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What social face of the new EU trade agreements? Beyond the 'soft' approach

Lore Van den Putte, Jan Orbie, Fabienne Bossuyt, Deborah Martens and Ferdi De Ville

Lore Van den Putte, Jan Orbie, Fabienne Bossuyt, Deborah Martens and Ferdi De Ville are all members, in differing capacities, of the teaching and research staff at the Centre for EU Studies (CEUS), Ghent University, Belgium.

Policy recommendations

If the EU is genuinely committed to promoting labour rights through trade agreements, it should invest more people and resources in this goal and enhance its approach to the trade-labour linkage on three counts: (i) involvement of civil society in the monitoring should be more substantial; (ii) monitoring of the implementation and its follow-up should be more thorough, systematic and inclusive; (iii) the dialogue-based approach should be more holistic in terms of both policies and involvement of actors. These issues are more important than the debate on whether or not it is appropriate for the EU to adopt a more sanctions-based approach.

Introduction¹

The EU has been negotiating bilateral trade agreements at a frantic pace over the past decade, during which time the social ambition of such agreements has grown to a remarkable extent. The EU approach to the trade-labour linkage in trade agreements is characterised by the inclusion of labour provisions in a chapter dealing essentially with trade and sustainable development (T&SD chapter) and by a focus on cooperation and dialogue that falls short of hard enforcement. Critical evaluations usually castigate this 'soft' European handling of labour issues in trade agreements, opposing to it the 'hard' US approach that allows for trade sanctions in case of non-compliance with labour provisions. The European Commission asserts, however, that a sanctions-based approach does not work in practice and argues that its own approach is 'smarter' insofar as it deals with the root causes of labour problems rather than with the symptoms and because it entails more sustainable results in the long run.

This Policy Brief, while endorsing the EU position that a cooperative approach would be preferable, argues also that sanctions might, as a measure of last resort, be a useful instrument for triggering

compliance with labour provisions. More importantly, however, we aim to go beyond this familiar 'soft versus sanctions' debate. Our main argument is that there is scope for improvement of the cooperative approach *as it is currently organised*. The opportunities created by the inclusion of chapters on trade and sustainable development have not been fully exploited; as such, the EU's 'soft' approach is currently not fit for purpose and requires improvement. The EU undoubtedly has the legitimacy to demand respect for labour rights in its trade agreements with third countries; what is lagging far behind is the political willingness within the EU to pursue this end.

1. The current state of affairs: social commitment failing to materialise

The European Union's commitment on the trade-labour front is a longstanding affair. Already at the end of the 1990s the EU bodies proposed a cooperative approach in which the need

¹ As a follow-up to a lunch debate on the social dimension of the EU's trade agreements held in Brussels on 23 June 2015 and jointly organised by Ghent University's Centre for EU Studies (CEUS) and the ETUI, this Policy Brief proposes three practical policy recommendations on how the EU should upgrade its trade-labour-linkage approach in free trade agreements. Several of the insights provided draw on recent studies conducted by CEUS researchers, more information can be found on www.eu-sdg.ugent.be.

for dialogue was stressed and the 'carrot' explicitly preferred to the 'stick' (Council of the European Union 1999; European Commission 2001). This pronounced ambition has been further developed in the new generation of EU Free Trade Agreements (FTAs) negotiated in the wake of the Global Europe trade strategy (European Commission 2006). While this cooperative approach is often characterised as 'soft' because no sanctions are foreseen in case of non-respect of labour standards (as opposed to the US approach), the differences between the two approaches extend far beyond the discussion on sanctions.

In the light of this *cooperative approach*, current EU trade agreements contain a T&SD chapter in which labour and environmental standards are included to ensure that trade contributes to sustainable growth. Against this background, the *social commitment* of EU trade agreements has, since the mid-2000s, *increased* in three ways (Van den Putte *et al.* 2013). First of all, the scope of social norms, including the four Core Labour Standards (CLS) put forward by the International Labour Organisation (ILO), has been deepened and widened. The new generation of FTAs now not only include social norms as areas for cooperation, but also refer to them as human rights. Secondly, there is an increased reliance on judicial means and dispute-settlement provisions to settle labour disputes: in a first instance, government consultations can be initiated to discuss the dispute and, if the issue is not resolved, a Panel of Experts can be set up to settle the issue². Thirdly, in the new generation of trade agreements, non-governmental actors on several levels are also involved in the monitoring and promotion of labour provisions. Not only do new agreements contain reference to Corporate Social Responsibility (CSR) and ethical trade schemes but they also provide for involvement of civil society in monitoring their implementation.

There has thus been a growing commitment to the fostering of labour rights through trade agreements. While the debate so far has centred on the availability of sanctions, we would argue that the frequently stressed distinction between 'hard' versus 'soft' approaches should be placed in perspective. Not only has the level of 'judicialisation' (see above) increased, but also – and more importantly – the possible impact of sanctions should not be overrated. Recourse to the suspension of a trade agreement entails the simultaneous abandonment of means of engagement with the partner government, making it even less likely that reforms in the field of labour rights would ever be implemented. It should be noted, moreover, that even the US has never gone so far as to enforce sanctions on trade partners for failing to comply with the labour standards in trade agreements and that it too, in practice, applies a cooperative approach (Oehri 2015). Finally, and most importantly, the EU is generally perceived as possessing greater legitimacy than the US for advancing the trade-labour linkage because of its so-called 'European social model' and the fact that it has ratified the ILO's Core Labour Standards.³

2 No sanctions are foreseen in case of non-compliance with the final report of the Panel of Experts. In theory however, the violation of labour rights could be dealt with under the essential elements clause of a trade agreement which stipulates that the agreement should respect universal human rights.

3 This finding is based on field research in Colombia and Peru (March-April 2015) and in Costa Rica (May-June 2015).

At the same time, the current EU system does suffer from flaws. While this increased social commitment is a laudable development in the context of the European Union's ambition to promote labour rights, so far it is *hard to identify any substantive evidence that EU trade agreements have actually contributed to increased respect for labour rights in third countries*. While this lack of evidence may well be attributable to the relatively recent conclusion of these agreements, a number of reforms can nonetheless be advocated in order to promote the emergence of a longer-term and sustainable impact. In the light of this assessment, some concrete policy recommendations are set out below.

2. More substantial involvement of civil society in the monitoring

The attribution of a formal role to civil society in the process of implementing the sustainable development chapter, through the establishment of appropriate mechanisms, can only be encouraged. Under the new generation of EU FTAs, two different but interrelated mechanisms have been devised by means of which civil society can monitor the implementation of labour and environmental provisions and advise governments accordingly. The first of these mechanisms is domestic and consists of an advisory group composed, ideally, of labour, environmental and business representatives. Such a mechanism is often referred to as a 'Domestic Advisory Group'. The second mechanism is transnational in the sense that civil society representatives at EU and partner-countries level meet jointly once a year to discuss the implementation of the chapter on sustainable development. This is usually known as the 'Civil Society Dialogue'. Within this general pattern, there is no uniform system of civil society involvement in the various EU trade agreements but it may be stated that, in general, *the functioning of both these civil society mechanisms is flawed and needs to be enhanced with regard to their composition and possibilities for meeting, as well as the accountability of governments*.

First of all, the monitoring mechanisms set up for the combination of labour and environmental issues under the heading of 'sustainable development' need to be disentangled. While it is hard to oppose the concept of sustainable development as such, the combining of labour and environmental issues under the heading of sustainable development is a negative development in terms of human rights for not only does it distract attention from the fact that labour rights are part of the universally agreed body of human rights but it serves at the same time to gloss over the inherent distinction between labour rights and environmental issues.⁴ It would make more sense if labour interests (i.e. both trade unions and employer organisations) and environmental interests were to meet separately. This would allow workers' interests to be more clearly and coherently voiced than is currently the case. At the same time, the EU should make sure that partner countries are not overburdened by the need to set up the requisite civil society mechanisms; in some cases it might well be a better idea

4 For a more thorough discussion of the problematic of placing labour rights under the umbrella of sustainable development, see Van den Putte and Orbie (2015).

to support already existing mechanisms.⁵ In addition, transparency concerning the selection process is required in both the EU and its partner countries.

Secondly, while the face-to-face meeting of labour and business representatives of different countries can only be encouraged, these stakeholders should be given the opportunity to convene more regularly. The annual, rather ad hoc, 'physical' meetings could be complemented, for example, by four-monthly video conferences. Only by means of regular civil society monitoring can problems be detected early on and transnational alliances forged. However, challenges exist with regard to the monitoring capabilities of civil society and to its transnational collaboration. An appropriate step would be to ask civil society representatives from both sides jointly to place specific problems and suggestions for improvement on the table. This would require more budgetary support for the functioning of these dialogues, including a permanent secretariat to assure continuity and an appropriate follow-up.

Thirdly, and related to the previous point, accountability of third-party governments and of the European Commission towards the civil society mechanisms needs to be improved. It is indeed unclear in many cases how governmental actors deal with the input and remarks they receive from the civil society mechanisms; the rules of procedure of these mechanisms should thus stipulate that the governments are required to take the input of civil society into account, as is already the case under the EU-South Korea agreement. The rules of procedure should also explicitly mention how civil society can signal a labour problem and can ask the European Commission to engage in government consultations to address the issue in question⁶. At the present time this procedure is unclear especially for third countries but, of course, the European Commission should also be open for input about the EU's internal social development.

3. A more thorough, systematic and inclusive follow-up

The EU should acquire more insight into whether and how its cooperative approach is working. Therefore, the monitoring of its efforts concerning labour rights should be conducted in a more thorough, systematic and inclusive manner. Although for many of its trade agreements the EU releases annual implementation reports (including on how the sustainable development chapter is being

5 In the case of the EU trade agreement with Peru and Colombia, for example, both countries use already existing mechanisms that are expected to serve as a domestic advisory group. Currently, however, there is no evidence that these mechanisms contribute to improved respect of labour rights; nor does the EU seem to be well informed about their specific mode of functioning. In the case of Costa Rica, meanwhile, under the EU-Central America agreement, new mechanisms are being established.

6 The EU domestic advisory group under the EU-South Korea trade agreement formally requested former trade commissioner Karel De Gucht to initiate government consultations. The trade commissioner replied that the EU should first rely on the Committee on Trade and Sustainable Development and civil society dialogue mechanisms before considering government consultations. In the case of Guatemala, meanwhile, European civil society does not seem to have requested sanctions, which are nonetheless possible under the GSP+ arrangement.

tackled), little is known about the impact of the trade agreement on the labour situation. While such reports enumerate the sectors that have benefitted and those that have suffered as a result of the trade agreement, it is unclear how this information has impacted on labour rights and job opportunities for people in the third country. *A more effective follow-up approach could be introduced along lines similar to the monitoring system of the current GSP+ system, thereby systematically involving the civil society forum that is established under the sustainable development chapter.*

Under current GSP+ rules developing countries, in order to benefit from additional trade preferences, have to ratify and implement the eight ILO core labour conventions⁷. With the entry into force of the revised GSP regulation in January 2014, the monitoring of these countries' compliance with the international conventions has been strengthened. The European Commission conducts an annual analysis ('scorecard') of the extent to which the conventions have been applied, based on the reports of relevant monitoring bodies (e.g. the ILO committees). This evaluation, which is not disclosed to the public, is then sent to the third-country governments who are required to respond within three months. Wherever it is deemed appropriate, the issues raised in the report are subsequently discussed with the partner government. The follow-up process can also involve a monitoring visit – as happened for example in Costa Rica, Nicaragua and Guatemala in 2014. The drawback of the enhanced monitoring system is that it lacks transparency and involves state actors only. The scorecards are not publicly available and it is unclear when and how they lead to government consultations.

A similar type of systematic monitoring exercise could be introduced for follow-up of the labour provisions. The lack of transparency and inclusiveness could be remedied by involving the – currently underperforming – civil society forums. Ideally, this new monitoring approach would become part of a broader Human Rights Impact Assessment (HRIA) to be conducted in advance of the negotiations for a trade agreement, as well as on a regular basis after its entry into force (cf. De Schutter 2011). Such an HRIA should include not only quantitative data but also a qualitative assessment of the direct and indirect implications and repercussions of a trade agreement on labour and human rights. This would need to cover not only the implementation of national and international legislation, but also issues of democracy, transparency and participation, ultimately showing how people perceive the EU and experience the impact of the trade agreement. If the ambition is indeed to engage in a cooperative approach which entails long-term and sustainable results for labour rights, the evaluation methods too should become more sophisticated and multifaceted.

4. The cooperative approach should be more holistic

Finally, in order for the EU's cooperative approach to have a positive impact on respect for labour rights, a more holistic

7 Countries are required, in addition, to ratify and implement conventions related to environmental protection and good governance.

approach to the promotion of these rights is needed. *This should extend to cover additional policy fields rather than trade alone and should involve more actors.*

First of all, the promotion of labour rights should not be reserved for trade alone. While labour issues are increasingly emphasised in the EU's trade relations, this emphasis is not as strongly reflected in other policies concerning development or foreign policy in general. Accordingly, few specific budgets are foreseen for projects specifically targeted at the advancement of labour rights in third countries. This is in strong contrast with both the large EU budgets for development cooperation and the level of spending foreseen for labour projects within the US Department of Labour. In order to guarantee a coherent and EU-wide approach to promoting labour rights externally, the sharing of information and resources between different European Commission services and agencies – like DG Trade, DG Development, DG Employment, Social Affairs & Inclusion, the European External Action Service (EEAS) and the European Parliament – should be encouraged⁸. One example here would be the follow-up of the Road Map on human and labour rights and environmental issues issued by the Peruvian and Colombian governments at the request of the European Parliament. The inclusion of labour attachés in the EU Delegations would also be an important asset in this regard, for they could become responsible for the follow-up of specific projects aimed at advancing labour rights. Whereas the EU delegation's approach currently depends very much on the proactivity of each particular delegation, greater consistency is desirable. What is more, other institutionalised forums (i.e. in addition to trade), such as human rights dialogues, could be used for discussion of labour issues. Coherence between different policy fields should be achieved in both the planning and the execution of policy.

Secondly, various non-state and state actors should be involved in the promotion of labour rights. In today's international trade environment, the rules are shaped not by states alone but also by commercial and other non-state actors. Therefore, recent EU legislative initiatives on fair trade criteria in public procurement (European Parliament & Council 2014) and on trade in conflict minerals (European Commission 2014) are to be welcomed. However, the EU could be more active in promoting fair trade (FT) and CSR. In addition, the EU should also coordinate with other major trade powers, international organisations (like the ILO), and its own member states in order to bundle resources to target specific problems in third countries, a practice almost non-existent at the present time. A case in point is Guatemala, where a complaint is currently subject to dispute settlement under the US-CAFTA DR trade agreement⁹, no action having been taken on the EU side. Several EU member states, such as the Netherlands, are currently focusing on labour rights in their external policy. Their experience and information should be pooled at the European level. A more positive example is Costa Rica, where the European Commission has co-funded an ILO programme for the training of judges and labour inspectors.

8 These DGs (together with DG Environment and DG Health and Food Safety) recently began to cooperate in a Working Group to evaluate the GSP+. Their monthly meeting illustrates the potential of collaboration and the advantages it carries for coherence and improvement.

9 US Dominican Republic-Central America Free Trade Agreement.

In the context of a holistic approach, the Sustainability Compact concluded with Bangladesh in the aftermath of the Rana Plaza incident embraces an innovative approach to promoting labour rights in third countries. Though several of the goals set out in the Compact currently seem a long way from achievement, a number of best practices can be distilled from this initiative. First of all, the approach has strong support (and thus legitimacy) because it was designed by the EU and the ILO in collaboration with the Bangladesh government and was subsequently backed by the US, with relevant stakeholders such as industry and trade union representatives also providing input. Secondly, the Compact is targeted specifically at the textile sector and proposes specific targets. Thirdly, the Compact has managed to combine trade, labour and development policy. Finally, there is a rigorous follow-up, and specific budgetary instruments are included for financing projects. The initiative could thus serve as an example of how the EU could – and should – make its approach more holistic. The T&SD chapter in the trade agreements could also be used to foster more creative thinking between various stakeholders on how labour standards can be sustained in a fast-changing global order¹⁰.

Conclusion

The EU has often been accused of taking a 'soft' approach on the trade-labour linkage and thereby of failing to foresee any sanctions in the event of non-compliance with labour standards. We argue however that the problem lies not in the absence of sanctions but rather in the fact that the EU is not fully exploiting the opportunity created by the T&SD chapters. In principle, the emphasis on dialogue and regular involvement of civil society in the implementation of trade agreements carries considerable potential for triggering an improved labour situation in third countries. However, if the EU is to deliver on its engagement, it should enhance its approach in several respects. While it might be premature to undertake a far-reaching assessment of the impact of the T&SD chapters, any such impact is likely to be limited if a number of issues are not taken into account. What is needed is more substantial involvement of civil society, a more thorough and systematic follow-up, and a more holistic policy design and implementation.

To be sure, even if these recommendations were to be followed, it is unlikely that labour rights in the EU's trading partners would dramatically improve. Though we do not assume that trade agreements are a panacea in this sphere, it would be equally naïve to believe that trade agreements can operate in isolation from broader societal considerations, for entry into a trade agreement inevitably has strong political and socio-economic repercussions. By signing a trade agreement the EU not only recognises the partner government as a legitimate partner, but also endorses the circumstances under which the goods to be traded are being produced. At the same time, the agreement necessarily impacts on trade flows, inevitably entailing winners and losers (the latter being situated in vulnerable sectors). For all these reasons it would be unfair to ignore the social context of trade agreements or to assert that trade agreements should be 'concerned with trade alone'.

10 A specific challenge to be tackled is the informal character of labour in many of the EU's trade partner countries.

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The editor responsible for this Policy Brief is Philippe Pochet, ppochet@etui.org

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