X	X			
Mexico (1997)	X		X			X
South-Africa (1999)	X	XX	X			
ACP/Cotonou (2000)	XX	XX	X			X
Egypt (2001)	XX		X			
Algeria (2002)	XX	X	X			
Lebanon (2002)	XX		X			
Chile (2003)	XX	XX	X			XX
CARIFORUM (2008)	XXX	XX	X		X	XX
Korea (2010)	XXX	XX	XX	X	X	XX
Colombia/Peru (2012)	XXX	XX	XX	X	X	X

⁶ The date in brackets refers to the year in which the agreements were signed.

Central-America (2012)	XXX	XX	XX	X	X	XX
Ukraine	XXX	XX	XX	X	X	X
Georgia	XXX	XX	XX	X	X	XX
Moldova	XXX	XX	XX	X	X	XX
Singapore	XXX	X	XX	X	X	X
Canada	XXX	XX	XX	X	X	XX

First, the substantial *content* has widened and deepened. Not only do agreements in the second period refer to a larger amount of social provisions, but their legal importance has also increased. In the early agreements, social provisions were taken up as issues for cooperation between the EU and the trade partner. It concerned cooperation in the field of social policy, which was mostly described in technical terms. For example, EuroMed agreements provided that workers from the Southern Mediterranean would enjoy the same social security benefits as the nationals of the EU Member States in which they were employed. Over time, however, labour standards were more and more presented as social human rights. This development undoubtedly relates to the 1998 Declaration of the International Labour Organisation (ILO) on the Four Core Labour Standards (CLS). All agreements during the second period also contain a provision stating explicitly that labour standards should not be used for protectionist trade purposes, and that the Parties should not waive or derogate from their domestic labour law to attract trade or investment. Briefly summarized, in addition to technical cooperation in social *policy*, the new generation of trade agreements includes a commitment to respect core labour standards as human *rights*.

Second, a further *judicialization* of labour provisions can be observed. With judicialization we refer to the *legal* reliance on binding language and on provisions for the settlement of disputes concerning the labour provisions of the agreement. First of all the binding nature of labour provisions has increased in the sense that labour provisions are formulated in a more binding way than before.⁷ In addition, the enforceability of these provisions has increased, given that the possibilities for legal scrutiny of labour standard violations through the dispute settlement system have been expanded.⁸ The handling of disputes is also to be carried out in a more transparent and neutral manner. While pre-CARIFORUM disputes on social issues could only be discussed by government representatives in so-called government consultations,⁹ in the new generation of FTAs the issue can, as a next step, be referred to a Panel of Experts. This is meant to make recommendations more professional and more transparent than before, which in turn should lead to more objective outcomes.

⁷ The agreement with Colombia and Peru for example contains strong legal language, such as the provision in Art. 277.1: 'No Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment.' This is rather new compared to agreements signed before the mid-2000s.

⁸ However, one should note that the settlement of disputes on labour (and environmental) issues is explicitly excluded from the strong and enforceable dispute settlement system that applies to the other chapters of the trade agreements.

⁹ Note that since the Korea Agreement, government consultations are also explicitly mentioned in the context of the sustainable development chapter.

The list of experts is decided upon after the entry into force of the agreement, and one-third of the selected experts should not be a national of any of the Parties in order to serve as a chairman. When a Panel submits its final report the Parties should implement its conclusions but no provisions are included to enforce their compliance. As such enforceability has increased, but it appears that only soft pressure can be exerted on the Parties.

Third, the *governance* of social provisions has deepened and widened. With governance we refer to the *political* process whereby actors of various kinds and on different levels are involved in the government of an issue, in our case the implementation of the labour provisions. The new generation of trade agreements involves more actors on more levels, with both business and civil society actively involved in the promotion and monitoring of the implementation of the labour provisions. Provisions on Corporate Social Responsibility (CSR) encourage companies to comply with social (and environmental) standards. Civil society actors officially take part in discussing social issues arising under a trade agreement¹⁰ through their participation in institutionalized civil society dialogue. As such they also have an explicit monitoring duty. In the EU-South Korea FTA, for example, civil society organizations on both sides meet once a year to discuss the implementation of the labour provisions, after which their report is sent to the South Korean government and the European Commission.¹¹

2.2 A STRONGER POTENTIAL FOR IMPLEMENTATION

We argue that this widening and deepening reflects a significantly increased social ambition on the part of the EU. Although the labour provisions in the new generation of trade agreements are mostly cooperative and non-binding, their potential impact cannot be underestimated. There are several reasons why we think that the EU's cooperative approach should not be dismissed as a cheap rhetorical commitment.

First, and contrary to what is often assumed, legal enforceability is not entirely excluded. Although the reports by the Panel of Experts are not legally binding, 'systematic non-compliance (of labour provisions) combined with clear arbitration panel reports that point in that direction may affect the behaviour of

¹⁰ Note that the Chile agreement (2003), which was the last agreement concluded in the pre-CARIFORUM-period, included an institutionalized civil society dialogue. However, we do not regard this agreement as being part of the new generation FTAs because it does not include provisions on CSR, nor does it include the possibility to establish a Panel of Experts.

¹¹ See, L. Van den Putte, *Involving Civil Society in the Implementation of Social Provisions in Trade Agreements: Comparing the US and EU Approach in the Case of South Korea*, 6 *Global Lab. J.* (2015).

the EU and its Member States with regard to additional future trade concessions, and with regard to financial support in general and technical assistance in particular'.¹² Moreover, serious violations of the CLS might be challenged under the 'essential elements clause' given that these labour rights are part of the body of human rights. Indeed, in today's world the distinction between civil-political and social and economic rights is difficult to maintain – a view that has been endorsed by the EU.¹³ In the case of violations of the essential elements clause, 'appropriate measures' can be taken. While in the case of a dispute on social provisions the non-enforceable dispute settlement provisions should be exhausted first of all, the invocation of the essential elements clause and thus the suspension of trade benefits is a distinct possibility.¹⁴ Its use as a final resort was also confirmed by the then Trade Commissioner Karel de Gucht in a speech on the EU's trade agreement with Colombia and Peru.¹⁵ Interestingly, he stated explicitly that the threshold for unilateral suspension in this agreement is lower than in previous agreements. A simple violation of labour rights, as included in the essential elements clause, would suffice for the EU (or Colombia or Peru) to take appropriate measures. This shows that the EU leaves the door open for the hard enforcement of labour rights, at least in relation to countries where human and labour rights violations have been fiercely criticized.

Second, the oft-made comparison between the 'hard' sanctions-based approach advocated by the US versus the 'soft' incentives-based EU approach should be qualified. When looking at the practical implementation of social provisions in trade agreements, the 'de jure' distinction between hard enforcement (US) and soft engagement (EU) gets blurred. De facto, and despite numerous complaints and cases on labour provisions, the US also engages in cooperative activities and shies away from legal enforcement.¹⁶

Third, the potential longer-term impact of a cooperative approach should not be underestimated (even if trade sanctions are often applied to serve a domestic audience rather than to contribute to social development in sanctioned countries). Through 'experimentalist governance' involving regular reporting,

¹² B. Kerremans & M.M. Gistelincx, *Labour Rights in EPAs: Can the EU-CARIFORUM EPA be a Guide? Beyond Market Access for Development: EU-Africa Relations in Transition* 310 (G. Faber & J. Orbie eds, Routledge 2009).

¹³ I. Manners, *The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective*, 14 *Eur. For. Affairs Rev.* (2009), 785.

¹⁴ Interview DG Trade, 25 Feb. 2013.

¹⁵ K. De Gucht, *On the EU Trade Agreement with Colombia and Peru. Speaking Points Before the International Trade Committee of the European Parliament (INTA)* (Brussels 2010).

¹⁶ M. Oehri, *Comparing US and EU Labour Governance 'Near and Far' – Hierarchy vs Network?* 1 *J. Eur. Pub. Pol.* (2014). The recent Guatemala case might become an exception. Here the US has gone further in the enforcement procedure. However, the continuous extension of deadlines since the case was filed in 2008 shows that the US for now continues to be reluctant to enforce labour standards.

monitoring and peer-reviewing of the implementation of standards agreed by the EU and third countries,¹⁷ the EU may turn out to be an effective standard-setter in the long run. This does not only involve consultations between governments but also civil society meetings. Recent research has already indicated that a soft approach can lead to increased respect for labour standards, especially because civil society actors of both sides can learn from each other.¹⁸ The Civil Society Forums now set up under the recent EU agreements provide a potentially fruitful context for such long-term learning, since they involve regular physical meetings of trade unions and business organizations from both sides. They could also facilitate transnational advocacy building.¹⁹ The fact that civil society can now come together in an official forum creates more concrete opportunities for collaboration, as was the case in the framework of the North-American Agreement on Labour Cooperation.²⁰ Indeed, it might open up debates on labour rights and can lead to collaboration that did not exist previously. A noticeable example is the workshop on ILO Conventions that was organized as a side event to the Civil Society Forum meeting of the EU-South Korea agreement.²¹ Moreover, the civil society meetings provide a forum for critical voices such as trade unions, which may use their dialogue with European partners for internal legitimization within their domestic political context. Ideally, the institutionalized dialogue enables the empowerment of marginalized domestic actors such as trade union representatives.

Fourth, the relevance of these meetings can be clearly derived from the strong resistance that some governments have displayed towards the establishment of the Civil Society Forum. Disagreements between the EU and some of its trading partners have arisen as to who should be represented in the civil society

¹⁷ J. Zeitlin, *Extending Experimentalist Governance? The European Union and Transnational Regulation* (Oxford U. Press 2015).

¹⁸ E. Postnikov & I. Bastiaens, *Does Dialogue Work? The Effectiveness of Labour Standards in EU Preferential Trade Agreements*, 21 J. Eur. Pub. Pol. 923 (2014).

¹⁹ C. Del Felice, *Transnational Activism and EU Free Trade Agreements: Power Between the Tie and the T-Shirt* (unpublished thesis); C. Del Felice, *Transnational Activism and Free Trade. Exploring the Emancipatory Potentials of Global Civil Society*, 23 *Voluntas* 302 (2012); R. Peels, *Facing the Paradigm of Non-state Actor Involvement The EU-Andean Region Negotiation Process* (unpublished thesis); M. Finnemore & K. Sikkink, *International Norm Dynamics and Political Change*, 52 *Intl. Org.* 887 (1998).

²⁰ L. Compa, *Labor Rights and Labor Standards in International Trade*, 25 *L. & Pol. Intl. Bus.* 165(1993); L. Compa, *NAFTA's Labor Side Accord: A Three-year Accounting*, 3 *NAFTA, Law and Business Review of the Americas*, (1997), 6; T. Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, 111 *Am. J. Soc.* 715 (2005).

²¹ Andreas Bieler represents a more skeptic view in this regard. See, A. Bieler, *The EU, Global Europe, and Processes of Uneven and Combined Development: the Problem of Transnational Labour Solidarity*, 39 *Rev. Intl. Stud.* 161 (2013). According to him, Northern and Southern trade unions are affected differently by trade agreements with Northern groups being more supportive of the neoliberal logic behind it. However, the opposition of the European Trade Union Confederation against the FTA with Colombia and Peru in his view is a possible first step to transnational labour solidarity.

fora, in particular when third-country governments attempted to appoint representatives that are favourable towards the regime. This indicates that governments expect (or at least fear) a possible impact of the transnational meetings within the domestic political sphere. For example, in the beginning South Korea was reluctant to include one of the two most important trade union confederations in the mechanism.²² Also, there have been serious disagreements on the composition of the CARIFORUM Civil Society Forum, implying that for years no actual meetings have been held.²³ Some Central American governments such as Nicaragua have equally been reluctant to involve critical actors such as trade unions in the civil society meetings. If these meetings were merely a talking shop, they would not be taken seriously by the EU's trading partners.

Whether or not these provisions could effectively impact on third countries' compliance with labour provisions depends on numerous factors. While some of these are EU-specific, such as the political will on the EU side to take the dialogues seriously and the extent to which they are made coherent with its development policies, many of them are beyond the EU's scope. What matters is the extent to which government consultations are used to discuss labour issues,²⁴ the extent to which the civil society forums manage to put social rights on the agenda, the frequency with which they meet, their composition and capacity to build transnational networks. On a more general level, results will also depend on the evolving political context within the EU and its trading partners. The agreements certainly allow for more discussion and contestation, but their long-term impact remains to be analysed empirically. For now the potential of the opportunities for a better implementation of labour standards that have arisen from the new model EU trade agreements has not been fully exploited.²⁵ However, our point is that the upgraded social dimension of recent trade agreements should be taken seriously and not be dismissed *a priori* as an empty shell, as some have argued.²⁶

²² Interview with a South Korean labour representative, 26 Aug. 2014.

²³ L. Campling, J. Harrison, B. Richardson & A. Smith, *Working Beyond the Border? A New Research Agenda for the Evaluation of Labour Standards in EU Trade Agreements*, 3 University of Warwick School of Law Legal Studies Research Paper (2014).

²⁴ In this regard an interesting test case may be the Dominican Republic. A letter was sent to the European Commission to request an independent investigation to address possible violation of CLS in sugar cane plantations in the Dominican Republic. This investigation has been requested by the Clarkson-Montesinos Institute under the EU-CARIFORUM agreement. For more information, visit <http://clarkson-montesinos.org/press-info/>.

²⁵ E. Postnikov, *EU Trade Policy and Civil Society: Different Channels, Same Success?* paper prepared for presentation at the European Union Studies Association Fourteenth Biannual Conference, Boston, 5–7 Mar. 2015 (unpublished).

²⁶ J. Adriaensen & M. Gonzalez Garibay, *The Illusion of Choice: The European Union and the Trade-Labor Linkage*, 9 J. Contemp. Eur. Res. 542 (2013).

3 IN SEARCH OF EXPLANATIONS

The previous section showed that labour provisions have become increasingly prominent in EU trade agreements. It was also argued that, even if they are mostly non-binding, their potential relevance cannot be underestimated. What makes this observation surprising is that the rising social ambition of trade agreements coincides with a rightward ideological shift within the EU and a radicalization of its free trade agenda. If anything, one would have expected the social trade agenda to be set aside in this context. However, exactly the opposite happened. In this section we will search for an explanation for this puzzle.

3.1 THE PUZZLE

The rise of labour provisions in EU trade agreements is surprising because previous research suggested that political actors' support for 'social clauses' closely correlates with their ideological orientation. Traditionally, the major advocates have been social-democratic political parties, supported by their constituency in the labour movement.²⁷ Indeed, the centre-left dominance in the Council of Ministers has been pointed out as a major explanation for why the EU started to favour the trade-labour linkage by the end of the 1990s.²⁸ At that time social-democratic parties were part of 13 out of 15 governments in the EU. The coming to power of New Labour in the UK (1997) and the SPD in Germany (1998) was crucial in this regard. Whereas the previous conservative governments in both these countries had strongly resisted a social clause, their social-democratic successors supported it. Furthermore, the then social-democratic Trade Commissioner, Pascal Lamy (1999–2004), consistently emphasized the role of trade policy in the promotion of European values and the need to 'harness globalization'. Within this ideological context, the EU upgraded the social conditionality system of its GSP regulation (1998) and demanded a social clause at the WTO conference in Seattle (1999).²⁹

Based on this explanation, one would expect the abandonment of social clauses with the resurgence of centre-right governments across Europe in the early 2000s. However, we have witnessed the opposite, namely a deepening and widening of social provisions in the new trade agreements. What makes this observation even more intriguing is that during this period the EU's trade

²⁷ B. Burgoon, *The Rise and Stall of Labor Linkage in Globalization Politics*, 2 Intl. Pol. 41 (2004).

²⁸ J. Orbie, H. Vos & L. Taverniers, *EU Trade Policy and A Social Clause: A Question of Competences?* 3 *Politique européenne* 159 (2005).

²⁹ Council, *WTO: Preparation of the Third Ministerial Conference – Council Conclusions*, 12121/99 (Presse 318) (1999).

agenda made a shift from ‘harnessing globalization’ towards a more explicitly neoliberal trade agenda. The Global Europe strategy of 2006 is known not only for shifting the EU’s focus from multilateralism towards bilateralism, but also for its neoliberal trade policy orthodoxy. Competitiveness at home and abroad is the central message of the trade strategy, which also made it explicit that EU trade agreements should henceforth be informed less by historical or developmental concerns and more by economic interests.³⁰ ‘Non-trade issues’ (a term used by opponents to indicate that trade should not be bothered with issues such as labour) were pushed to the sidelines and barely mentioned in the Global Europe strategy. Interestingly, the economic crisis has not softened this free trade orientation: it has rather entailed a radicalization of the neoliberal trade agenda because new free trade agreements are seen as a solution to the crisis.³¹

The question thus remains why labour provisions were not removed from new trade agreements and why they were even further extended. Pascal Lamy’s successors, Trade Commissioners Peter Mandelson and Karel De Gucht,³² and the Member States’ governments that constituted the Council over the past decade, may not have been ardent supporters of a social clause. However, there are no indications of any resistance against the continuing rise of labour provisions in the new trade agreements. The EP has continued to be a major advocate of the trade-labour linkage. The most obvious explanation seems to be that the EU has been acting out of protectionist motives, whereby seemingly legitimate social concerns are used to justify barriers to trade. Although the context of the economic crisis makes this explanation particularly appealing, we will argue that it cannot account for the deepening and widening of labour provisions in EU trade agreements. Instead, we will suggest that labour provisions have reached the status of an unobjectionable norm within the EU’s trade policy, *inter alia* because they have been embedded within a broader sustainable development frame.

3.2 PROTECTIONISM REJECTED

Thus, what makes the rise of labour standards even more surprising is that protectionist motives have not been an important driver behind EU policy. From a classical political economy perspective, one could expect that labour provisions

³⁰ European Commission, *Global Europe: Competing in the World. A Contribution to the EU’s Growth and Jobs Strategy*, COM (2006) 567.

³¹ F. De Ville & J. Orbie, *The European Commission’s Neoliberal Trade Discourse Since the Crisis: Legitimizing Continuity through Subtle Discursive Change*, 16 *Brit. J. Pol. & Indus. Rel.* 149 (2013).

³² In between the commissionership of Mandelson and De Gucht, Catherine Ashton (2008–2009) and Benita Ferrero-Waldner (2009–2010) were both Trade Commissioners for a brief time. Neither seems to have put a strong stamp on the social trade issue.

would have expanded in order to protect the EU's sensitive economic sectors against competition from countries with lower labour standards. Indeed, fears of protectionist use of social clauses have always been a major reason why developing countries, business organizations and classical trade economists have resisted them.³³ In the context of the economic crisis and competition from emerging economies such as China, the temptation to protect sensitive domestic sectors against 'social dumping' may be particularly strong.

However, there is not much evidence for this explanation. We do not find any indication either in EU discourse or in EU practice of protectionist reasoning that would explain the deepening and widening of labour provisions in EU trade agreements since the mid-2000s. An examination of EU trade policy discourse reveals that the inclusion of labour provisions is legitimized in terms of human rights, and as argued below also increasingly in terms of sustainable development. Under the protectionism hypothesis, we would expect a 'competitiveness frame' to be used with discursive references to 'unfair competition' or 'social dumping'. However, we do not find much evidence of the EU institutions using such a frame. Rights-based and sustainable development-based frames are dominant, whereas competition-based frames are almost absent.

For example, the 'Global Europe' strategy emphasizes 'social justice' and 'sustainable development'³⁴ in the context of labour standards promotion. The follow-up communication 'Trade, Growth and Development' links labour standards promotion to the objectives of growth, social justice and development.³⁵ Both documents also stress the 'cooperative' nature of labour provisions, which by definition implies that they cannot be used for protectionist purposes.³⁶ The labour-related articles of the EU's trade agreements also reject the use of labour standards for protectionist purposes, which is fully in line with the WTO consensus since the 1996 Singapore Summit. Furthermore Article 3 of the Treaty on the European Union mentions that the EU should contribute to

³³ Jagdish Bhagwati, *Free Trade Today* (Princeton U. Press 2002).

³⁴ European Commission, *Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy*, COM (2006) 567.

³⁵ European Commission, *Trade, Growth and World Affairs. Trade Policy as a Core Component of the EU's 2020 Strategy*, COM (2010) 612.

³⁶ Also the European Commission Communication 'Promoting Decent Work for All' (2006) states that 'The endorsement of social objectives cannot under any circumstances be used for protectionist purposes. The objective is to achieve social progress across the board and ensure that it is spread fairly for the benefit of all.' (p.4) Labour provisions in trade arrangements should promote decent work and sustainable development objectives (p. 8).

free *and fair* trade (emphasis added). This should be interpreted as intending to promote the integration of social provisions and trade liberalization.³⁷

Also in policy practice, opportunities for using violations of labour standards as a legitimation to reduce trade imports have not been used. The EU has displayed a cooperative and incentive-based approach, which goes against protectionist measures. The trade agreement with Colombia was strongly criticized by civil society organizations and Members of the European Parliament because of the government's involvement in the violation of human rights (including trade union rights). However, the European Commission insisted on the conclusion of the trade deal, pointing at the leverage it provides for the compliance with labour rights and for dialogue with the government. The Trade Commissioner emphasized that the trade agreement could be suspended under the essential elements clause (see above) – but he did not refer to social dumping or anti-competitive trading practices.³⁸

Clearly this is not to say that protectionist voices are completely absent. For example, within the EP there have been proposals to restrict imports for reasons of social dumping, thereby signalling a competitiveness frame.³⁹ However, even the EP has supported the cooperative approach towards the trade agreement with Colombia, comforting itself with the approval of a Roadmap on Labour, Human Rights and the Environment. Because of its lack of clear benchmarks (thereby copying the Colombia-US Action Plan) the EP attracted harsh criticism for putting trade interests above human rights and sustainable development.⁴⁰ Also sensitive industries have at times complained about social dumping, for example the French car industry protested about unfair competition from South Korea.⁴¹ The French Minister for Industrial Recovery argued that Europe is open, but should not be naïve and should not accept social and environmental dumping. In this regard the European car industry protested that South Korean cars contain cheap components made in countries such as China, which is seen as 'unfair'. In the end the EU-South Korea FTA was ratified and a safeguard regulation was negotiated to deal with a sudden rise of South Korean car exports. However, this

³⁷ A. Perulli, *Fundamental Social Rights, Market Regulation and EU External Action*, 30 Int'l J. Comp. Lab. L. Indust. Rel. 27, 41 (2014).

³⁸ K. De Gucht, *On the EU Trade Agreement with Colombia and Peru. Speaking Points Before the International Trade Committee of the European Parliament (INTA)*, (Brussels 2010).

³⁹ With a competitiveness frame we mean that the inclusion of labour standards in trade agreements is justified by the reasoning that developing countries would gain an 'unfair' competitive advantage because lower labour standards allow them to produce at lower costs. See, L. Van den Putte, *Divided We Stand: The European Parliament's Position on Social Trade in the Post-Lisbon Era* (Edward Elgar forthcoming).

⁴⁰ Agence Europe, (AE) *Opponents to Free Trade not Letting Go*, No. 10750 (2012).

⁴¹ Agence Europe, (AE) *South Korea: France Slams Unfair Car Trade*, No. 10664 (2012).

could be interpreted as a rather symbolic suggestion: in practice the EU invokes safeguards only in very rare instances.⁴²

Thus, EU trade policy discourse and practice do not show any sign of protectionist motives: quite the contrary. This resonates with the finding that the GSP⁴³ has barely been used for restricting trade flows from developing countries. Contrary to the expectations of those who fear a ‘protectionist wolf in social clothing’, the EU appears remarkably reluctant to apply trade sanctions for violations of labour rights, even in cases where it may be argued that sanctions would be legitimate. Since 1995 the GSP has provided that ‘serious and systematic violations’ of labour standards could lead to a withdrawal of trade preferences. Over the past two decades this has happened on only two occasions: Burma (1997–2013) and Belarus (2006–now). These countries are not economically important to the EU and the sanctions fit rather within the EU’s broader foreign policy sanctions. At the same time, numerous calls for sanctions (e.g., in the cases of China, Pakistan, Colombia) have not been taken into consideration.⁴⁴ After the Rana Plaza disaster the Trade Commissioner and the EU’s High Representative at first instance considered appropriate action under the GSP system ‘in order to incentivise responsible management of supply chains involving developing countries’.⁴⁵ They resisted calls to close the EU market for imports from Bangladesh, emphasizing that this ‘would hurt the wider population even if it were only aimed at unscrupulous employers’. Instead De Gucht proposed a Global Sustainability Compact to improve labour rights in a more cooperative way.⁴⁶ Thus, although the EU could have withdrawn Bangladesh’s trade preferences for the violation of trade union rights and occupational safety, it opted for an incentive-based approach. If anything could be criticized about the EU’s use of GSP labour rights conditionality, it is the continuation of preferential imports rather than protectionist abuse.

⁴² See, Hindley (2007) in G. Siles-Brügge, *Resisting Protectionism after the Crisis: Strategic Economic Discourse and the EU–Korea Free Trade Agreement*, 5 *New Pol. Econ.* 16 (2011); F. De Ville & J. Orbie, *The European Commission’s Neoliberal Trade Discourse Since the Crisis: Legitimizing Continuity through Subtle Discursive Change*, 16 *Brit. J. Pol. & Indus. Rel.* 149 (2013).

⁴³ S. Velluti, *The EU’s Social Dimension in its External Trade Relations*, in *Global Governance of Labor Rights* (A. Marx, J. Wouters, G. Rayp & L. Beke eds, Edward Elgar forthcoming).

⁴⁴ C. Portela & J. Orbie, *Sanctions under the EU Generalised System of Preferences and Foreign Policy: Coherence by Accident?* 20 *Contemp. Pol.* 69–70 (2014).

⁴⁵ C. Ashton & K. De Gucht, *Joint Statement by HR/VP Catherine Ashton and EU Trade Commissioner Karel De Gucht Following the Recent Building Collapse in Bangladesh* (2013).

⁴⁶ European Commission, *EU Trade Commissioner De Gucht launches Global Sustainability Compact in Response to Bangladesh Tragedy* (2013).

This rejection of protectionism also corroborates with research on the EU's general free trade orientation, which finds that EU trade policy has become increasingly neoliberal.⁴⁷

3.3 SOCIAL TRADE AS AN UNOBJECTIONABLE NORM

Instead of the easy suspect of protectionism, we suggest a normative explanation. The core of our argument is that labour provisions have achieved the status of an 'unobjectionable norm' in EU trade agreements. This analysis is based on Finnemore and Sikkink's work on the life-cycle of norms.⁴⁸ In the first stage of 'norm emergence', norm entrepreneurs actively promote a norm. In case these norm proponents can convince a critical mass, the norm reaches a tipping point. During this second phase, the norm is being socialized: it achieves a 'taken-for-granted' quality and becomes unobjectionable. Once norms are incorporated in legal documents and official discourse, norm entrepreneurs can refer to these sources in order to further advocate norm spread. Norm opponents, in contrast, cannot dismiss or attack the norm openly. They can only try to diminish the influence of the norm, for instance by proposing vague definitions and fuzzy descriptions.⁴⁹

In our case, the first phase corresponds with the fierce EU debate on a social clause between 1993 and 1997, with France, Belgium, the European Parliament and trade unions as the main norm entrepreneurs.⁵⁰ The second phase started with the social-democratic majority within the Council and the European Parliament and the tenure of Lamy (1999–2004). During this period, labour provisions became legalized through their inclusion in bilateral agreements and in policy documents. For example, the four ILO core labour rights were explicitly recognized as being part of the 'essential elements clause' of agreements

⁴⁷ G. Siles-Brügge, *Resisting Protectionism after the Crisis: Strategic Economic Discourse and the EU–Korea Free Trade Agreement*, 5 *Pol. Econ.* 16 (2011); F. De Ville & J. Orbie, *The European Commission's Neoliberal Trade Discourse Since the Crisis: Legitimizing Continuity through Subtle Discursive Change* 16, *Brit. J. Pol. & Indus. Rel.* 149 (2013).

⁴⁸ M. Finnemore & K. Sikkink, *International Norm Dynamics and Political Change*, 52 *International Organization*, 887 (1998); O. Elgström, *Consolidating 'Unobjectionable' Norms: Negotiating Norm Spread in the European Union*, in *European Union Negotiations: Processes, Networks and Institutions* 29 (O. Elgström & C. Jönsson eds, Routledge 2005).

⁴⁹ Other possibilities are to include exceptions, to argue for long transition periods, or to ask for a limited application in certain areas. See, *ibid.*

⁵⁰ P. Waer, *Social Clauses in International Trade: The Debate in the European Union*, 4 *J. World Trade* 30 (1996); G. Tsogas, *Labour Standards in the Generalized Systems of Preferences of the European Union and the United States*, 3 *Eur. J. Indus. Rel.* 6 (2000); J. Orbie, H. Vos & L. Taverniers, *EU Trade Policy and a Social Clause: A Question of Competences?* 3 *Politique européenne* 159 (2005).

between the EU and third countries.⁵¹ Many other documents confirmed the need to include labour provisions in trade arrangements,⁵² thereby further internalizing the norm. Also, the protectionist use of labour standards was firmly rejected.⁵³

Importantly, the social-trade norm was framed in terms of ‘human rights’. This was crucial for the norm in order to emerge and become accepted. Whereas there were still elements of protectionist thinking in the pleas for a ‘social clause’ by France, Belgium and the European Parliament in the mid-1990s, by the end of the Millennium a consensus had emerged that labour provisions should not be used for protectionist purposes and that they should be seen as human rights. This also coincided with the 1998 ILO Declaration which identified the Four Core Labour Standards as fundamental principles which all members are obliged to respect, promote and realize, even if they have not ratified the eight Conventions in question.⁵⁴ Supporting core labour standards as a means of human rights promotion and not as a means of protectionism was further legitimized through studies by the Organization for Economic Cooperation and Development which showed that developing countries respecting the core labour standards do not suffer from a competitive disadvantage in international trade.⁵⁵

The social trade norm achieved an unobjectionable status within this context, even when the social-democratic majority disappeared by the early 2000s and the global economic and financial crisis took hold at the end of 2008. One reason why the social trade norm has continued to feature in EU trade discourse and policy praxis without noticeable contestation, is that the debate on labour provisions was less politicized than in the 1990s. Precisely because of the consensus that labour standards should not be used as an excuse for protectionism and that a cooperative approach should be pursued, the debate proved less ideologically conflicted. Second, a path-dependent evolution has set off since the end 1990s whereby references to ILO Core Labour Standards became part of the EU’s standard ‘template’ to be used for any future trade

⁵¹ European Commission, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation*, COM (2001) 416.

⁵² European Commission, *Promoting a European framework for Corporate Social Responsibility*, COM (2001) 366 final; European Commission, *Towards a Global Partnership for Sustainable Development*, COM (2002) 82 final; European Commission, *Promoting Decent Work for All. The EU Contribution to the Implementation of the Decent Work Agenda in the World*, COM (2006) 249 final.

⁵³ Council, *WTO: Preparation of the Third Ministerial Conference – Council Conclusions*, 12121/99 (Presse 318) (1999); European Commission, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation*, COM (2001) 416.

⁵⁴ ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, (1998).

⁵⁵ OECD, *Trade, Employment and Labour Standards. A Study of Core Workers’ Rights and International Trade*, (1996); OECD, *International Trade and Core Labour Standards* (1996); International Labor Office and the Secretariat of the World Trade Organization, *Trade and Employment: Challenges for Policy Research* (2007).

negotiations. Even if governments and Commissioners might be less enthusiastic about the trade-labour linkage than their predecessors, it would be politically costly to remove labour standards from new trade arrangements: a minority of left-wing politicians within the Council and the EP would find it easy to mobilize against the EU's negligence of its previously proclaimed social ambitions.

This explains why the social clause has continued to feature in EU trade policy. However, it remains unclear why the EU's social ambitions have actually increased. In order to understand this, three further points should be mentioned. First, the European Parliament's impact on trade policy has steadily grown since the 1990s.⁵⁶ Since the Lisbon Treaty, the European Parliament formally needs to be involved in the negotiation and ratification of trade agreements. Some of the social issues in new trade agreements were specifically demanded by the European Parliament, such as an independent body to settle disputes on labour issues⁵⁷ and CSR provisions.⁵⁸ Even if there is no longer a (central) left majority, the EP has continued to emphasize the human rights dimension of trade agreements. This is what can be expected from the legislature, which is typically more concerned with the normative dimension of international trade⁵⁹ and with the potentially negative impact of trade agreements.

In addition, a social chapter makes it easier to find public support for the new generation of trade agreements by serving as a counterbalance for the far-reaching market provisions. It should be recalled that the Global Europe agreements are more ambitious than ever when it comes to trade liberalization, not only in terms of market access for goods and agricultural products, but also in terms of trade-related issues such as services, investment, competition and government procurement provisions. It is true that the labour provisions of EU trade agreements have deepened and widened over the past decade, but this has been parallel to an unprecedented widening and deepening of the market

⁵⁶ L. Van den Putte, F. De Ville & J. Orbic, *The European Parliament as an International Actor in Trade: From Power to Impact*, in *The European Parliament and its International Relations* 52 (S. Stavridis & D. Irrera eds, Routledge 2015).

⁵⁷ European Parliament, *Human Rights, Social and Environmental Standards in International Trade Agreements*, (2010).

⁵⁸ European Parliament, *Corporate Social Responsibility in International Trade Agreements*, (2010). However, the European Parliament's demand to have the same dispute settlement for the sustainable development chapter as for other parts of the agreement has not been met. See, European Parliament, *Human Rights, Social and Environmental Standards in International Trade Agreements*.

⁵⁹ M. Krajewski, *New Functions and New Power for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy*, in *European Yearbook of International Economic Law* 67 (M. Bungenberg and C. Herrmann eds, Springer 2013); L. Richardson, *The Post-Lisbon Role of the European Parliament in the EU's Common Commercial Policy: Implications for Bilateral Trade Negotiations*, 5 *College of Europe: EU Diplomacy Papers* (2012); M. Meunier & K. Nicolaidis, *The European Union as a Trade Power*, in *International Relations and the European Union* 275, 282 (C. Hill & M. Smith eds, Oxford U. Press 2011).

creating provisions in these agreements. Including social issues in the agreements makes it easier to find a broad political acceptance for the new generation of 'Global Europe Agreements', in particular because civil society organizations, members of parliament and other politicians regularly express their concern that trade liberalization would be detrimental for social development within the EU's trading partners. For example, European trade unions, who are in general supportive of the EU's trade agenda, argue for the inclusion of a social clause to mitigate possible negative effects of free trade.⁶⁰

There is one final reason why the social trade norm has continued to exist and even been expanded, although we will further argue that the very same reason might dilute its actual content in the long run. Whereas labour standards were originally framed as human rights, since the mid-2000s we witness a discursive shift towards a sustainable development frame. In the current agreements labour standards, together with environmental standards, are included in so-called chapters on 'Trade and Sustainable Development'. Under the new ideological constellation we do not notice an outright contestation of the social trade norm: what seems to have happened, however, is a reframing which makes the context of labour provisions more blurred. As predicted by the life-cycle of norms model, the unobjectionable status of norms has been indirectly contested through subtle reformulations, making it more ambiguous.

It was Mandelson himself who introduced the idea for the inclusion of sustainable development chapters in free trade agreements in a speech he gave in 2005.⁶¹ As mentioned above, the 2006 Global Europe trade strategy frames labour provisions not only in terms of social justice but also in terms of sustainable development. From the trade agreement with Korea onwards, all FTAs contain a chapter on sustainable development,⁶² specifically devoted to

⁶⁰ J. Hilary, *European Trade Unions and Free Trade: Between International Solidarity and Perceived Self-Interest*, 11 *Globalizations* 47(2014).

⁶¹ F. Bossuyt, *The Social Dimension of the New Generation of EU FTAs with Asia and Latin America: Ambitious Continuation for the Sake of Policy Coherence*. 14 *Eur. For. Affairs Rev.* 708 (2009).

⁶² In the Korea agreement labour provisions are included in the Chapter 13 on 'Trade and Sustainable Development'. In the Colombia/Peru agreement they are included in Title IX 'Trade and Sustainable Development'. In the Association Agreement with Central-America they are included in Part III 'Cooperation'. In the Ukrainian agreement they are mentioned in Chapter 13 'Trade and Sustainable Development' under Title IV 'Trade and Trade-Related Matters'. In the Association Agreement with Georgia they are mentioned under Chapter 13 'Trade and Sustainable Development'. In the agreement with Moldova they are also mentioned under Chapter 13 'Trade and Sustainable Development'. In the agreement with Singapore they are mentioned in Chapter 13 'Trade and Sustainable Development'. In CETA they are mentioned under 23 'Trade and Sustainable Development' and under 24 'Trade and Labour'.

social and environmental goals. Also the European Parliament has insisted on a sustainable development chapter in every new trade agreement.⁶³

The framing of labour provisions as an aspect of sustainable development, thereby putting them on the same level as environmental standards,⁶⁴ is problematic from a human rights perspective and also has legal consequences.⁶⁵ While implicitly they are also part of the essential elements clause, mentioning them also in the chapter on trade and sustainable development harms the indivisibility of human rights. In addition it is not clear how a violation of social norms should be handled: by taking appropriate measures as the violation of essential elements prescribes, or by referring it to the specific dispute settlement mechanism as described in the chapter on sustainable development? While labour and environmental provisions display some commonalities, they are too different with regard to their objectives and measures to combine them in one oversight mechanism.⁶⁶

4 CONCLUSIONS

We have argued that the surprising deepening and widening of labour provisions in EU trade agreements can be explained by the unobjectionable status that social trade has reached within the EU. One factor that has been of pivotal importance to this unobjectionable status is that social rights have been reframed under the more fuzzy heading of sustainable development.

The buzzword of sustainable development has allowed for a large political consensus within Europe to support the inclusion of labour standards in trade agreements. Reluctant trade partners might also be more willing to accept a sustainable development chapter than a separate chapter on social rights. It is hard for any actor to be opposed to sustainable development in a context in which this principle is universally accepted, e.g., also the UN is proclaiming Sustainable Development Goals as the successors of the Millennium Development Goals. In a different context, Mert summarized the consensual potential of this concept as follows:

⁶³ European Parliament, *External Dimension of Social Policy, Promoting Labour and Social Standards and European Corporate Social Responsibility*, 2010/2205 (2010).

⁶⁴ Also the labour rights conditionality of the EU's GSP system was reformulated as part of 'sustainable development and good governance' conditionality since 2005. See, European Commission, *Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015*, COM (2004) 461 final.

⁶⁵ L. Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, 24 *University of Cambridge Faculty of Law Legal Studies Research Paper Series* (2012).

⁶⁶ J. M. Siroën, et al., *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements* 101 (2008).

Sustainable development acts as an empty signifier that articulates a diversity of political demands, and around which actors with different and apparently conflicting interests can come together and cooperate. It is emptied of meaning so that each actor can interpret it according to their own perceived interests and requirements.⁶⁷

With Cecilia Malmström as Trade Commissioner (since November 2014), concerns about sustainable development in trade may even get an additional boost.⁶⁸ It remains to be seen what this will mean in practice for labour provisions in trade. While more attention for sustainable development is an aim one can hardly discourage, the reframing of core labour rights in terms of sustainable development is not without risks. Core labour standards that have acquired the status of human rights, and are expected to be respected by all the ILO members by virtue of their membership, are conceptualized at the same level as environmental provisions. Similar to Alston's famous critique⁶⁹ of the shift from international labour conventions to fundamental principles of the ILO, one might wonder if the sustainable development frame would entail a watering down of the human rights elements of EU trade agreements. Indeed, the EU's view of sustainable development risks becoming a 'basket' in which all kinds of goals and values can be put without a clear focus.⁷⁰

Norms are not eternally unobjectionable. As predicted in the life-cycle of norms model, making them more ambiguous may herald their erosion. The sustainability of the EU's social rights commitments through trade agreements remains to be seen. Much will depend on how the labour provisions are actually implemented, involving *inter alia* the reports by the Panel of Experts and the Civil Society Forums. Moreover, the EU's ambition in the social-trade nexus will be tested with the bilateral trade negotiations with India and the US. For the medium term, however, we predict that labour provisions in EU trade agreements are here to stay.

⁶⁷ A. Mert, *Partnerships for Sustainable Development: Shifts in Discourses of Environment and Democracy*, in *Environmental and Forest Governance: The Role of Discourses and Expertise* 69,72 (M. Böcher, L. Giessen & D. Kleinschmidt eds, Universitätsdrucke Göttingen 2008) (italics in original).

⁶⁸ See, for example, C. Malmström, *The Commission's Future Trade Strategy*, (Brussels, 2015) in which she raises the question whether there is a way to go beyond the current EU approach on trade and labour, thereby inspired by the Global Sustainability Compact designed for and together with Bangladesh, or the proposal on conflict minerals.

⁶⁹ P. Alston, *Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15 *Eur. J. Intl. L.* 457 (2004).

⁷⁰ M. Cremona & G.M. Durán, *Fair Trade in the European Union*, in *The Processes and Practices of Fair Trade: Trust, Ethics and Governance* 122, 156 (B. Granville & J. Dine eds, Routledge 2012).

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