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Economic and Monetary Affairs



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TTIP and Labour Standards

Study for the EMPL Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

TTIP and Labour Standards

STUDY

Abstract

The Transatlantic Trade and Investment Partnership (TTIP) will follow EU and US recent trade policy practice to include labour provisions. These could limit the risk that liberalisation results in social dumping and promote upward change.

This Policy Department A study concludes that the EU could take a precautionary stance and employ various instruments that increase the chances that TTIP will have positive social consequences. TTIP may combine the strengths of the EU and US approaches to labour provisions, while improving their weaknesses. More analysis of the social consequences of liberalisation and labour provisions might be stimulated and strong flanking measures at the EU and national level be foreseen.

This document was requested by the European Parliament's Committee on Employment and Social Affairs.

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LIST OF ABBREVIATIONS

| | |
|-----------------|--|
| AFL-CIO | American Federation of Labour-Congress of Industrial Organizations |
| CAFTA-DR | |
| CETA | Central-America-Dominican Republic-United States FTA Comprehensive Economic and Trade Agreement |
| CLS | Core labour standards |
| CSR | Corporate social responsibility |
| DAG | Domest advisory group |
| EP | European Parliament |
| ETUC | European Trade Union Confederation |
| EU | European Union |
| FDI | Foreign direct investment |
| FTA | Free trade agreement |
| GATT | General Agreement on Tariffs and Trade |
| GSP | Generalised system of preferences |
| ICS | Investment Court System |
| ILO | International Labour Organisation |
| ISDS | Investor-state dispute settlement |
| ITO | International Trade Organization |
| KOREU | EU-South Korea Free Trade Agreement |
| OECD | Organisation for Economic Cooperation and Development |
| PCA | Partnership and Cooperation Agreement |
| TSIA | Trade sustainability impact assessment |
| TTIP | Transatlantic Trade and Investment Partnership |
| US | United States |
| WTO | World Trade Organization |

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EXECUTIVE SUMMARY

Background

This study analyses the possible effects of the Transatlantic Trade and Investment Partnership (TTIP) on labour conditions in the European Union (EU), the United States (US) and third countries. It is based on a literature review, an evaluation of labour provisions in recent EU trade agreements, an assessment of primary documents and stakeholder positions, targeted interviews and our own on-going research. We provide recommendations to increase the chances that TTIP will have positive consequences for labour conditions in the EU, the US and third countries. This analysis comes against the background of an unprecedented debate on TTIP and trade policy in general, as well as of a prolonged economic crisis that has put social protection under strain. The possible impact of TTIP on labour conditions is therefore important for the legitimacy of the agreement and the trading system in general as well as for the trend of labour protection in the EU.

Aim

Both the negotiating directives of the Council and the European Parliament resolution of 8 July 2015 containing the European Parliament's recommendation's to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) attach great importance to the objective of promoting sustainable development, and labour rights in particular. **In the context of the heated debate around TTIP, in which the risk of a race-to-the-bottom in social protection plays an important role, ensuring that TTIP not only stimulates trade and investment but also promotes social progress is key.** This study goes beyond the Trade Sustainability Impact Assessment that is currently being developed (see European Commission 2014b, 2016) in adopting a broader view on labour standards (beyond the Core Labour Conventions) and, especially, by taking account of the possible indirect effects of TTIP on labour standards.

Table 1: Main results

1. What do we know about the effects of trade liberalisation and labour provisions in trade agreements on labour conditions?

Theoretically, **liberalisation can lead to a race-to-the-top as well as a race-to-the-bottom in labour conditions.** The main risk of liberalisation is that increased competition leads to pressure on social partners and governments to lower wages and other labour conditions. On the other hand, positive welfare effects resulting from liberalisation could lead to improvement in labour conditions. **Which effect predominates has not been empirically settled in the literature.** Labour provisions are included in trade agreements to limit the risk that liberalisation has negative social consequences and to maximise its potential for social progress. However, also **our knowledge about the effectiveness of labour provisions in general and of various types of provisions in particular is currently limited.**

2. How effective is the EU approach to labour provisions in FTAs?

The European Parliament has pushed for labour rights in trade policy since the 1980s. However, only since 2008 has the EU elaborated labour provisions in bilateral trade agreements. These have **widened and deepened in terms of content** (in terms of social cooperation, core labour standards, and domestic protection), **governance** (including civil society involvement), and **enforceability**. The EU's approach is still in an experimental

phase and so far there is little evidence for its effectiveness. **Compared to labour rights conditionality in the GSP+ (Generalised System of Preferences), bilateral agreements are weaker in terms of ratification requirements, enforcement provisions, and monitoring.** Theoretically, serious violations of the core labour standards might be challenged under the 'essential elements clause', but this is unlikely to happen. An effective impact of the labour provisions may be expected in the long term, provided that the new civil society mechanisms facilitate the empowerment of marginalized groups and enhance the monitoring of labour rights.

3. How do the EU and the US differ in their approaches to labour provisions?

While the EU and US approaches to labour provisions in trade agreements are more similar than is often assumed, they display some important differences. The EU relies more on the agenda of the ILO and its Core Conventions, while the US mostly refers to the ILO 1998 Declaration. On the other hand, the US allows for the possibility of sanctions when labour commitments are violated while the EU only foresees cooperative mechanisms. If the aim is for TTIP to have positive effects on labour conditions, it is advisable **to integrate the EU approach with that of the US at the highest** rather than the lowest **common denominator**.

4. How do the EU and the US score in terms of ratification and implementation of Core Labour Conventions?

Both the EU Member States and the US are bound as ILO members to the fundamental labour rights included in the 1998 Declaration. However, **EU countries have all ratified the eight Core Labour Conventions in full, while the US has only ratified two.** Moreover, observers argue that US labour law and practice deviate significantly from the Core Labour Conventions in several respects, while also EU Member States' implementation is sometimes criticised. If trade unions' rights are severely restricted in some parts of a free trade area, this can result in unfair competition for other parts, thereby further aggravating the trade unions' weakening of bargaining power as an automatic result of liberalisation. For this reason, it is important that provisions in TTIP help ensure that all parties respect the ILO Core Conventions, especially with regard to collective bargaining. The European Commission's current approach to trade agreements is to demand for the implementation of the core labour standards and for sustained efforts towards ratifying the ILO Core Conventions.

5. What are the main policy recommendations from this study?

In general, TTIP provides an opportunity to improve the EU's promotion of labour standards through trade

- First, it allows the EU to reinforce the **strengths of its approach to labour provisions in trade agreements**. This involves a **highest common denominator** integration of EU and US approaches, **allowing for sanctions** as the ultimate stick ensuring coherency with ILO activities and **improving the cooperative mechanisms** as **the potential of this approach has been underutilised**¹. As for the latter, several suggestions have been made, including

¹ The **Annex** to this study presents a proposal of how such a dispute settlement could be structured.

awareness raising in third countries about treaty mechanisms to promote labour rights, funding enabling organizations to attend the civil society meetings, and separate meetings of labour representatives.

- Second, as research shows the importance of social cohesion for sustainable support for economic integration, the development of **instruments within the EU that allow for better redistributing the gains and compensating the losers** from TTIP and other trade agreements across and within Member States seems advisable. This can range from a reinforcement of the Globalisation Adjustment Fund to the creation of more automatic stabilisers at the EU level. Moreover, a 'social safeguard mechanism' could be considered to respond to unforeseen negative social consequences.
- Third, there is **little evidence on the effectiveness of labour provisions**. Therefore, **further research** on the impact of trade liberalisation and labour provisions in trade agreements is needed. Given the considerable uncertainties on the impact of trade liberalization and labour provisions in trade agreements, the **EU could consider to apply a 'precautionary approach'** to the impact of TTIP on labour conditions by employing various instruments in the agreement to guarantee positive social effects. This could reinforce the position of trade unions to counter their loss of bargaining power because of trade liberalisation. In addition, in-depth and systematic monitoring are recommended.

1. INTRODUCTION

KEY FINDINGS

- **In the heated debate on TTIP, the possible effects of the agreement on labour protection play an important role.** While there is concern that TTIP might weaken labour protection in the EU, there is also hope that it could lead to upward change in transatlantic and worldwide labour protection.
- **The inclusion of strong labour provisions in TTIP is important for different reasons:** it will help restore the legitimacy of the agreement; it will ensure that TTIP will not negatively affect labour conditions; and it might provide a gold standard for other agreements and reinforce the authority of multilateral organisations on trade and labour.
- **The European Parliament has insisted on strong labour provisions in TTIP,** inter alia calling for the mandatory ratification of Core Labour Conventions and the enforceability of provisions before the general dispute settlement mechanism
- In response to the uncertainty about the effects of liberalisation and labour provisions in trade agreements on labour conditions, a **precautionary approach**, where the EU includes various instruments to **limit the social risks and maximise the social benefits of TTIP**, could be considered.

The Transatlantic Trade and Investment Partnership (TTIP) has generated unprecedented public attention for and debate on European Union (EU) trade policy. This debate has largely focused on the controversial investor protection provisions (more specifically investor-state dispute settlement, or ISDS, in the meantime reformed and renamed into Investment Court System, or ICS) and the regulatory cooperation dimension. **The common theme behind the concerns about TTIP is that the agreement will lower levels of protection within the EU and limit the policy space of governments to adopt measures in the public interest.** Also in the US, the legitimacy of the free trade regime is increasingly questioned. Trade has become a core theme in the Presidential primaries and criticism towards the social consequences of past trade agreements is widely seen as one of the reasons for the success of candidates at the more radical wings of both major parties (see e.g. Summers 2016).

Labour standards² are one of the areas for which it is feared, on the one hand, that a Free Trade Agreement (FTA) with the United States (US) might lead to a race-to-the-bottom. On the other hand, the EU has the policy to include labour provisions in a Chapter on Trade and Sustainable Development in its trade agreements to prevent downward adjustment of labour and environmental protection and there is even hope that this might lead to upward change in transatlantic labour protection. While the scope of labour provisions included in trade agreements has recently expanded, the Fundamental Principles and Core Labour Conventions of the ILO play a central role, and are therefore introduced in front of this study in Box 1.

² In this study, we will use the terms 'labour provisions', 'labour standards', 'labour rights', and 'social provisions' to refer to provisions in trade agreements that include: 'any labour standard which establishes minimum working conditions, terms of employment or worker rights; any norm on the protection provided to workers under national labour law and its enforcement; as well as any framework for cooperation in and/or monitoring of these issues' (ILO 2013: 6). We will use the term 'labour conditions' and 'labour protection' to refer to the level of protection at work applying within a country.

Box 1: ILO Fundamental Principles and Core Conventions

| Fundamental Principles (ILO 1998 Declaration) | Corresponding Fundamental Conventions (ILO Core Conventions) |
|---|---|
| <i>Freedom of association and the effective recognition of the right to collective bargaining</i> | <ul style="list-style-type: none"> • Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) • Right to Organise and Collective Bargaining Convention, 1949 (No. 98) |
| <i>Elimination of all forms of forced or compulsory labour</i> | <ul style="list-style-type: none"> • Forced Labour Convention, 1930 (No. 29) • Abolition of Forced Labour Convention, 1957 (No. 105) |
| <i>Effective abolition of child labour</i> | <ul style="list-style-type: none"> • Minimum Age Convention, 1973 (No. 138) • Worst Forms of Child Labour Convention, 1999 (No. 182) |
| <i>Elimination of discrimination in respect of employment and occupation</i> | <ul style="list-style-type: none"> • Equal Remuneration Convention, 1951 (No. 100) • Discrimination (Employment and Occupation) Convention, 1958 (No. 111) |

The inclusion of strong labour provisions in TTIP is important and desirable for several reasons. *First*, it is one way to **restore the legitimacy** of TTIP by ensuring that it is not only (seen to be) pursuing the maximisation of transatlantic trade and investment as ends in themselves, but is contributing to the objective of sustainable development, as mandated by the Treaties (Art. 21 TEU, Art. 205 and 207 TFEU) and as elaborated in the recent EU trade strategy 'Trade for all' (European Commission 2015a). Especially since the TTIP has unleashed unprecedented debate about the desirable balance between liberalisation and the rights of foreign suppliers and investors on the one hand and protection and the right of governments to regulate on the other, the inclusion of a strong Chapter on Trade and Sustainable Development is key. It should be clear that currently not only the legitimacy of TTIP is being questioned, but the legitimacy of the free trade system in general is under challenge. Strong provisions in TTIP on sustainable development, and labour standards in particular, might be one way to restore the legitimacy of this particular agreement and trade policy in general.

Second, labour provisions can **protect against possible negative effects of economic integration**. As liberalisation of trade and investment might negatively affect labour conditions, the inclusion of labour provisions and effective participation of labour representatives might be countervailing factors to make TTIP more neutral with regard to the social consequences and the bargaining power of different societal groups. 'Positive integration' of labour rights might then compensate for 'negative integration' in trade and investment.

Third, strong labour provisions in TTIP can **help reinforce the social dimension of globalisation** at the multilateral level. TTIP is often presented as a 'gold standard' or 'template' agreement that will affect future agreements with and practices in other developed, emerging and developing countries. Hence, the extent to and manner in which labour standards are promoted through TTIP might spill over geographically to third countries and timewise into the future. In this way, TTIP might be a stepping-stone to reinforce the legitimacy and effectiveness of the global governance institutions that promote trade and

labour rights, the World Trade Organisation (WTO) and International Labour Organisation (ILO) respectively, and help to find a just balance between both.

It is hence logical that the European Parliament in its most recent resolution on TTIP of 8 July 2015 has paid considerable attention to the issue of labour standards.

Box 2: European Parliament resolution on TTIP: labour provisions

The European Parliament resolution on TTIP of 8 July 2015 contains five paragraphs (under section *d* 'regarding the rules') with recommendations on labour provisions:

(ii) to ensure that the sustainable development chapter is **binding and enforceable** and **aims at the full and effective ratification, implementation and enforcement** of the **eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO's Decent Work Agenda** and the core international environmental agreements; provisions must be aimed at further improving levels of protection of labour and environmental standards; an ambitious trade and sustainable development chapter must also include rules on **corporate social responsibility** based on OECD Guidelines for Multinational Enterprises and **clearly structured dialogue with civil society**;

(iii) to ensure that labour and environmental standards are not limited to the trade and sustainable development chapter but are **equally included in other areas of the agreement**, such as investment, trade in services, regulatory cooperation and public procurement;

(iv) to ensure that labour and environmental standards are **made enforceable, by building on the good experience of existing FTAs by the EU and US** and national legislation; to ensure that the implementation of and compliance with labour provisions is subjected to an **effective monitoring process, involving social partners and civil society** representatives and to the **general dispute settlement** which applies to the whole agreement;

(v) to ensure, in full respect of national legislation, that employees of transatlantic companies, registered under EU member state law, have access to **information and consultation** in line with the **European works council directive**;

(vi) to ensure that the economic, employment, social, and environmental impact of TTIP is also examined by means of a **thorough and objective ex-ante trade sustainability impact assessment** in full respect of the EU Directive on SIA, with clear and structured involvement of all relevant stakeholders, including civil society, asks the Commission to conduct comparative in-depth impact studies for each Member State and an evaluation of the competitiveness of EU sectors and their counterparts in the US with the aim to make projections on job losses and gains in the sectors affected in each Member State, whereby the **adjustment costs could be partly taken up by EU and Member State funding**.

Source: European Parliament (2015), emphases added.

This study reviews the literature on the relationship between labour conditions, liberalisation and the inclusion of labour provisions in trade agreements and analyses what we currently know about the provisions in and effects of TTIP. Building on this, we aim to assess the potential social consequences of TTIP and to provide the European Parliament with concrete recommendations. The analysis is primarily based on desk research, comprising a systematic literature review, own research on the effectiveness of the inclusion of labour provisions in recent EU trade agreements and analysis of primary documents in TTIP. This desk research is complemented by analysis of position papers from as well as a number of targeted interviews with TTIP stakeholders and experts, and with

representatives from partners in EU trade agreements that include labour provisions (such as Colombia and Peru). A balance between governmental, producer and labour perspectives has been pursued. This study goes beyond the Trade Sustainability Impact Assessment that is currently being developed (see European Commission 2014b, 2016) in taking a broader view on labour standards (beyond the Core Labour Conventions) and, especially, by taking very seriously the possible indirect effects of TTIP on labour standards, primarily through the weakening of the bargaining power of trade unions (see *infra*).

The remainder of this study is structured as follows. In the second chapter, we review the academic literature on the relationship between liberalisation and labour standards. Does liberalisation result in a race-to-the-bottom in terms of social protection? And can the inclusion of labour provisions in trade agreements countervail such possible effects, and even contribute to a race-to-the-top? The third chapter discusses findings on the effectiveness of the inclusion of labour provisions in EU trade agreements so far. In the fourth chapter, we analyse the expected provisions in and consequences of TTIP on labour standards, by contrasting the EU and US approaches to labour provisions in FTAs, comparing the EU and US record in terms of ratifying and implementing the Core Labour Conventions, analysing the EU proposal on labour standards in TTIP, and assessing the possible consequences of TTIP for labour standards in third countries as well as within the EU. We conclude with recommendations regarding possible improvements to the sustainable development chapter(s) in EU trade agreements, on our knowledge of the effects of free trade agreements on labour standards, and concerning measures within the EU and Member States that can limit the social risks and maximise the social opportunities offered by TTIP.

2. TRADE AGREEMENTS AND LABOUR CONDITIONS

KEY FINDINGS

- The dynamics between trade liberalisation and labour protection are multi-faceted. Liberalisation can have **positive effects** on labour protection by raising income levels, labour protection can boost competitiveness and welfare gains from liberalisation in the medium term, but liberalisation can also induce a **race-to-the-bottom** process. **Which effect predominates has not been empirically settled.**
- **Labour provisions in trade agreements can limit the risk** that liberalisation results in a lowering of labour protection while increasing the possibility that the trade agreement contributes to improved labour conditions. However, the social effects of (different) labour provisions in FTAs has been insufficiently empirically determined.
- Given these uncertainties in existing research, continuous monitoring of labour implications of trade agreements is advisable and adopting a **precautionary** approach towards the social consequences of TTIP recommended. Specific attention might go to **limiting the possibility of social dumping and countervailing the loss of bargaining power of unions.**

2.1. Liberalisation and labour rights: a race-to-the-bottom?

Theoretically, different dynamics might be at play in the relationship between liberalisation and labour rights. On the one hand, (at least) three channels might lead to an **increase in labour conditions after liberalisation**:

- liberalisation is generally assumed to result in higher average income levels, which is considered to be conducive to higher labour standards (**income channel**) (e.g. Flanagan 2006):
- especially in the medium to long term, higher labour standards are considered to lead to increasing productivity and consequently competitiveness, incentivising firms to apply better labour conditions (**productivity channel**) (e.g. Bazillier 2008);
- integration into the global market might increase the demand from consumers for goods produced in decent working conditions (**reputational channel**).

On the other hand, **liberalisation can also lead to lower labour standards** (at least) through two dynamics (cfr. Brown, Deardorff & Stern 1996):

- liberalisation increases the competitive pressures on countries and firms and might lead them to resort to 'social dumping' tactics to improve their (short-term) cost competitiveness (**cost channel**);
- the free movement of goods, services and capital, but much less of employees, that result from free trade agreements increases the bargaining power of employers and investors vis-à-vis workers and governments (**bargaining power channel**) (see e.g. Leahy & Pavelin 2004; Dumont, Rayp & Willemé 2006, 2012). This might lead to wage decreases, job insecurity and lower labour standards (Rodrik 1997).

The consequences of the increased attractiveness of social dumping and the weaker position of unions after liberalisation should not per se reveal themselves through explicit lowering of labour standards, but can also more subtly become evident by halting progress in social protection (**social chill**).

The more a trade agreement limits the ability to use other (industrial policy) instruments to protect domestic industries or promote their competitiveness (e.g. by restraining the use of tariffs, quotas, subsidies, technical standards, government procurement, domestic content requirements, etc.), **the more governments might be inclined to use social (as well as fiscal and environmental) dumping to increase the competitiveness of their firms and attract investment** (Arestoff-Izzo et al. 2008). As TTIP is considered the most advanced and profound trade and investment agreement to date disciplining the use of a wide array of policy instruments, the risk that governments will take recourse to lowering (or not increasing) labour standards is theoretically also higher. Therefore, strong labour provisions in TTIP are key to limit the risks of social dumping.

Unfortunately, we don't have a plethora of empirical studies at our disposal to decide which of the theoretically possible effects predominates. Indeed, Davies and Vadlamannati have argued that 'there is **little work on the potential strategic interactions in labour standards**' (2013: 1). Among the existing studies available, authors arrive at different conclusions. Olney (2013) has found evidence of a race-to-the-bottom in employment protection among Organisation for Economic Cooperation and Development (OECD) countries. He found that a reduction in employment protection rules leads to an increase in foreign direct investment (FDI) and that there is evidence that countries are competitively undercutting each other's labour market standards. This can be an explanation for the finding that in the past three decades the increase in FDI and the decrease of average employment protection have gone hand in hand, including in OECD countries. This finding has been corroborated by Marx, Soares and Van Acker (2016) for freedom of association and collective bargaining rights. Others also find a race-to-the-bottom taking place. Davies and Vadlamannati (2013) have found interdependence between countries' labour standards, meaning that a reduction in one country's labour protection is positively correlated with a cut in others' labour standards. They found that this effect is stronger for labour practices than for labour laws and that while the effect is prevalent in both developed and developing countries, it is strongest among the latter. Dumont et al. (2006, 2012) have found empirical evidence that globalisation weakens union bargaining power (and low-skilled workers' unions especially), which may lead indirectly to a weakening of labour rights. On the other hand, Greenhill, Mosley and Prakash (2009) have found evidence for a race-to-the-top: strong legal protection of collective labour rights in the export markets of one country is positively correlated with more stringent labour laws in the exporting country. This effect is, different from the finding above, stronger for labour law than for labour practices.

A review of the literature on the relationship between liberalisation and labour protection hence **does not provide unambiguous conclusions** about the direction and strength of the effect. Due to variation in the definition of labour rights, the methodology used, the case selection and data availability, reliability and quality, authors arrive at different conclusions. Salem and Rozental (2012: 66) conclude: 'disentangling the links between labor standards, trade openness and trade flows remains a challenge' (also see ILO 2016: chapter 2).

While there is still considerable uncertainty about the balance between positive and negative effects of liberalisation on labour standards, there is a consensus that liberalisation unavoidably creates (in the short-term) winners and losers within countries (e.g. Davidson & Matusz 2006) and that liberalisation at least also carries with it some risk to put in motion dynamics that might lead to lower levels of labour protection than would have been the case without the liberalisation. At least, we witness today that the perception that globalisation is hollowing out social protection leads to a popular backlash against trade agreements. Including strong labour provisions in trade agreements can be a way to ensure that globalisation is compatible with social stability and consensus in (su-pra-)national democracies (cfr. Rodrik 2011).

In this study, we will not try to judge if the (social) benefits of TTIP outweigh the costs. We argue for a **precautionary approach that seeks to limit the social risks of TTIP** and maximise its opportunities. The **inclusion of labour standards in TTIP** is one way to limit its social risks and increase its opportunities. What does the literature tell us about the effectiveness of labour standards in trade agreements?

2.2. Labour standards in trade agreements: a race-to-the-top?

Theoretically, labour standards are included in trade agreements for (at least) three possible reasons (cfr. ILO 2016):

- from an **economic perspective**, they should **compensate for potential negative social effects** of liberalisation and avoid that countries 'abuse' liberalisation by lowering labour standards to attain an unfair competitive advantage ('social dumping'). The inclusion of labour standards in trade agreements contributes to levelling the playing field in the social dimension and ensures that all firms play by a minimum of social rules. According to critics of this argument, however, labour provisions can be abused as a 'disguised protectionist instrument', illegitimately protecting workers in developed countries against legitimate comparative advantages of workers in developing countries;
- from an **ethical perspective**, the inclusion of labour standards in trade agreements can be used as an instrument to **improve labour conditions in third countries**. Hence, here the motivation is not to protect domestic workers against unfair competition abroad, but using the leverage of trade to promote better working conditions abroad. But to what extent do labour standards in trade agreements reach these goals?;
- If they do not at all, from a **negotiation-tactical perspective**, their inclusion might merely be a useful social '**fig leaf**' to ensure sufficient support for trade agreements.

Again, we lack extensive empirical research to answer the question which motive predominates. Salem & Rozental (2012: 73) argue that '[d]espite the growing inclusion of labor provisions in trade agreements, there is little research that examines how these commitments affect labor conditions'. Marx, Soares and Van Acker (2016: 14) state that 'relatively little data is available to assess whether these labour standards [ILO conventions integrated in unilateral and bilateral trade policies] have had any real impact on the situation on the ground at the country level'. While providing an overview of the scarce literature, the ILO has recently concurred that '**evidence with respect to the effectiveness of labour provisions in trade agreements is relatively sparse**' (ILO 2016: Chapter 2). Salem and Rozental (2012: 78ff) discuss a number of qualitative studies on the effectiveness of labour provisions. These have found that: **weak enforcement mechanisms lower the effectiveness** of labour obligations in the Dominican Republic-Central America-United States FTA (CAFTA-DR); the ILO's "Better Factories Cambodia" program set up as part of the 1999 US-Cambodia trade agreement on textiles and apparel was relatively successful due to a combination of market access conditionality, monitoring, technical assistance and capacity-building (see also Polaski 2006); and that the threat of sanctions are most effective if accompanied by technical and financial help.

The ILO's report 'Social Dimensions of Free Trade Agreements' (2013) provides an overview of the evolution, types and effectiveness of the inclusion of labour provisions in trade agreements. With regard to impact, it concluded that (for the conditional approach) 'the more comprehensive effects on labour standards issues have emerged from pre-ratification conditionality, but ... the[se] effects depend considerably on the accompanying advocacy

action of the social partners and civil society actors' (2013:30). For post-ratification conditionality, through the use of dispute settlement procedures, there are very few cases to judge on impact. For the promotional approach, which is used in just about all of FTAs containing labour provisions of which around 60 per cent are exclusively promotional in nature (including those concluded by the EU, see *infra*), its impact has proven difficult to assess (ILO 2013: 67-8). Interestingly, the ILO (2016) also found that **trade agreements with labour provisions do not have different effects on trade** as compared with agreements without such provisions, refuting the 'protectionist' concerns of critics of such provisions.

In sum, **the current state of the art does not provide clear answers about the effect of trade agreements and labour provisions therein on labour conditions**. This is due to the complex, multifaceted nature of the dynamics between liberalisation, labour provisions and labour conditions and gaps in the literature that have to be filled. There are, however, a number of tentative conclusions that can be drawn. If it is the aim to limit negative social consequences of trade agreements, **the possibility for social dumping and for the weakening of the bargaining power of trade unions should be avoided**. While the precise effectiveness of labour provisions is still uncertain, it seems that **a combination of various instruments has a higher probability to lead to positive results**. Exactly because these findings have to be treated with caution, a precautionary approach guides our further analysis.

In the next chapter, we turn to our analysis of the EU's track record so far as a stepping-stone for our evaluation of and recommendations for labour provisions in TTIP.

3. LABOUR STANDARDS IN EU TRADE AGREEMENTS: EFFECTIVENESS, MONITORING AND ENFORCEMENT

KEY FINDINGS

- Against the background of a failed social clause at the multilateral level (WTO), the EU started to include labour rights in the unilateral Generalised System of Preferences (GSP) since 1995. Although it managed to foster the ratification of ILO Core Labour Conventions in some countries, **overall the success of GSP conditionality on implementation of core labour standards has been mixed**. In practice the GSP is more and more replaced by bilateral FTAs.
- Labour provisions are more elaborated in the new generation of EU FTAs (since the EU-Cariforum 2008 and the EU-Korea 2010 agreements) **in terms of content, governance, and enforceability**.
- Nevertheless, the EU sticks to a soft approach to the trade-labour linkage. **Weaknesses compared to the GSP** are that **ratification** of ILO Core Labour Conventions is not strictly required, that **enforceability** is limited to government consultations, civil society monitoring, and *blaming and shaming* by a Panel of Experts (without sanctions), and that **monitoring** by the EU institutions seems to happen less thoroughly.
- One noticeable new element is the **non-lowering clause**, which provides that Parties cannot weaken existing labour standards for the purpose of stimulating trade or investment. However, it seems difficult to ensure compliance with this obligation in practice.
- Given the uncertainties about the impact of trade liberalisation on labour rights (see chapter 2) and on the impact of labour provisions in trade agreements (see this chapter), in-depth and systematic **monitoring** is key. In this regard, the new **institutionalised involvement of civil society** at national and transnational level is an improvement of the EU's cooperative approach. The civil society meetings could enable a more accurate monitoring of labour rights. Moreover, they have the potential for **empowerment** of marginalised civil society actors.
- However, its potential has so far been underutilized. The EU's approach to labour provisions in trade agreements is still in an experimental phase and so far there is little evidence for its effectiveness. There are several ways in which **flaws within the cooperative approach** could be addressed, even without changes to the approach. Suggestions include awareness-raising about the existence of these mechanisms in third countries, funding to guarantee that civil society actors can attend the meetings, and secretarial support for their organization and follow-up. The EU could also foster closer coherence between the labour rights commitments in the trade agreements and its development cooperation policies, as well as with the activities of other actors such as the US and the ILO.
- Finally, the EU could consider a **sanction mechanism** for serious and systematic violations of core labour standards, as an instrument of last resort and in line with the activities of the ILO. There should not be a contradiction between cooperation and (ultimately) sanctioning, as the 'stick' of sanctions can be seen as a way of leveraging the cooperative approach. The EU could also establish a **public submission system** (or other complaint mechanism) that allows actors from third countries to bring up alleged violations of labour rights to the EU institutions.

3.1. Background: A social clause in EU and international trade

Although the debate on a 'social clause' in international trade goes back to the first wave of globalisation at the end of the 19th century (Charnovitz 1987), it took until the mid-1990s before European policy-makers started to advance concrete proposals in this regard. Within the EU, **the European Parliament has been a frontrunner in calling for the inclusion of labour standards in international trade.** Already in 1987 it approved a resolution on the observance and strengthening of international labour norms, which also suggested that a social clause should be included in the multilateral (General Agreement on Tariffs and Trade, GATT) and bilateral (Lomé) trade agreements (European Parliament 1986). While this proposal fell on deaf ears with the member states and the European Commission, the 1994 Sainjon Report (European Parliament 1994) would be more successful in sparking an EU debate on the trade-labour nexus.

Indeed, the time was ripe for a more serious consideration of the trade-labour linkage. In the context of the final phase of the GATT Uruguay Round negotiations (which would establish the WTO), increasing economic globalisation and growing unemployment rates in Western Europe, some EU member states and eventually also the European Commission started to support the idea that labour rights should be addressed in the world trade regime. However, divergences within the EU continued to exist. Whereas the EP and member states such as France and Belgium favoured a binding and enforceable social clause, **most member states and the European Commission advanced that this issue should be addressed in a soft and cooperative way.** The latter also argued that the ILO is the most appropriate forum to deal with international labour rights.

This soft and cooperative approach, with reference to the ILO's expertise, continues to characterise the EU's policies until today, as will become clear below.

It also became the consensus within the WTO. The trade-labour nexus was hotly debated in the run-up to the Ministerial Conference of Singapore (1996). The Declaration included a paragraph on 'Core Labour Standards' (CLS):

Box 3: Core Labour Standards in the Singapore Declaration

4. We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

Source: WTO, Ministerial Declaration, Singapore, 18 December 1996; WT/MIN(96)/DEC.

The Singapore Declaration thereby consolidated the **perception that labour rights are incompatible with the international trading system** (Wilkinson 2001). It basically holds that (1) the ILO is the competent body to deal with core labour standards, not the WTO, (2) trade liberalisation will lead to economic growth, development and thus eventually to better labour standards, and (3) labour standards cannot be used for protectionist purposes in order to offset the comparative advantage of low-wage developing countries. Hereby the WTO's role has been effectively sidelined (except from the small addition that the WTO and ILO secretariats will continue their 'existing' – but de facto barely existing – collaboration). **The consequence is that until today the multilateral trade and labour systems have**

been fragmented, each with their own monitoring and enforcement mechanisms (cfr. De Schutter 2015).

To be sure, there is **a consensus on the value of the fundamental principles of the ILO**, as laid down in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (see Box 1). The CLS are widely recognized to constitute human rights that should be upheld and promoted. However, the disagreement centres on the question whether *trade instruments* should be used for the purpose of upholding and advancing core labour standards. Underlying the belief that trade and labour should remain unlinked, is the fear that 'ethical' concerns on labour rights would be (mis-)used by western governments for protectionist purposes (see supra). This explains why not only advocates of free trade within and outside the EU, but also developing country governments have opposed a social clause in trade agreements. Hence the social clause has faced opposition from a strong coalition of free trade advocates, fearing that it would jeopardise the post-war liberal trading system, and developing countries, fearing that this would become yet another loophole for developed countries to safeguard their sensitive sectors. This **potential conflation between ethical and economic motivations (see also above section 2) explains why the debate has been so sensitive**.

Nevertheless, **the separation between labour rights and international trade law is less self-evident than it might seem**. What tends to be neglected in the debate is the linkage the architects of the post-war 'embedded liberal' global economic system did envisage. The 1948 Havana Charter for the establishment of the International Trade Organisation (ITO) included an Article on 'Fair Labour Standards', which stated that 'unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory' (Art.7). In this regard cooperation with the ILO was encouraged. The social provisions of the Havana Charter disappeared when the ITO was rejected by the US Congress and replaced by the more limited GATT, but, interestingly, one specific provision on the 'products of prison labour' has remained in the agreement. Until today, Article XX(e) of the GATT provides that the principles of free trade should not apply to goods involving prison labour. Some international trade lawyers argue that a more 'enlightened' interpretation of this GATT article, and of the 'public morals' exception in Article XX(a) GATT, would allow that countries also condition the import of products of which the production has involved a violation of certain labour norms. The problem is not so much the international trade rules, but much more their rigid interpretation (e.g. Howse and Mutua 2000).

When the WTO Doha Development Round was launched in 2001, the Singapore consensus on the exclusion of labour norms within the trading system was confirmed. Although the EU had become a cautious supporter of the trade-labour linkage since the end 1990s, it had already given up on this issue at the multilateral trading level before the conference started. In addition to developing countries' resistance (with India being a vocal opponent), also the US government (the new Bush administration) had become less enthusiastic about the trade-labour linkage at the WTO; whereas for the EU the main priority was to make sure that a new trading round would be launched which included development-friendly provisions *and* new trade issues such as investment, competition and public procurement.

Meanwhile, the EU had been exploring alternative avenues to promote labour rights through trade. The 1995 and 1998 reforms of its **Generalised System of Preferences (GSP)** – which provides additional and unilateral trade advantages to developing countries – established for the first time a system of 'hard' and 'soft' social conditionality. Developing countries could either receive additional tariff preferences if they comply with the ILO Core

Labour Conventions, or lose existing preferences if they seriously and systematically violate these labour standards. The sanctioning part has been used only twice: Burma/Myanmar (1997-2013) and Belarus (2008 until today) lost their preferential GSP tariffs for the violation of conventions on forced labour and freedom of association respectively. The incentive system was extended in 2005 with the 'GSP+' enhanced preferences for 'vulnerable' countries that ratify and implement international conventions relating to human and labour rights, environment and good governance. Under the GSP+ the number of countries benefiting from additional trade incentives increased to about 15 (most of them are Latin American countries).

The success of this labour conditionality system has been mixed. Some countries ostensibly **ratified** a number of ILO conventions in order to receive the additional tariff concessions (e.g. Venezuela, El Salvador, Bolivia and Colombia). The effect of the GSP carrot was most obvious in the case of El Salvador, which ratified ILO Conventions No. 87 and 98 in order to benefit from larger access to the European market (Orbie and Tortell 2011, p.673). Ratification is also important because it enables the supervisory role of ILO expert bodies (see Box 8). However, this incentive scheme has been criticized for merely 'ticking the box' of ratification records without considering the **implementation** of the ILO core conventions (Velluti 2015). Third countries such as Colombia, Venezuela, Guatemala and Honduras received GSP+ market access even if the ILO expert bodies (the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA)) issued very critical reports about their implementation of ILO Core Conventions (Orbie and Tortell 2011, p.676-678).

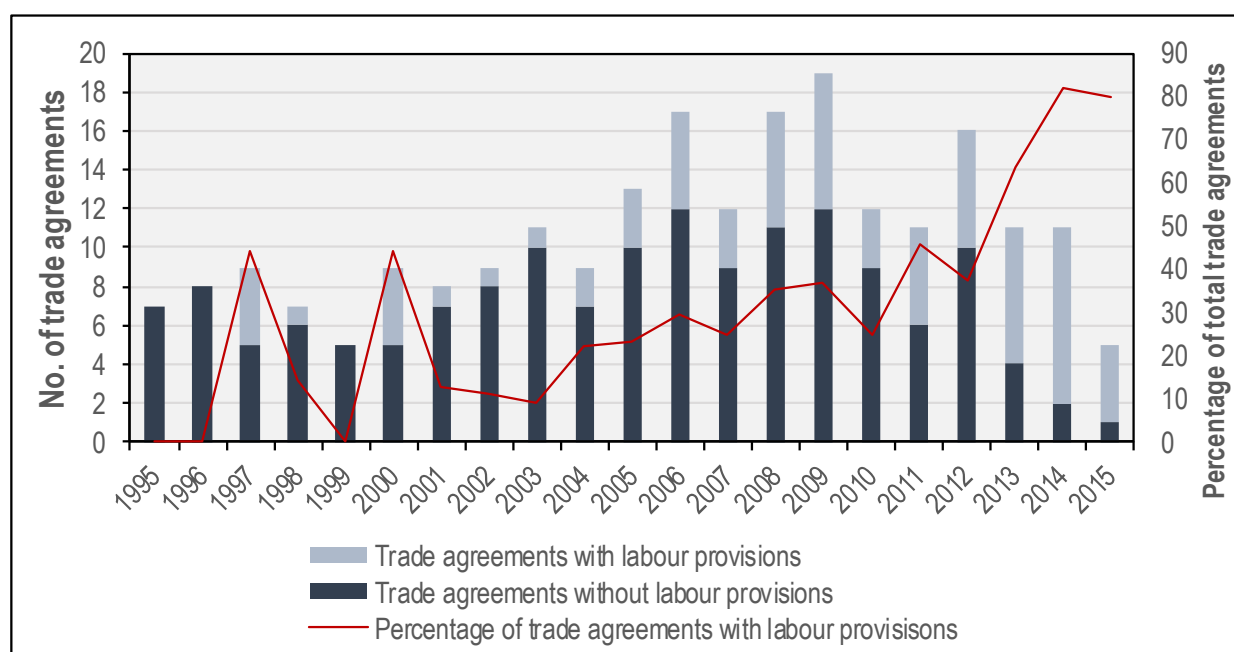
Experience with GSP conditionality suggests two things that may also be relevant in the context of TTIP. First, ratification does not necessarily lead to implementation of ILO conventions. Second, the EU seems to lack the **capacity to effectively monitor the observance of labour rights**. Both issues are nevertheless related: ratification of ILO Conventions makes it easier to monitor the implementation because one can rely on reports of the competent ILO expert bodies which assess the implementation of the relevant conventions (see also infra, Box 8).

Under the new GSP regulation that went into force in 2014, **EU monitoring has somehow improved**. 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 (Van den Putte & Orbie 2015). Moreover, only a limited number of 'vulnerable' countries are eligible for the GSP+, and this number has even further declined since countries concluding a bilateral trade agreement no longer qualify. This includes countries whose track record on core labour rights has been criticized, such as Colombia, Peru, and the Central American countries. Therefore, it is all the more important to look at how labour standards are addressed in the new free trade agreements.

3.2. Labour in EU Bilateral Agreements: Comparative overview³

Since it became ever clearer during the second half of the 2000s that the Doha negotiations had reached an impasse, the number of bilateral agreements has increased exponentially. **Not only has there been an increase in the number of free trade agreements, these agreements have also increasingly included labour provisions.** Over 80 per cent of the trade agreements that entered into force since 2013 include labour provisions (ILO 2016: chapter 1; see Figure 1).

Figure 1 : Evolution of the inclusion of labour provisions in trade agreements



Source: reproduced from ILO (2016).

For the EU, the new generation of trade agreements has provided an opportunity to overcome the stalemate on a 'social clause' at the WTO by addressing it on the bilateral trade front. Although there is significant variation in the way and extent to which labour provisions feature in EU trade agreements, reflecting power and preferences of the EU's trading partners, in general terms we notice **a growing elaboration of the trade-labour linkage since the mid-2000s**. This can be explained by the growing contestation against free trade agreements by civil society actors and policy-makers who are increasingly concerned about the potentially negative effects on trading partners *and* on European citizens. That the **European Parliament** now has full competence for trade policy decision-making since the Lisbon Treaty went into force in 2009, certainly also explains why labour rights (as well as human rights and sustainable development) cannot be ignored by EU trade negotiators. Since the EU's approach continues to be soft and cooperative (see above), also opponents of a binding social clause are not concerned.

Thus, while the EU has continued to hold a soft and cooperative approach to the trade-labour linkage, at the same time it has also elaborated its approach over the past decade. Specifically, there are three dimensions in which the EU's approach has been elaborated:

³ This section is partly based on Van den Putte and Orbie (2015) 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions', *International Journal of Comparative Labour Law*, 31(3).

- **Content:** Cooperation on social issues, commitment to respect core labour standards, and non-lowering of domestic labour protection.
- **Governance:** Involving business and civil society in monitoring and implementation.
- **Enforceability:** More opportunities for promoting compliance, yet no sanctions are possible

Analysing the evolution on these three dimensions, we notice not only a growing elaboration but also a basic distinction in **two periods**. Table 2 illustrates this, with the number of crosses broadly reflecting the extent to which the sub-issues are elaborated:

- The **old generation** of EU trade agreements, ranging from the EuroMed agreements until the agreement with Chile (1990s–2003), displaying limited but gradually increasing labour provisions.
- The **new generation**, starting with the CARIFORUM agreement (since 2008), shows an elaboration of the labour provisions on the three dimensions.

Table 2: Growing elaboration of trade-labour linkage in EU trade agreements^{4,5}

| AGREEMENT (year signed) | CONTENT | | | GOVERNANCE | | | ENFORCEABILITY | | |
|----------------------------|-------------|----------------------|------------------------------------|------------|---------------|------|----------------|------------------|-----|
| | Decent Work | ILO Core Conventions | Domestic labour law (non-lowering) | CSR | Civil Society | CTSD | Govt. Consult | Panel of Experts | DSM |
| Tunisia (1995) | XX | | | | | | | | |
| Israel (1995) | XX | | | | | | | | |
| Morocco (1996) | XX | | | | | | | | |
| Jordan (1997) | XX | | | | | | | | |

⁴ We did not include the EPAs concluded with the West African States, East African Community and SADC (all to be signed) because these resort under the Cotonou Agreement, and because it concerns limited goods-only agreements that are expected to be extended to other trade-related issues.

⁵ Here we give some guidance to understand table 2. We describe what each cross (X) means within each column, which can be attributed to a higher score than one cross. Two crosses do not mean that they are twice as strong as one cross. Regarding Decent Work X means there is a reference to social protection or social dialogue. XX means there is a reference to social protection and social dialogue. In case of XXX there is a reference to the whole Decent Work Agenda. In the column on the ILO CLS X means there is a reference to some kind of basic social rights, while XX means there is a reference to the CLS and the principles are mentioned specifically. In the column on domestic labour law X refers to a provision on 'upholding levels of protection' stating that domestic labour law should not be lowered to attract trade or investment. In the column government consultations X refers to the possibility to initiate government consultations on any matter related to the agreement. XX refers to the possibility to have government consultations specifically on labour issues. In the column Panel of Experts X means that (an) expert(s) or arbitrator(s) can be appointed to settle a dispute related to the agreement as a whole. XX means that a Panel of Experts with specific rules can be set up to judge on labour issues. In the column on dispute settlement X means that the violation of labour provisions can be treated under the general dispute settlement system of the agreement. In the column on civil society X means that there is a provision concerning civil society dialogue on social provisions in a broad sense (thus not specifically focused on labour). XX means that the agreement contains provisions for domestic as well as transnational civil society dialogue on labour provisions. In the column on the Committee on Trade and Sustainable Development X means that there is a governmental body that meets regularly to oversee the implementation of the labour provisions. In the column on CSR X means there are provisions on CSR mentioned in the agreement.

| AGREEMENT (year signed) | CONTENT | | | GOVERNANCE | | | ENFORCEABILITY | | |
|----------------------------|-------------|----------------------|------------------------------------|------------|---------------|------|----------------|------------------|-----|
| | Decent Work | ILO Core Conventions | Domestic labour law (non-lowering) | CSR | Civil Society | CTSD | Govt. Consult | Panel of Experts | DSM |
| Mexico (1997) | X | | | | | | | | |
| South-Africa (1999) | X | XX | | | | | | | |
| Cotonou (2000) | XX | XX | | | X | | | | |
| Egypt (2001) | XX | | | | | | | | |
| Algeria (2002) | XX | X | | | | | | | |
| Lebanon (2002) | XX | | | | | | | | |
| Chile (2003) | XX | XX | | | X | | | | |
| CARIFORUM (2008) | XXX | XX | X | X | X | X | X | X | X |
| Korea (2010) | XXX | XX | X | X | XX | X | X | X | |
| Colombia/Peru (2012) | XXX | XX | X | X | XX | X | X | X | |
| Central-America (2012) | XXX | XX | X | X | XX | X | X | X | |
| Ukraine (2014) | XXX | XX | X | X | XX | X | X | X | |
| Georgia (2014) | XXX | XX | X | X | XX | X | X | X | |
| Moldova (2014) | XXX | XX | X | X | XX | X | X | X | |
| Singapore (not signed) | XXX | XX | X | X | XX | X | X | X | |
| Canada (2014) | XXX | XX | X | X | XX | X | X | X | |
| Vietnam (2015) | XXX | XX | X | X | XX | X | X | X | |

3.2.1. Content

First, the **content** has widened and deepened. In the early agreements, social provisions concerned *cooperation* in the field of social policy, which was mostly described in technical terms. The different areas of social cooperation correspond with the Decent Work agenda and are even more elaborated in recent agreements. Moreover, labour standards have more and more been presented as social human *rights*. All the agreements explicitly recognize the parties' commitment to respect the fundamental principles and core conventions of the ILO (see Box 1). Thus, not only do new generation agreements refer to a larger number of social provisions, their legal importance has also increased.

However, unlike the GSP conditionality, **ratification of the ILO Conventions is not explicitly required**. The trade agreements can enter into force without the third parties having ratified all the eight ILO Core Conventions. Instead, EU agreements require the Parties to *promote and implement in their domestic law and practice* the fundamental ILO principles (sometimes with reference to the Core Conventions) and to *make continued and sustained efforts towards ratifying* the ILO Core Conventions.

Box 4: ILO Core Conventions in recent EU trade agreements

EU-KOREA AGREEMENT

"3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to **respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights**, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will **make continued and sustained efforts towards ratifying the fundamental ILO Conventions** as well as the other Conventions that are classified as 'up-to-date' by the ILO." (Art. 13.4)

CETA

1. Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work which are listed below. The Parties **affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization** (the "ILO") and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;

(c) *the effective abolition of child labour; and*

(d) *the elimination of discrimination in respect of employment and occupation.*

4. (...) *The Parties shall **make continued and sustained efforts to ratify the fundamental ILO Conventions** if they have not yet done so. The Parties shall exchange information on their respective situations and advances regarding the ratification of the fundamental as well as priority and other ILO Conventions that are classified as up to date by the ILO. (Art. 23.3)*

Importantly, the content of the new generation FTAs also extends to *domestic labour protection* (going beyond the core labour standards) by including a **non-lowering clause**. The agreements explicitly stipulate that existing levels of protection afforded under the parties' labour laws shall not be reduced for the purpose of attracting investment or increasing trade. This basically constitutes a provision against social dumping: the Parties commit to weaken social protection *de jure* or *de facto* in order to encourage trade or investment. Again, there is variation in how these 'non-lowering' provisions are formulated in recent agreements (see Box 5).

Box 5: Non-lowering clause in recent EU FTAs

EU-KOREA AGREEMENT

"... *to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties.*" (Art. 1.1(h))

"A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties." (Art. 13.7(2))

EU-CANADA AGREEMENT

"1. *The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection embodied in domestic labour law and standards.*

2. *A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law, as an encouragement for trade or the establishment, acquisition, expansion or retention of an investment or an investor in its territory.*

3. *A Party shall not fail to effectively enforce its labour law, through a sustained or recurring course of action or inaction, as an encouragement for trade or investment.*" (Art.4 of 'Trade and Labour Chapter')

So far there have not been applications of the non-lowering clause. It **remains to be seen if the Parties will be able and willing to invoke this clause**. The provision 'not waive or otherwise derogate' seems to encompass a wide range of weakening of labour rights. However, a major difficulty may be that one has to prove not only that there has been a weakening of labour standards, but also that this has been done in order to encourage *trade and/or investment*. Both the intentionality behind such measures and their economic impact on trade and investment are not easy to demonstrate.

New agreements also briefly mention **fair or ethical trading schemes**, as well as corporate social responsibility (**CSR**), although these issues are not elaborated.⁶

3.2.2. Governance

Second, the **governance** of these labour commitments has been elaborated. With governance we refer to the actors involved in the monitoring and implementation. The new generation of trade agreements involves more actors at more levels. Within the (Sub-) Committee/Board on Trade and Sustainable Development, senior government officials regularly meet to oversee the implementation of the labour (and environmental) commitments in the agreement. In addition, civil society actors officially take part in discussing social issues arising under a trade agreement through their participation in **institutionalised civil society meetings**. **Since the Korea Agreement**, each EU trade agreement establishes a domestic as well as a transnational forum of civil society actors.

These civil society meetings could provide an **opportunity for marginalised actors, such as some trade unions in Korea and Colombia**, to express their voice on issues relating to trade and labour rights. As such the new forums for domestic and transnational discussions could lead to the **empowerment** of groups that are not heard within the domestic political system.

Box 6: Labour provisions implementation in KOREU

After the entry into force of the EU-Korea FTA (KOREU), also on the Korean side a domestic advisory group (DAG) was set up. At the start the composition of this DAG was not representative of labour groups. However, after some pressure from the EU DAG, domestically by union federations within Korea and by the European Commission, the group was recomposed and main union federations now take part in a dialogue. As such, the civil society mechanism has contributed to dialogue between Korean civil society and its government.

As there is some loose coordination between European and Korean labour movements before these meetings take place, some increased collaboration between civil society can be reported. In addition, union representatives of both DAGs managed to organize a workshop on labour issues in 2013 in Seoul. Another reported effect is that by issuing joint recommendations – which, however are seen as weak – issues are set on the agenda of both governments and thus contribute to agenda-setting in the intergovernmental dialogue. A drawback reported from this transnational mechanism is that the Korean side has watered down the joint opinion on labour issues even when this was substantiated by ILO evidence.

Source: Van den Putte (2015).

More practically, the civil society meetings also serve to **monitor the implementation** of the labour commitments within the countries. Given the limited capacity of the EU to monitor the implementation of the commitments on core labour standards, the involvement of a broad range of stakeholders could serve as an **'alarm bell'** for the EU. Furthermore, the civil society meetings might lead to **recommendations** for the parties to the agreement. Of course, the question is to what extent these new bodies will manage to perform these functions (Orbie et al 2016; see also below).

⁶ Echoing the WTO Singapore Declaration (see above), all new agreements also contain a provision stating that labour standards should not be used for protectionist purposes.

3.2.3. Enforcement

Third, the **enforceability** of the labour commitments has been elaborated – albeit still within the framework of the soft and cooperative approach. Not only are labour provisions formulated in a more binding way than before, but also the possibilities for legal scrutiny of violations have somewhat increased. Prior to the EU-CARIFORUM agreement (2008), disputes on social issues could only be discussed in **'government consultations'**. The new agreements provide that the issue can, as a next step, be referred to a **'Panel of Experts'**. This new body should make recommendations more neutral and more transparent. The list of experts is decided upon within a short time frame 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 function as a chairman. When a Panel submits its final report the Parties should implement its conclusions and in some cases develop an action plan in this regard. However, there are no measures to enforce compliance.

Although enforceability has increased, it thus appears that **only soft pressure can be exercised on the governments through the Panel of Experts and civil society meetings**. In line with the EU's 'cooperative approach', the handling of labour violations is explicitly excluded from the general dispute settlement procedure of the agreement. The sustainable development chapters do not provide direct and explicit provisions that would allow for (trade or monetary) sanctions in the case of serious and systematic violations of the relevant international conventions. An interesting (partial) exception is the earlier cited EU-CARIFORUM agreement, where it is mentioned that 'appropriate measures' can be taken in case of labour violations (Art. 213(2)). Although it is explicitly added that trade sanctions are not possible, it seems that other sanctions can be envisaged. So far, there have not been applications of these provisions, which are more far-reaching in terms of dispute settlement than the other recent EU agreements.

Theoretically, **serious violations of the core labour standards might still be challenged under the 'essential elements clause'** given that these labour rights are part of the body of human rights (Bartels 2012). In the case of violations of the essential elements clause, **'appropriate measures'** can be taken. While for a dispute on social provisions firstly the non-enforceable dispute settlement provisions should be exhausted, the invocation of the essential elements clause and thus the suspension of trade benefits is not imaginary. Its use as a final resort has also been confirmed by the previous trade commissioner Karel De Gucht (2010) in a speech before the European Parliament on the EU's trade agreement with Colombia and Peru. 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 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 criticised.

The **EU's preference for a 'soft' and cooperative approach** does not only stem from developing country opposition. It is rooted in a belief within the EU institutions that trade sanctions are neither desirable nor effective, and that labour rights should be promoted through different instruments. For example, in the Comprehensive Economic and Trade Agreement (CETA) negotiations, **it was the EU, not Canada, which opposed sanctions in the context of labour and environmental standards**. A leaked consolidated draft of the agreement does indeed reveal that the EU insisted on its standard approach whereby decisions by the Panel of Experts 'shall not trigger the imposition of any economic penalties by the other Party', whereas Canada demanded the possibility to apply and enforce financial sanctions. As a result the final CETA agreement does not provide the possibility to sanction. Compared to the other agreements, there is some more emphasis on follow-up monitoring

procedures and civil society involvement regarding the Panel's findings. However, trade or financial sanctions are not foreseen.

Moreover, the **human rights clause** in the Strategic Partnership Agreement, which accompanies the **CETA agreement, is relatively weak**. It seems that only a *coup d'état* or a major international security incident (not a violation of labour rights) would lead to the suspension of the agreement (Yencken 2016). Similarly, the EU has displayed a flexible attitude towards human rights in the trade agreement with Singapore. The accompanying Partnership and Cooperation Agreement (PCA) signed has a human rights clause, but it also includes a 'side letter' which specifies that 'at the time of signature, neither party are aware, based on objectively available information, of any of each other's domestic laws, or their application, which could lead to the invocation of the non-execution mechanism' (UK Parliament, 2014, in Yencken 2016). Here too, it seems unlikely that violation of labour rights would lead to sanctions under the human rights clause. This confirms the broader observation that the EU mostly sanctions in case of violations of civil and political rights, whereas violations of social and economic rights are less likely to entail sanctions. Until further notice, it seems that **the human rights clause is merely a theoretical possibility for the enforcement of labour rights**.

In conclusion, the trade-labour linkage has been elaborated in EU agreements over the past decade. The content, governance and enforceability provisions have widened and deepened. However, it remains uncertain to which extent the chapter, in its current form, can be effective. **Compared to GSP/GSP+ conditionality** – which previously applied to several countries that concluded a free trade agreement with the EU – **the sustainable development chapter appears to be weaker on three points**. First, the bilateral agreements do not require **ratification** of the ILO Core Conventions as a precondition for trade benefits. Second, they do not provide the possibility of **sanctions** in case of serious and systematic violations of these conventions. Since developing countries that signed a bilateral trade agreement with the EU (e.g. Colombia and Peru, Central American Countries, Vietnam) no longer fall under this social conditionality system, it has become more difficult than before to employ trade sanctions in case of violation of core labour standards. Third, they do not include the **monitoring** mechanism that has recently been elaborated in the context of GSP+ (see above). Monitoring mechanisms by governments are less elaborated and largely delegated to an (as yet 'underutilised', see above) system of civil society meetings.

On the positive side, the **non-lowering clause is an improvement**, since it goes against 'social dumping' and goes beyond the core labour standards (applying to all domestic legislation and practices in labour). Compared to the GSP/GSP+, the governance dimension is also more elaborated including institutionalized civil society involvement. However, some improvements would be desirable in order to make it more effective. Indeed, the **cooperative modalities of the sustainable development chapter could be further strengthened**, even without changes to the existing trade agreements. In the short and medium term, it would be more realistic to improve the current (cooperative) provisions on the observance of labour rights. We turn to this issue in the next section.

3.3. Lessons learned

Several lessons can be drawn from the previous discussion and from our ongoing research (Van den Putte et al 2015; Orbie et al 2016) on the sustainable development chapter. **Despite the increasingly elaborated approach of the EU**, the EU's approach to labour provisions in trade agreements is still in an experimental phase. **Crucial challenges regarding effectiveness, monitoring and enforcement remain**. These are important to consider in order to see whether they will be taken up in TTIP.

First, the trade-labour linkage continues to be a **sensitive debate**. Whilst over the past two decades a consensus has grown within the EU that labour rights should be addressed in trade arrangements, the topic is still sensitive at the international level and especially in discussions with developing country governments. The latter's fear for protectionist misuse and undue interference in domestic sovereignty should be taken seriously. **From that perspective, the EU is right to opt for a cooperative approach in first instance.**

Second, however, it is recommendable to **make sanctions possible, albeit only as a last resort**, after the cooperative approach has failed. There should not be a contradiction between cooperation and (ultimately) sanctioning, as the 'stick' of sanctions should rather be seen as a way of leveraging the cooperative approach. **Assessments** leading to sanctions could also be better **made in line with the activities of relevant international institutions** such as the ILO. In this regard, the EU could learn from the experience with GSP(+) conditionality. The dispute settlement mechanism can be structured so as to make sanctions the ultimate instrument, thus encouraging parties to seek amicable solutions in earlier phases of enforcement. In the **Annex** to this study, we outline a proposal of how such a dispute settlement could be structured.

Third, the absence of direct and explicit sanctions should not divert attention from the **flaws within the cooperative approach**. Our research suggests that the 'soft' approach has so far been underutilised. Even without changing the treaty provisions, it could indeed be further strengthened in different ways:

- **Governments** (i.e. the EU) could more closely **monitor** the implementation of sustainable development commitments under the agreements, making use of the possibility of 'government consultations' if necessary. Again, lessons can be learned from the monitoring under the GSP system (see 3.1 on the 'scorecard'). Given the uncertainties on the impact of trade liberalisation on labour rights (see chapter 2) and on the impact of labour provisions in trade agreements (see chapter 3), in-depth and systematic monitoring is key.
- For the same reason, the monitoring and advising role of **civil society** may be taken more seriously. **More resources could be provided** in order to make it possible that civil society members from both sides could meet regularly and truly discuss the implementation of the sustainable development chapter. Many civil society representatives in third countries, including trade unionists, do not have sufficient resources for traveling to the civil society meetings in Brussels or even in their own region. While the use of videoconferencing would be an improvement, additional budgetary resources could also make physical meetings possible. It would also be desirable to extend the number of meetings (currently one per year) and evolve towards a quasi-permanent monitoring of the sustainable development chapter. In this regard, additional secretarial support would also be necessary. An increase in the number of FTAs with cooperative labour provisions without an equivalent increase of resources might de facto lead to a weakening of the effectiveness of the cooperative approach.
- **Accountability mechanisms between these civil society forums and the governments** could be provided. So far the interaction between the work of the domestic advisory groups and transnational civil society meetings on the one hand, and the governmental parties on the other, has been in most cases superficial (limited to a one-way communication in which the civil society organisations bring up issues to the governments). Without such accountability mechanisms, there is a risk that the civil society mechanisms will be (seen to be) no more than a 'fig leaf' for the legitimisation of free trade (see supra).
- The EU and actors involved might better guarantee that the **wide-ranging objectives of the 'sustainable development' chapter do not overshadow international**

labour rights. In some cases it may be desirable to organise **separate meetings of domestic and transnational labour representatives**, instead of including them within a diverse setting including also sector federations, indigenous movements, environmental groups, animal welfare organisations, etc. In the same vein, it remains important to make sure that the groups involved are balanced and representative and that also groups that are marginalized within the domestic context are given the opportunity to express their voice.

Additional 'soft' mechanisms could be elaborated, such as the possibility of '**public submissions**' or other complaint mechanisms directed to the governments in order to bring up alleged violations of the sustainable development principles. Finally, **civil society actors could be better informed** about the existing possibilities under the sustainable development chapter to make their voice heard. There is currently a lack of knowledge with relevant civil society organizations about the opportunities that the current agreements might offer.

- The **European Parliament** can also play a more important role in the strengthening of this cooperative approach. Not only could the Parliament aim for above-mentioned improvements during the negotiation and ratification phase of the agreement; there is also some under-used scope for monitoring and follow-up once the agreement is being implemented. Members of the EP could more actively engage the parties of the agreements to engage in government consultations and they could link up with civil society organisations involved. Through its debates, questions and resolutions, the EP has the power to **amplify the voice of civil society actors**. Moreover, this could **strengthen the moral and political weight of the (non-binding) recommendations that may be made by the Panel of Experts**.

Fourth, the content of labour rights could be strengthened. Specifically, the EU could explicitly require the **ratification of the ILO Core Conventions**, as has been the case for the GSP+. Moreover, it could go further and also require the improvement of some **domestic labour laws (or practices)** beyond the ILO core labour standards, as the US had done in several cases (e.g. in the context of its trade agreement with Colombia the US requested the creation of a Ministry of Labour; e.g. in the context of TPP the US-Vietnam Plan for Enhancement for Trade and Labour Relations provides specific modifications of labour laws in Vietnam, (see box 9).

Fifth, the **EU could put more effort into aligning its approach** to promoting labour rights through trade agreements with like-minded partner countries, such as the US (see next chapter).

The sustainable development chapters form part of larger trade agreements, and trade agreements are only one (albeit increasingly important) instrument in the EU's bilateral relations with third countries. Therefore, it is important to ensure **coherence between different instruments of the EU's external action**. The **development cooperation** policy can play an important role in this regard (see ILO 2016 on the issue of coherence with regard to labour provisions). For example, when the mechanisms established under the sustainable development chapter reveal shortcomings in the implementation of certain labour rights, funding could be provided. Development cooperation budgets could be targeted at the training of labour inspectors, awareness-raising with workers and trade unions, strengthening the capacity of the legal system on international labour rights, etc.; and this could be done in close cooperation with the ILO. Research by the ILO (2013; 2016) has shown that the combination of cooperative provisions, conditionality instruments and technical assistance provide the greatest opportunity to advance labour conditions through trade agreements (see supra).

In sum, if the EU truly aims to discuss and improve international labour rights in the context of its trade agreements, it **may not only provide for a 'last resort' sanctioning opportunity but also elaborate more effective cooperative provisions**. This section has suggested a number of practical improvements that can be made without significantly changing the existing trade agreements.

4. LABOUR PROVISIONS IN TTIP: EXPECTATIONS, OPPORTUNITIES AND CHALLENGES

KEY FINDINGS

- In practice the EU and US approaches to labour provisions in trade agreements are more similar than is often assumed. However, the EU includes more references to the **ILO agenda**, including a commitment towards ratifying the ILO Core Conventions. Unlike the EU, the US also allows for the possibility of **sanctions**.
- Although both the EU and the US are bound as ILO member states by the 1998 Declaration, observers have argued that **US law and practice deviate significantly from the ILO Core Conventions** on several aspects.
- The **EU proposal** on Trade and Sustainable Development in TTIP is ambitious in substantial scope, but of yet **fails to meet the European Parliament's recommendations** for mandatory ratification of ILO Core Conventions and for the possibility of sanctions.
- Labour provisions in TTIP will have no direct **effect on third countries**. However, indirect positive spill-over can be amplified if TTIP provides a 'gold standard' in terms of promoting labour protection and if strong and mandatory provisions to cooperate with and in third countries are included.
- **Other chapters than the one on Trade and Sustainable Development** can also affect labour conditions in both parties. Regressive effects could be limited by excluding provisions that constrain the policy space for governments to protect and promote labour conditions (limit negative integration). Progressive effects can be reinforced by including positive obligations for both Parties to include social considerations in domestic policies (include positive integration).
- **Losers from TTIP (in terms of job or income loss) could be compensated** by flanking measures at the domestic level and, to offset differential intra-EU effects, at the EU level.

4.1. Comparison of EU and US approach to labour provisions in trade and investment agreements

In this part we compare the EU and US approach to the trade-labour linkage. This is often summarised as respectively **the 'soft' and 'hard' approach**. As part 3 made clear, the EU model is based on cooperation and dialogue (with civil society and governments), shying away from sanctions. In contrast, the US model includes conditionality and sanctions. After having described the difference between both approaches as they are included in the trade agreements, we will show how **both the EU and the US in practice rely primarily on cooperation and dialogue**. In the part set out below we will use the EU-Korea agreement and the US-Peru agreement as illustrative examples, which represent the first agreements of the new approach of respectively the EU and the US to the trade-labour linkage.

4.1.1. De jure comparison

As we described for the EU in the previous chapter, also the US template for including labour provisions in FTAs has evolved over time (Bolle, 2016). The US approach discussed here mainly refers to the bipartisan compromise forged on May 10th 2007 in relation to the agreement with Peru.

Six elements are highlighted hereafter and each time contrasted to the EU approach:

(i) the general place where labour provisions are mentioned, (ii) the substantial labour rights referred to, (iii) the dispute settlement system, (iv) the non-derogation clause, (v) the involvement of civil society in the monitoring of labour provisions and (vi) labour cooperation:

- the US tends to incorporate labour provisions in a **separate labour chapter** within its trade agreements. The EU, on the other hand, includes labour provisions in a chapter on 'Trade and Sustainable Development', in which both labour and environmental provisions are mentioned⁷;
- substantially, US agreements refer to two main bodies of labour rights. Firstly, the agreements set out that 'each party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the **ILO Declaration** on Fundamental Principles and Rights at Work and its Follow-up (1998)' (art. 17.2(1) of the US-Peru labour chapter). By referring to the ILO Declaration trading partners can only be held to the principles of the Declaration but not to the details of the Conventions, nor to the follow-up procedures. This comes as no surprise given that the US has only ratified 2 out of 8 core ILO conventions. Secondly, it is mentioned that Parties shall not fail to **effectively enforce their labour laws**. These relate not only to the principles set out before, but also to 'acceptable conditions of work with respect to minimum wages⁸, hours of work, and occupational safety and health' (art. 17.8 US-Peru labour chapter). As mentioned in part 3, EU agreements also refer to the 1998 Declaration and 'commit to respecting, promoting, and realising, in their laws and practices, the principles concerning the fundamental rights' (EU-Korea art. 13.4(3)). In addition, **the EU and its trade partners commit more explicitly to the ILO agenda**. They commit to effectively implement the ILO conventions the parties have ratified and make 'sustained efforts' to ratify the ILO Core Conventions. Moreover, the objectives of Decent Work are included.
- the violation of labour provisions can result in **sanctions**. When a labour issue arises with a significant impact⁹ on trade and/or investment relations, trade partners should first engage in cooperative labour consultations. However, when the issue is not resolved, they can rely on the general commercial dispute settlement system of the trade agreement as a whole, which can result in financial or trade consequences. In this context US agreements include a specific procedure for the submission of complaints on alleged labour violations¹⁰. Theoretically thus, under the US approach sanctions are possible in case of labour violations, a possibility that is **virtually absent in the EU approach** (see part 3). EU agreements foresee the possibility to start up government consultations (art. 13.14 EU-Korea) and thereafter, if the matter is not resolved, a Panel of Experts (art. 13.15 EU-Korea). Labour violations are however explicitly excluded from the general dispute settlement system contained in EU trade agreements.
- US agreements contain a **binding non-derogation clause** in which it is stated that 'Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations ... in a matter affecting trade or investment between the Parties ...' (art. 17.2(2) US-Peru labour chapter). In the same vein **EU**

⁷ CETA is an exception as it contains a chapter on trade and sustainable development (ch. 23), a chapter on trade and labour (ch. 24) and a chapter on trade and environment (ch. 25).

⁸ For greater certainty, the agreements clarify that the chapter only obliges the Parties to enforce their own established minimum wage.

⁹ The US-Peru agreement for example sets out that "to establish a violation of an obligation under Article 17.2.1 a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting trade or investment between the Parties.

¹⁰ The specific procedure for public submissions under US agreements is set out here: <http://www.dol.gov/ilab/media/pdf/2006021837.pdf>.

agreements include a non-lowering clause, which can however not lead to sanctions (see part 3, Box 5).

- US agreements foresee the possibility for **civil society involvement** in the monitoring of the labour provisions of the agreement. This takes place when the Labour Affairs Council (comprised of high-level representatives from the Parties) meets in an open session with the public. In practice such meetings take place within the first year after the entry into force of the agreement and sporadically thereafter¹¹. Also on a domestic level US agreements encourage the trade partners to consult a national labour advisory committee (see art. 17.5.7 in the US-Peru agreement)¹². **EU agreements are more binding and elaborate** in this regard as they oblige the parties to consult a domestic civil society mechanism. Apart from that they set up a transnational dialogue between civil society of the trade partners. While the civil society mechanisms in the case of the EU should deal with sustainable development, the mechanisms in the US agreements are explicitly set up to deal with labour issues.
- US agreements foresee ample possibilities for labour **cooperation and capacity building**, which in the Peruvian case range from the worst forms of child labour over alternative dispute resolution to cooperation on labour statistics (annex 17.6). EU agreements also foresee the possibility to cooperate on trade-related labour and employment issues of mutual interest (art. 13.4 EU-Korea).

The similarities and differences between the EU and US approach to labour provisions in FTAs are summarised schematically in table 3 (cfr. European Parliament 2014).

Table 3: Legal comparison of US and EU approach

| Labour aspects in US and EU trade agreements | | |
|--|---|--|
| | US approach | EU approach |
| Content | labour chapter | chapter on trade and sustainable development |
| | principles of 1998 ILO Declaration Corporate Social Responsibility | |
| | -national labour law (including acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health) | ILO core conventions (including sustained efforts towards ratification) Decent Work |
| Promotion | issues for cooperation | |
| Non-derogation clause | obligation not to lower domestic labour law for increased trade or investment | |

¹¹ Under the US-Peru agreement such sessions have taken place in 2010 and 2014.

¹² The US itself has a fixed national body, the National Advisory Committee, consisting of public, labour and business representatives mandated to, among others, monitor the implementation of the labour chapters of US agreements.

| Labour aspects in US and EU trade agreements | | |
|--|--|---|
| | US approach | EU approach |
| Dispute settlement | cooperative labour consultations | |
| | commercial dispute settlement system with financial or trade sanctions | panel of experts without sanction possibility |
| Implementation mechanisms | Labour Affairs Council | Committee on Trade and Sustainable Development |
| | domestic labour advisory committee (optional) | domestic advisory committee on sustainable development (obligation) |
| | - open meeting civil society with Labour Affairs Council | - transnational advisory committee on sustainable development |

4.1.2. De facto comparison

The above mentioned strong distinction between the US 'hard' and the EU 'soft' approach is **not as strong in practice**. First, and most importantly, in practice both the US and the EU prefer a **cooperative approach** combined with dialogue (Oehri, 2015). Sanctions have never been applied by the US as a response to labour violations by a trade partner. Only in the case of Guatemala did the US proceed to the formal dispute settlement procedure. The original submission dates back to 2008 when the AFL-CIO and 6 Guatemalan workers' organizations complained about the country's lack of enforcement of its labour commitments under the CAFTA-DR agreement. This has (still) not resulted in any sanctions. Second, the **US seems to fund more labour cooperation projects than the EU**. So far, labour-related capacity building through EU development cooperation has been limited (Ebert, 2015).

4.2. Comparison of EU and US ratification and implementation of ILO labour conventions

This part deals with the **domestic respect for ILO labour conventions, both concerning ratification and implementation**. While all 28 EU Member States have ratified all eight fundamental labour conventions, the US has only ratified Convention 105 on forced labour and Convention 182 on child labour. The US government, while being openly self-critical under the terms of former President Bill Clinton, holds that its domestic labour laws and practices respect the content of the Core Labour Conventions. However, trade unions within the US and academics have disagreed and have lamented that US law and practices are especially non-compliant with the core labour standards of freedom of association (C87) and right to collective bargaining (C98). Such complaints have also been considered by the ILO's Committee on Freedom of Association¹³. In a comprehensive study on the implementation

¹³ For examples, see: <http://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0:FIND:NO>.

by the US of the ILO Core Labour Conventions, Weissbrodt and Mason conclude that (2014: 1878):

The United States and the ILO take varying approaches to the right to organize, the right to bargain collectively, the right to strike, treatment of public employees, the rights of non-citizen workers, treatment of children, anti-union discrimination, and treatment of women. Despite being bound to respect and promote the principles and rights established in the ILO Constitution and the principle of freedom of association, the United States tends to provide lower levels of coverage and protection for employees than required by ILO standards. The lower level of protection and coverage for U.S. employees remains especially visible in the right to strike, treatment of public employees, and rights of noncitizen workers. To achieve a higher level of compliance with ILO standards, the United States would need to ratify a greater number of Conventions (particularly the core conventions) and accept more recommendations.

A detailed analysis of labour legislation in the US at both the federal as well as the state level goes beyond the scope of this report. However, in Box 7 we enlist some illustrative examples where **labour law in the US is less protective than what is prescribed by the core ILO Conventions.**

Box 7: Examples comparing US labour law with ILO Core Labour Conventions

- In the US, a **more narrowly defined group of workers is covered by the right to organise** than in the ILO Convention No. 87 definition. Also the rights for selecting a bargaining representative and for establishing and joining unions are broader in the ILO convention than in US law. Only 36 states and Washington DC clearly permit some public employee collective representation, with some others explicitly prohibiting it.
- US labour law also imposes significant **limitations on the right of non-interference with union activities**, violating certain prescriptions of ILO Convention No. 98. For example, the US is an exception among ILO members in allowing anti-union campaigns by employers, as could recently be witnessed in a conflict between unions and management at Delta.
- While the right to strike is considered as a fundamental union right by the ILO Convention No. 87, US labour law **may restrict or even prohibit the right to strike**. US law for example restricts sympathy strikes. Also, in the US it is allowed for employers to hire permanent replacements for strikers and only offer reinstatement to the latter as vacancies arise. Collective bargaining agreements in the US also generally contain some kind of no-strike clause.
- With regard to **non-discrimination** (ILO convention No. 111), the US labour law is **equivalent to the ILO** prescriptions and includes with its affirmative action clause even a relatively unique concept. However, ILO Convention No. 100 on **equal remuneration is less than fully respected** by the US Equal Pay Act as the first provides equal pay for “comparable work” and the latter for more strictly defined “equal work”.
- US labour law **conforms to most requirements of ILO convention 138 on Child Workers**, but conflicts arise in areas of **youth employment** that are **exempt from the Fair Labour Standards Act**. The US has ratified ILO Convention 182 on the worst forms of child labour.

Source: Weissbrodt & Mason (2014); Fashoyin & Ebisui (2010); Compa & Meyer 2010; Greenfield & Compa (2007).

As discussed in chapter two, the less than full respect of the ILO Core Labour Conventions by the US, especially with regard to freedom of association and right to collective bargaining, can give US' firms (unfair) competitive advantage over EU firms. This may in turn result in a weakening of bargaining power of trade unions at the European side because of more severe competitive pressure after the liberalisation effects of TTIP.

While all **EU Member States** have ratified the eight ILO Core Conventions, **all is not automatically well with regard to their implementation** (for an analysis of the relationship between the ILO conventions and the EU acquis, see European Commission 2014a). For example, in November 2012, the ILO Committee on Freedom of Association found that there were repeated and extensive interventions into free and voluntary collective bargaining and an important deficit of social dialogue in Greece. Also in other Member States, governments have intervened in collective bargaining and other labour protection institutions in response to the crisis. Hence, it should be reminded that strong and enforceable labour provisions in TTIP could have an impact not only in the US but also on EU Member States. Of course, when the objective is to avoid that TTIP will lead to weaker labour protection, this constraining impact might be considered a positive thing.

Box 8: What difference does it make when a country has ratified ILO conventions?

The effectiveness of labour provisions in free trade agreements can partly be dependent on the issue of ratification of ILO (core labour) conventions. As Doumbia-Henry and Gravel (2006: 193) argue, where FTAs oblige parties to respect their own labour laws, which should be in line with the ILO declaration on core labour standards (as in the US approach), it is difficult to determine such conformity without them having ratified ILO conventions: '[o]ften there are no impartial criteria for evaluating the compliance of all FTA signatories, since the agreements themselves do not always provide for an external and objective control body to confirm the effective application of the rights enunciated'. Where a country has ratified an ILO Convention on a specific principle, the **ILO does have an effective supervisory system** that can determine compliance – the system's main legal organ being the Committee of Experts on the Application of Conventions and Recommendations (CEACR), a body of 20 independent high-level jurists representing all continents and all legal systems. However, when the relevant Convention has not been ratified and there are no other monitoring bodies, assessing conformity is obviously more difficult'. When compliance with the ILO 1998 Declaration can be assessed by institutions established in a trade agreement without ILO involvement, this also risks leading to a fragmentation of the interpretation of the fundamental labour rights.

As elaborated in the previous section, experience with the GSP+ has shown that **ratification of ILO Core Labour Conventions is insufficient** to guarantee their effective implementation. **However, ratification can help in enforcing the respect for fundamental labour rights** as it implies impartial monitoring by the ILO, thereby reinforcing control and moral pressure. This also **alleviates monitoring costs for the EU**, a problem that is already present and is likely to become only worse as the number of EU FTAs including labour provisions increases.

4.3. Analysis of the EU proposal for labour provisions in TTIP

The **European Union's initial proposal for a legal text on "Trade and Sustainable Development" in TTIP** was made public on 6 November 2015 (European Commission 2015b). This initial proposal currently only covers substantial provisions, while institutional, civil society and dispute settlement provisions will be added at a later stage (see infra). The Commission has indicated that it wants to agree with the US first on the substantive

commitments before negotiating on institutional provisions and dispute settlement. In what follows, we analyse what is currently in the EU's proposal by comparing it with labour provisions in recent FTAs of the EU (CETA and KOREU) and the US (TPP); with the recommendations made by the European Parliament; and with the position of employers and trade unions in the EU.

Comparing this proposal with the EU-Korea and EU-Canada agreements, no significant divergences appear. As Table 4 shows, both agreements constitute typical examples of the new generation of EU trade agreements with more elaborate social content, governance, and enforceability dimensions. The same applies to the EU's TTIP proposal, which seeks to continue the EU's soft and cooperative approach. When looking more into detail, some differences between the agreements can be noticed. These are summarized in Table 4. What is particular about the CETA is that the sustainable development commitments are addressed in three separate chapters. Substantially, the **social content seems broader in CETA compared to KOREA, and broader in the EU TTIP proposal compared to CETA.** However, in all three cases the most tangible commitment concerns the ILO fundamental principles. **Parties pledge to make efforts toward ratifying the underlying ILO Core Conventions,** without requiring the ratification as a pre-condition for the entry into force of the agreement (cf above).

Table 4: Comparison of labour provisions in KOREU, CETA and TTIP (EU proposal)

| | KOREU | CETA | TTIP |
|-----------------------|---|---|--|
| Chapters | 1 Chapter on 'Trade and Sustainable Development' | 3 Chapters on 'Trade and Sustainable Development', 'Trade and Labour, and 'Trade and Sustainable Development' | 1 Chapter on 'Trade and Sustainable Development' |
| Scope (labour) | ILO CLS Brief reference to Full Employment and Decent Work (UN 2006) Brief reference to CSR | ILO CLS Decent Work Agenda; 2008 ILO Declaration on Social Justice for a Fair Globalisation; other international commitments ¹⁴ Brief reference to CSR | Elaborate references to ILO CLS: Separate Article for each of the fundamental principles and rights at work Brief reference to Full Employment and Decent Work (UN 2006) Elaborate reference to the Decent Work Agenda; 2008 ILO Declaration on Social Justice for a Fair Globalisation Elaborated article on CSR |
| Institutions | Civil society meetings | Civil society meetings | Yet to be determined |

¹⁴ Other international commitments mentioned are : 'Health and safety at work, including the prevention of occupational injuries and illnesses and compensation in cases of such injuries or illnesses ; establishment of acceptable minimum employment standards for wage earners, including those not covered by collective agreements ; and, non-discrimination in respect of working conditions, including for migrant workers'. (Art. 3.2, Trade and Labour Chapter).

The most significant recent trade agreement negotiated by the US that might indicate its position on labour provisions (similar to other dimensions) in the TTIP negotiations is the Trans-Pacific Partnership discussed in Box 9.

Box 9: Labour provisions in the Trans-Pacific Partnership

The United States has recently concluded a Trans-Pacific Partnership (TPP) with eleven countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam). The agreement has been signed on 4 February 2016 and now has to be ratified by all states before entering into force. The TPP contains a Chapter 19 on Labour. This chapter follows the US approach to labour provisions in trade agreements. With regard to substantial commitments, it requires, inter alia, that: each party shall adopt and maintain in its laws the fundamental labour rights as stated in the **ILO Declaration**; that no party shall encourage trade or investment by weakening or reducing labour laws; that labour laws shall be effectively enforced; that no party shall eliminate all forms of forced or compulsory labour domestically as well as discourage importation of goods from other sources produced with compulsory labour; that each party shall encourage **corporate social responsibility**; that each party shall promote awareness of its labour laws; and that each party shall ensure **impartial and independent tribunals for enforcement**.

To cooperate on these commitments, the TPP foresees the possibility of public submissions, cooperative activities, a cooperative labour dialogue, a labour council, contact points and public engagement. To enforce these commitments, it foresees a procedure for labour consultations with clear deadlines. If the consulting parties fail to resolve the dispute no later than 60 days after the date of receipt of a request for consultations, the complaining party may request the establishment of a panel as provided in Chapter 28 on Dispute Settlement of the TPP. As usual in the US model, to establish a violation of a labour right it has to be demonstrated that the other party has failed to adopt or maintain such right in a manner affecting trade or investment between the parties. A dispute may result in sanctions.

Besides, the US has concluded bilateral agreements on specific legal and institutional labour reforms with Brunei, Malaysia and Vietnam. These reforms include, inter alia, concrete commitments for revisions to laws on the freedom of association, right to collective bargaining, scope of strikes, forced labour and discrimination. The partner countries should implement these reforms prior to the date of entry into force of the TPP, hence strong pre-application conditionality is foreseen.

Secondly, **comparing this proposal with the European Parliament's resolution**, we have identified **eight specific, falsifiable¹⁵ requests** on labour standards:

1. *'binding and enforceable'*

The textual proposal made public on 6 November 2015 does not yet include provisions on dispute settlement, and hence on the enforceability of the labour provisions. In a disclaimer it is explained that 'additional proposals, including on institutional aspects, civil society participation, and dispute settlement, will be developed at a later stage'.

¹⁵ By 'falsifiable', we mean that the recommendations are formulated sufficiently concrete, so that it can be reasonably determined if TTIP respects or violates them.

2. *'full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO's Decent Work Agenda'*

The textual proposal does not mandate the ratification of the eight Core Labour Conventions, but instead stipulates that each party shall:

'Art. 4.2.a) ensure that its laws and practices respect, promote, and realise within an integrated strategy, in its whole territory and for all, the internationally recognised core labour standards, which are the subject of the fundamental ILO Conventions

Art. 4.2.b) continue to make sustained efforts towards ratifying the fundamental ILO Conventions and their Protocols

Art. 4.3. in accordance with the ILO Decent Work Agenda ... ensure to protect: a) health and safety at work ... b) decent working conditions for all

Art. 4.4. effectively implement in its laws and practices and in its whole territory the ILO Conventions it has ratified.'

The core labour standards are subsequently addressed in more detail in Art. 5 (Freedom of association and the right to collective bargaining), Art. 6 (Elimination of forced or compulsory labour), Art. 7 (Effective abolition of child labour) and Art. 8 (Equality and non-discrimination in respect of employment and occupation).

3. *'corporate social responsibility'*

Art. 20 of the EU's textual proposal deals with corporate social responsibility and responsible business conduct and refers to the OECD Guidelines for Multinational Enterprises.

4. *'clearly structured dialogue with civil society'*

Art. 18 on Transparency and public participation encourages the involvement of civil society actors in measures to protect labour conditions that may affect trade or investment or trade or investment measures that may affect the protection of the environment and labour conditions. However, other proposals for civil society participation, for example in monitoring the implementation of the Sustainable Development Chapter, will be developed at a later stage (see supra).

5. *'ensure that labour ... standards are ... equally included in other areas of the agreement'*

This will be discussed under section 4.5. below.

6. *'ensure that labour ... standards are made enforceable ...; that the implementation of and compliance with labour provisions is subjected to an effective monitoring process, involving social partners and civil society representatives and to the general dispute settlement which applies to the whole agreement'*

As explained above, proposals on civil society participation and dispute settlement will only be developed at a later stage.

7. *'to ensure, in full respect of national legislation, that employees of transatlantic companies, registered under EU member state law, have access to information and consultation in line with the European works council directive'*

Article 5.3.a) reads 'the Parties shall ... implement effective domestic policies and measures for information and consultation of workers through dialogue with workers including through permanent worker representation bodies in companies, such as works councils and encourage their active functioning in accordance with domestic laws'.

8. 'to ensure that the economic, employment, social, and environmental impact of TTIP is also examined by means of a thorough and objective ex-ante trade sustainability impact assessment' ... whereby the adjustment costs could be partly taken up by EU and Member State funding.

This will be discussed under section 4.5. below.

In sum, at this point we can conclude that the **EU textual proposal** on Trade and Sustainable Development made public on 6 November 2015 is in line with the European Parliament's recommendations on corporate social responsibility and information and consultation of workers in line with the European works council directive but **does not conform yet with the EP's request to aim at full and effective ratification of the eight ILO Core Conventions**. Especially as the textual proposal currently does neither contain provisions on civil society participation in the monitoring of the implementation of the agreement nor on dispute settlement, the respect of the other recommendations cannot be assessed as of yet.

Finally, we discuss the position of the main stakeholders – the European social partners – on the labour provisions in TTIP in Box 10. As can be read, the European social partners have diverging views regarding the desirability of requiring ratification of the ILO Core Labour Conventions and with regard to the possibility of sanctions.

Box 10: Position of stakeholders on labour provisions in TTIP

The **European Trade Union Confederation (ETUC)** and its American counterpart **AFL/CIO** issued a joint statement on the TTIP negotiations in 2014. In this position paper they stated their position with regard to labour standards as follows:

'Ensure sustainable development by requiring parties to protect fundamental labour rights and the environment by including **recourse to dispute settlement and trade sanctions** if necessary. Labour rights must be enshrined in the body of the agreement, be applicable to all levels of government, and be subject to **dispute settlement and trade sanctions** equivalent to other issues covered by the agreement. The parties should commit to the **ratification and the full and effective implementation of the eight core conventions of the ILO** and of core international environmental agreements. The provisions should envision labour and environmental standards that continue to rise, aiming in particular toward implementation by all parties of all up-to-date ILO Conventions. Moreover, the dispute settlement mechanism must not undermine, weaken or create conflict with existing interpretations of ILO Conventions and Recommendations.'

Business Europe has summarised its position on the Sustainable Development Chapter of TTIP as follows: '[t]he sustainability chapter should **encourage effective domestic implementation** at central and sub-central level of **ILO Conventions** and Environmental Agreements that have been ratified by the US or individual Member States. Parties should be free to define policies and measures adjusted to labour and environmental standards they deem appropriate ... calls for an **effective enforcement** of all TTIP provisions, including those in the sustainability area, and supports **soft pressure**, consultation, transparency and publicity'.

Business Europe thus does neither support the demand that the US should ratify (or even implement) the ILO conventions it has not ratified yet, nor the use of sanctions to enforce compliance (while not explicitly opposing the latter either), while ETUC does.

Sources: ETUC & AFL-CIO (2013), BusinessEurope (2015), interview with ETUC (30 March 2016) and Business Europe (1 April 2016) representatives.

4.4. Global consequences of planned labour provisions in TTIP

The impact of TTIP on third countries is a much-debated issue. According to the Commission's own impact assessment (2013: 44ff) third countries would benefit economically from TTIP, while no region is expected to lose. Other studies predict limited negative real income effects for a significant number of third countries, however (e.g. Aichele & Felbermayr 2015). Ultimately, it is generally accepted that the effects on third countries in terms of welfare and their acceptance of product standards depends on the way in which transatlantic regulatory convergence will be pursued in TTIP, either on a bilateral or an *erga omnes* basis (see De Ville & Siles-Brügge 2016: Chapter 2), with the latter having more positive effects for the economies in third countries as well as for the ability of the EU and the US to set global standards.

The impact of labour provisions on third countries is (even) more difficult to predict. However, it can be expected that in this area **no explicit, direct spill-over mechanisms will be foreseen, as might be the case for product standards**. TTIP will most likely not harmonise labour standards and apply these standards as market access conditions to third countries. **However, the agreement might still affect labour standards in third countries in at least three ways** (see also literature review on the relationship between trade and labour protection in section 2):

- if TTIP leads to a **rise or decline in income levels** in third countries this could result in a concomitant increase, respectively decrease in labour standards. As the expected positive and negative economic effects of TTIP on third countries are rather limited anyhow, this effect could also be considered as likely limited.
- if TTIP results in a **'gold standard' for future trade agreements of the EU and the US**, including with regard to labour provisions, this could have a second-order effect on labour standards in third countries, if the EU and the US include the same provisions in their future agreements, for example with a country like India, or even perhaps with China, Brazil, and other countries (e.g. in the Gulf Region) that have not yet concluded an agreement with the EU and the US. By including ambitious labour provisions in TTIP (including ratification of ILO Core Labour Conventions), their moral authority to do so would arguably increase.
- if the labour provisions in TTIP reinforce the **legitimacy of the ILO**, the impact on third countries could be diffused through the multilateral channel. Equally, if TTIP would be a stepping-stone for re-opening the discussion on a **social clause in the WTO**, this could have global and continuous consequences. Of the three mechanisms, this could be the most forceful, sustainable and legitimate one.

In Article 9 'Working together on the labour aspects of trade and sustainable development' of the EU textual proposal, the following **EU-US cooperative activities with regard to third countries** are foreseen: 'g) cooperation with and in third countries, with a view to promoting respect and giving effect to the ILO core labour standards and to promoting ratification and effective implementation of fundamental ILO conventions; h) exchange of information on each Party's experience in implementing labour provisions in Free Trade Agreements concluded with third countries, including with regard to technical assistance, and, where appropriate, cooperation in this regard in countries and regions of common interest'. There is certainly potential for improved cooperation between the EU and the US in third countries. The effectiveness of the EU would increase if it could act in line with the US where possible. Moreover, there might be a potential complementarity between the soft and cooperative approach of the EU and the more intrusive, sanction-based approach of the US. For example, the US has been investigating abuse of trade union rights in Guatemala (since 2008) under the CAFTA-DR trade agreement. Guatemala used to be a GSP+ beneficiary of the EU and is a member of the Central America free trade agreement with the EU, but

apparently there is no coordination between both trading powers. The same seems to apply to the more recent US procedure against alleged violations of labour rights in the agricultural and textile sector in Peru (since 2015). A similar case might take place with regard to forced labour and child labour in the Dominican Republic (which is a member of the CAFTA-DR with the US and the CARIFORUM with the EU). Notwithstanding different approaches, there seems certainly scope for more (in-)formal coordination between the EU and the US in third countries. The expertise and legitimacy of cooperation would be further enhanced by involving the relevant multilateral bodies (such as the ILO).

4.5. Risks for a social race-to-the-bottom from other chapters in TTIP

Besides the effects that liberalisation might have on labour conditions and the countervailing impact of labour provisions in the trade agreement discussed above, also other provisions in TTIP can directly affect labour conditions. The European Parliament has therefore demanded in its July 2015 resolution that **labour provisions should be equally included in other areas of the agreement**, such as investment, trade in services, regulatory cooperation and public procurement.

The inclusion of labour provisions in these other parts of the agreement could have both **positive and negative effects on labour conditions**. Provisions that explicitly support labour standards in other areas (positive integration) will lead to improvement while provisions that constrain the ability of governments to support labour standards (negative integration) will lead to a weakening of labour standards.

In theory, TTIP could include provisions that mandate both parties to include social criteria in public contracts, sometimes also called “socially responsible public procurement” or “buying social”. Equally, the investment chapter of the agreement could make it binding for investors to respect the OECD Guidelines for Multinational Enterprises or to give access to workers to information and consultation in line with the European works council directive. However, in practice, trade agreements as a rule do not impose such positive integration obligations concerning, for example, social protection (Krajewski & Kynast 2014: 16-17).

Agreements might include derogation and justification clauses that allow, for instance, countries to maintain social criteria in their domestic procurement law, in that way limiting the negative social impact this chapter of the trade agreement might have. However, it is important to realise that these are structurally defensive instruments and that the state that invokes them bears the burden of proof that their application falls under the exceptions or reservations of the agreement.

Finally, these other parts of TTIP might have direct negative consequences on social conditions, if they would prohibit, for example, the use of social criteria in public procurement (negative integration). Equally, if not carefully defined, investment protection provisions could be used against labour measures, and result in deterring governments of enacting new labour legislation because of the threat of being sued (“social chill”).

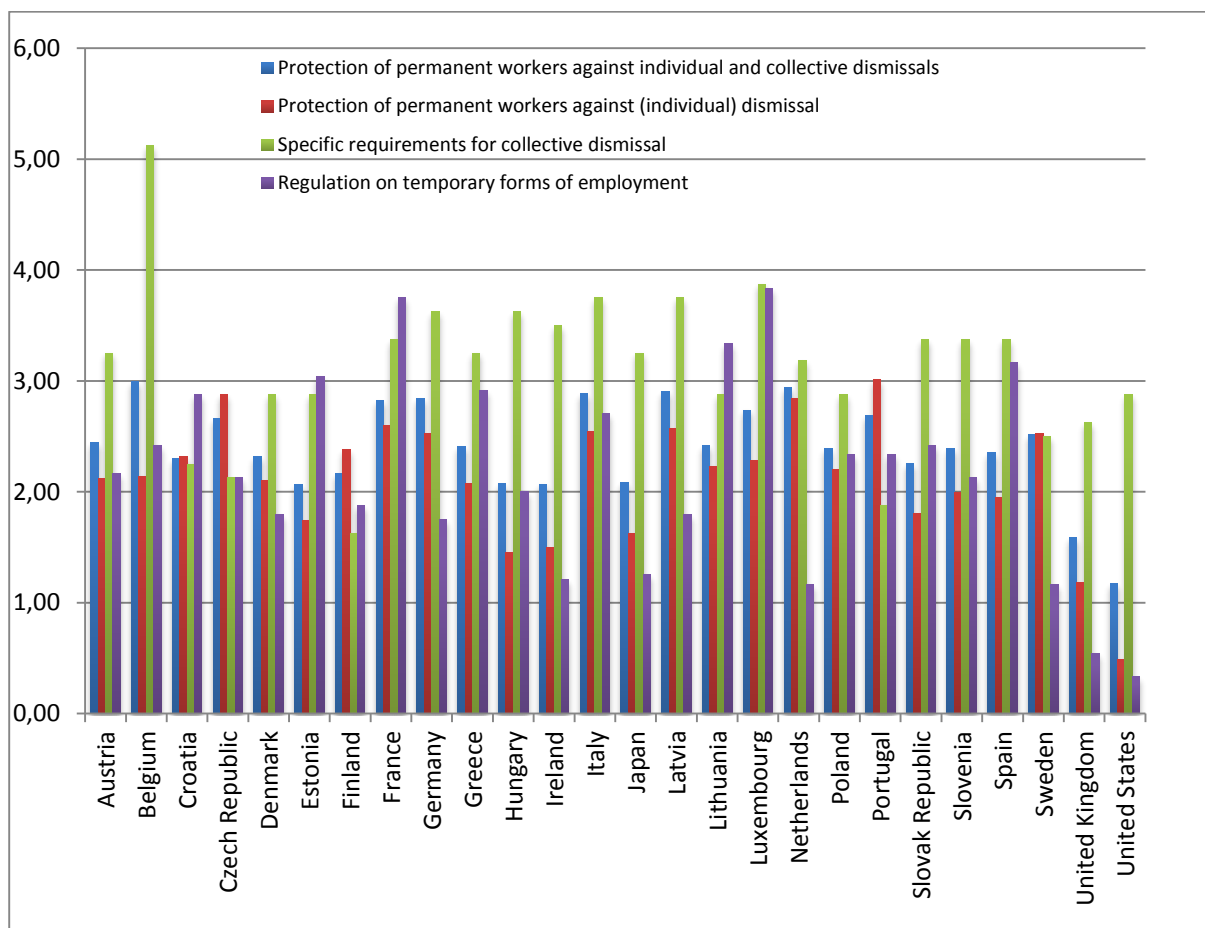
4.6. European and national flanking measures

While it is an **accepted proposition in economics that trade liberalisation generates aggregate net economic benefits, it is equally established that it also creates losers** (e.g. Davidson & Matusz 2006). In the short term, liberalisation can result in increased unemployment as it takes some time before dismissed employees find new jobs. On the individual level, some dislocated workers will be forced to accept new jobs that, when compared to their positions before the liberalisation, result in wage cuts. This can lead to permanent lower earnings throughout one’s lifetime. According to Kletzer (2001), such pay cuts resulting from liberalisation amount to 12% on average (for a recent analysis for the United States, see Autor et al. 2016). According to Dauth, Findeisen and Suedekum (2016)

the push effects (of workers out of industries) resulting from import shocks is stronger than the pull effects of export shocks. In order to compensate groups harmed by liberalisation, different government responses have been proposed and sometimes implemented. These responses mostly resort under labour market policies and may include wage subsidies, employment subsidies and trade adjustment assistance either in terms of unemployment benefits or training subsidies.

As shown in Figure 2, **labour market regulation in EU Member States is stricter (more generous towards beneficiaries) than in the US** (see also European Parliament, 2016: 22ff). Statutory minimum wages, employment protection legislation both for permanent and temporary workers and unemployment protection are significantly higher in EU Member States than in the US. In response to adjustment needs, Felbermayr recommends to make use of labour market policies that contribute to flexicurity (combining unemployment insurance systems and active labour market instruments). While he recognises the need for special trade adjustment assistant programs as the Globalisation Adjustment Fund (EGF) from a political economy perspective, he argues that this is not required from a purely economic perspective. But **as TTIP might imply different adjustment needs for different Member States, temporary adjustment assistance for governments from the supranational level might be advisable**. This could take the form of a strengthened EGF or could give support to bolder initiatives to establish automatic stabilisers at the supranational level in the European Union.

Figure 2: Employment protection legislation in EU Member States and the US



Source: OECD Indicators on Employment Protection Legislation.

While the stricter labour market institutions in the EU as compared to the US don't seem to have systematically hurt European competitiveness and have in recent years even gone in

tandem with increasing trade surpluses for EU member states with the US (Felbermayr 2016: 23), **it seems desirable to limit the risk that intensified transatlantic trade results in a further hollowing out of labour protection in the EU.** While this can be done through strong and enforceable provisions in the agreement that prohibit the reduction of labour standards to boost competitiveness ('standstill clause') and a better functioning cooperative approach (see chapter 3), **flanking measures** can contribute to this objective.

Binding commitments in TTIP will plausibly only prohibit the lowering of labour standards and as such don't say anything about the **possibility that social standards will not be increased, as a consequence of increased competition**, while they might have absent TTIP ('social chill', see chapter 2). **The European Parliament could act as the political guard** that calls governments and social partners to account when the increased competition with the US is used as a pretext to lower or fail to increase social standards (see recommendations).

The social impact of TTIP, including on third countries, is also the subject of a Trade Sustainability Impact Assessment. However, as we explain in Box 11, this T-SIA has not been concluded yet.

Box 11: Social analysis in the Trade Sustainability Impact Assessment

The conclusion and publication of the trade sustainability impact assessment (T-SIA) on TTIP had originally been foreseen for December 2014. In May 2014, a final inception report has been published, summarising the main methodological components of the study and highlighting already some of the main issues that will receive further attention (European Commission 2014b). In May 2016, when the final version of this study had been submitted to the European Parliament, the draft Interim Technical Report has been made public, containing a chapter on overall social impacts and a case study into the impact of TTIP on ILO Fundamental Conventions (European Commission 2016).

The T-SIA will, as usual, contain overall economic, social and environmental analyses, as well as sectoral analyses. The social analysis comprises three main methods: a quantitative analysis of the impact of TTIP on employment, wages, household income and household expenditures; a qualitative analysis of relevant social issues within the EU; and an analysis on human rights.

The issue of labour standards will primarily be dealt with in the second component. The inception report and draft Interim Technical Report assume that TTIP will neither directly affect (de)ratification of ILO Core Conventions in the EU and the US, nor change EU regulations in the field of labour. The final inception report (European Commission 2014b) noted that TTIP might result in dynamics that lead to pressure on Member States and social partners to enhance labour market flexibility and thus lead to different compliance with and implementation of labour conventions, laws and regulations, and might put pressure on social dialogue. As this might differ from Member State to Member State depending on their economic and labour market situation, the final report will contain a number of case studies, inter alia to investigate the likeliness of a 'race to the bottom' taking place in implementation of employment protection legislation. These case studies should then lead to recommendations on how TTIP could support an increase in the level of labour market regulation, in particular in the US. The draft Interim Technical Report only briefly mentions that '[t]he exact magnitude of this downward pressure, if any, is rather difficult to quantify' (European Commission 2016: 137-138).

This chapter has shown that the **strong labour provisions in TTIP demanded by the European Parliament, including ratification of the ILO Core Conventions, are pivotal**

for various reasons. They will allow the better monitoring of US law and practice in terms of the respect of the core labour standards and limit the risk that lower levels of employment protection in the US put pressure on EU member states with higher levels. Besides, ambitious labour provisions in TTIP will allow the EU and the US to include equally ambitious provisions in future agreements and will reinforce the legitimacy of multilateral institutions, which seem the main channels through which TTIP might affect third countries. A combination of 'best practices' of the US and EU approaches to labour provisions in trade agreements offers a path towards such ambitious labour provisions, in line with the EP recommendations. Finally, as the social risks of TTIP cannot be fully eliminated through labour provisions alone, on the one hand other chapters in TTIP could be made to contribute to social progress and, on the other, flanking policies at the EU and member state level might compensate losers from TTIP.

5. RECOMMENDATIONS

KEY FINDINGS

- **TTIP could provide an impetus to improve the EU's promotion of labour conditions through trade agreements.** This study has argued that improvement is possible on at least three fronts.
- TTIP can improve the EU's approach towards labour provisions in trade agreements by **combining the strengths of its own (cooperative) and the US' (conditional) approach** as well as by ameliorating its cooperative approach through some 'quick wins'.
- It is uncertain that even improved labour provisions in trade agreements can fully limit risks of negative social effects, however. Therefore, TTIP could be accompanied by **new intra-EU initiatives that allow for redistribution of the gains of liberalisation and compensate the losers** among and within Member States (see also: European Parliament 2016).
- Knowledge about the impact of liberalisation and effectiveness of labour provisions on labour conditions could be improved. Special attention in the TTIP **Trade sustainability impact assessment (T-SIA)** could be given to lessons learned about the EU's approach so far. The T-SIA process itself can be ameliorated and academic research may be stimulated.

5.1. With regard to labour and other provisions in TTIP

Our review of the literature on the effectiveness of labour provisions in trade agreements in general and EU and US trade agreements in particular has shown that **both the EU and US approaches have stronger and weaker characteristics**. While FTAs with labour provisions of the US have had some positive impact thanks to pre-ratification conditionality, capacity building and economic incentives (including the ultimate threat of sanctions), the lack of requesting ratification of ILO (Core) Conventions might hinder the benchmarking and monitoring of labour conditions if partner countries have not ratified all Core Conventions. On the other hand, while the EU approach has been argued to lead (especially in the longer term) to labour conditions improvement due to the demand for effective implementation and enforcement of the fundamental labour rights, the encouragement to ratify Core Conventions and, especially, civil society involvement in and monitoring of implementation, the remaining gap between commitments and enforcement in target countries is a weak point in the EU approach. Also, the EU FTAs do not foresee in a sanctioning mechanism if civil society involvement commitments are not followed-up by the other side.

Hence, there is much reason to advocate for a combination of the EU and US approach to labour provisions in TTIP. Besides the recommendations to foresee sanctions as the ultimate instrument to enforce labour provisions and to insist on the ratification of the ILO Core Labour Conventions, we also identify 'quick-wins', **i.e. how the EU's current cooperative approach can be improved in several respects**. Finally, as all these changes to labour provisions in TTIP cannot guarantee that the agreement will not lower labour conditions, a '**social safeguard clause**' could be considered as the ultimate assurance.

Recommendation 1: Foresee economic incentives and sanctions as ultimate threat

Our review has indicated a number of reasons to advocate for the inclusion of positive (incentives) and negative (sanctions) conditionality with regard to labour provisions in trade agreements. While evidence for the effectiveness of labour provisions in trade agreements is limited and inconclusive, a number of case studies show the **purchase conditionality may have if integrated in a comprehensive approach including technical assistance, (development) cooperation and ILO involvement**. While pre-ratification conditionality and development cooperation might be less relevant to TTIP itself, the EU and the US could agree to cooperate more vis-à-vis third countries in the future. In compliance mechanisms, **dispute settlement including sanctions** can be structured so as to make the latter the ultimate instrument that should encourage parties to seek amicable solutions in earlier phases of enforcement. In the **Annex** to this study, we outline a proposal of how such a dispute settlement could be structured.

Moreover, besides the additional leverage the possibility of sanctions may give to labour provisions, **the option of sanctions would also add legitimacy to the agreement**. As 21st century trade agreements, of which TTIP is the prototype, intrude deep into domestic policies (e.g. intellectual property rules, technical standards or government procurement practices) and these disciplines are enforceable before the dispute settlement mechanism of trade agreements, it is difficult to understand why labour conditions are not enforceable through the same dispute settlement provisions. It is equally difficult to understand why there would be a trade-off between enforceability and ambition in the Trade and Sustainable Development chapter, but not in all the other (not less sensitive) issue areas where high ambition and enforceability are combined. Finally, also other issue areas (e.g. government procurement) in TTIP touch upon Member State competences but will probably be made enforceable and their disrespect can lead to sanctions. Excluding labour provisions from the enforcement mechanism applied to other sensitive domestic policies could hence contribute to the perception that the Trade and Sustainable Development chapter is no more than a 'fig-leaf'.

Recommendation 2: Insist on ratification of ILO Core Labour Conventions

Our review also concluded that there are at least four good **reasons why the EP could consider insisting on the commitment in TTIP of the US to ratify the ILO Core Labour Conventions**. **First**, while the US is bound to comply with 1998 Declaration and asks for its respect by other countries in its trade agreements, several observers have argued that US labour law and practice deviate in a number of significant respects from the ILO Core Labour Conventions. Their ratification could improve labour conditions in the US (an ethical goal in itself) and help limit the potential negative social consequences of TTIP for labour conditions in the EU (the economic goal of preventing social dumping). **Second**, if a country has ratified an ILO convention, monitoring its compliance with these core labour standards is improved. **Third**, including the obligation to ratify ILO Core Conventions in the 'gold standard' TTIP can also have positive effects in monitoring and improving labour conditions in future FTA partners of the EU and the US. **Finally**, the eventual ratification of the US of the eight Core Conventions would improve the legitimacy of the ILO, thereby extending and anchoring the positive social consequences of TTIP.

This recommendation is also linked with the previous one. The commitment to ratify the ILO's Core Conventions and clear reference to these conventions rather than more generally to the 1998 Declaration **ensures that the core labour standards will be uniformly interpreted under ILO guidance**. The combination of dispute settlement with reference to respect of the ILO 1998 Declaration rather than the Core Labour Conventions (the US approach) risks leading to a fragmented interpretation of the fundamental rights included therein (ILO 2013;

Agusti-Panareda et al. 2014). However, this might add another layer of complexity to the already fragmented ILO-WTO regime governing labour standards in trade (see section 3). If TTIP is to be a stepping-stone rather than a stumbling block to multilateral governance, the European Parliament may wish to ensure that it does not contribute to this fragmentation but rather turns it around.

Recommendation 3: Improve the cooperative dimension of labour provisions

As elaborated in section 3.3., **the potential of the EU's cooperative approach to labour provisions in trade agreements is currently not fully exploited**. Monitoring by governments of labour commitments can be improved, civil society input could be facilitated, including through the possibility of public submissions, and followed-up better, and accountability mechanisms between civil society and government actors may be provided (Van den Putte et al 2015). The European Parliament could play a more important role, inter alia by amplifying the voice of civil society actors and the Panel of Experts, whose roles might be reinforced. The question if separate mechanisms for trade and environmental standards are desirable could be given profound consideration. Finally, more coherence between the cooperative labour provisions and other instruments of EU external action could be pursued.

Recommendation 4: Introduce a 'social safeguard clause'

Provisions in TTIP can mandate the ratification and/or implementation of fundamental labour conventions, thereby establishing the governmental *duty* to regulate to a minimal extent to protect labour rights. They can explicitly protect the *right* to regulate on labour standards and prohibit the lowering of labour conditions to encourage trade and investment to avoid social dumping that might undermine this right. However, these provisions do not preclude that the effects of liberalisation as such limit the *ability* of governments to regulate. One way to reinforce the promise that TTIP will not lead to a worsening of social conditions in the EU whatsoever, through a provision in the agreement (for flanking measures, see 5.3.), would be to include a 'social safeguard clause' (cfr. Rodrik 1997). This would broaden the legitimate reasons under which a safeguard clause can be used from 'caus[ing] or threaten[ing] to cause serious injury to the domestic industry' as in traditional safeguard clauses towards 'distributional concerns or conflicts with domestic norms or social arrangements' (Rodrik 1997: 83). This would deviate from the conditionality instruments discussed above as it could be invoked even if the other party does not violate commitments of the TTIP, but **when liberalisation as such has unforeseen negative social consequences**. Procedural rules to guarantee that such a clause is not used for purely discriminatory reasons can be foreseen, similar to current multilateral rules for the use of safeguard clauses, by requiring that governments show broad support among all concerned constituencies (hence broader than import-competing industries) for the application of the safeguard clause based on legitimate concerns.

5.2. With regard to flanking measures

Even with the most effective labour provisions (assuming that we will once have the knowledge about which labour provisions are the most successful in advancing labour conditions), **trade agreements might still result in risks for race-to-the-bottom dynamics and might produce (at least in the short term) losers** from the trade agreement. As TTIP represents the most important EU trade agreement ever, unprecedented in terms of intrusion into domestic policies 'behind-the-border', it could be considered to give special attention to how social risks of the agreement can be mitigated outside of the agreement itself and how losers can be compensated.

Recommendation 5: EP could help ensure TTIP is not abused to curb social progress

Even with strong and enforceable commitments to ratify and implement the ILO Core Conventions and to restrain from using social dumping to encourage trade and investment, trade liberalisation can lead to changes in the domestic political environment that are conducive to social chill or even regress, but which should or could not per se be cured by trade instruments such as a social safeguard clause. Trade liberalisation without fully equal social (or fiscal and environmental) harmonisation will always improve the bargaining power of mobile capital (by increasing the credibility of their 'exit option') vis-à-vis workers and governments to some extent. **As during the debate on TTIP, advocates have repeatedly promised that TTIP will not lead to a lowering of social protection in the EU in whatever way, this guarantee could be followed-up domestically** by political institutions after the eventual entry into force of the agreement. As national parliaments might have an incentive to give undue preference to domestic firms and investors to attain competitive advantages, it could be considered by the **European Parliament** to assume the task of monitoring if TTIP, and the argument of competitive pressure coming from the other side of the Atlantic, is not (ab)used during negotiations between social partners or in governmental decision-making processes as an excuse for lowering or, rather, not improving social conditions (social chill).

Recommendation 6: TTIP could be stimulus to reinforce EGF and/or Social Union

There have been both normative as well as empirical arguments that open economies should be, and on average are, accompanied by generous social welfare states (see Rodrik 1998). Further liberalisation through TTIP may at the same time increase the demand for social insurance and compensation for the losers as well as make it more difficult for governments to finance insurance and compensation schemes. **Together with the plausible risk that TTIP will have asymmetrical consequences for Member States, it could be considered to reinforce automatic stabilizers at the supranational level in parallel to TTIP.** In the short term, a reinforcement of the European Globalisation Fund could be a step in this direction. In the longer term, an open EU would be more sustainable if a Social Union is developed. This would allow for redistribution of the gains from trade over the different EU Member States as well as, by being better able to tax mobile capital because of the larger scale of this Union, to raise money to finance social security for the losers of trade. It would also help all 28 member states in their ability to effectively respect and implement the ILO Core Conventions.

This is again significantly related to the legitimacy of TTIP and an open trade system in general. Liberalisation, and globalisation more broadly, can count on social consensus as long as the increased exposure of immobile groups to external risks can be compensated (Rodrik 1997). TTIP will increase this exposure and limit to some extent the autonomy of governments to use several instruments for social objectives (e.g. in services or public procurement). Therefore, it could be considered to complement this agreement by increased social protection. Secondly, the EU may also be more effective in advancing social conditions through trade agreements if it can rely on more harmonised social legislation within the EU.

5.3. With regard to gaps in research

The review executed in this study has shown that there is **little consensus in the literature on the relationship between trade agreements, labour provisions and labour conditions**. While the recent increase in their inclusion shows that negotiating parties seem convinced about the desirability to incorporate labour provisions in trade agreements, more research is needed to find out which provisions in Trade and Sustainable Development and other chapters of these agreements are most successful in promoting labour conditions.

In line with a precautionary approach, it could be considered to continuously monitor the effects of trade agreements on labour standards. More and better research could be promoted in both T-SIAs (allowing for case-specific findings and recommendations) and academia.

Recommendation 7: T-SIA process might be improved

As defined in the EU's Handbook on Trade Sustainability Impact Assessment, a T-SIA is 'undertaken during a trade negotiation, which seeks to identify the potential economic, social and environmental impacts of a trade agreement ... The idea is to assess how best to define a full package of domestic policies and international initiatives to yield the best possible outcome'. To be able to feed into the negotiations, T-SIAs are carried out in 'real time'. Moreover, DG trade 'drafts position papers on Trade SIA findings which are submitted to an in-house consultation process involving other Commission departments ... The position papers should also identify concrete action to be taken in order to enhance the benefits of liberalisation both inside and outside the EU in the sectors under scrutiny or to mitigate negative effects. Such action may be in the trade domain or outside it, in areas such as aid, cooperation and technical assistance'.

However, for TTIP, the draft Interim Technical Report has only come out in May 2016, about two years later than originally planned, while the final report is foreseen for September 2016. As the TTIP negotiations are meanwhile said to be in the 'mid game' and their conclusion is still pursued before the end of 2016, the **T-SIA clearly fails its objective of providing input into the negotiations.**

During the CETA negotiations, the T-SIA came in earlier (the final report has been made public in June 2011, more than two years after the start of the negotiations) but the process has not been completed as foreseen either. At the time of writing, there is still no reaction of the Commission Services to the findings and recommendations of the T-SIA. Also, the CETA T-SIA does not include recommendations for domestic flanking measures (only for EU-Canada cooperation beyond the strict confines of the agreement) as foreseen in the Handbook.

Given that the T-SIA for TTIP is still being conducted, it might take into account the opinion of civil society vis-à-vis the EU's approach to labour provisions in recent trade agreements, such as EU-Korea or EU-Colombia-Peru. This can complement the (limited) knowledge about the effectiveness of labour provisions in trade agreements from the academic and policy literature.

As the T-SIA can be seen as a fundamental starting point to effectively integrate social objectives into trade agreements where other steps build on, it is recommendable to ensure that its effectuation is done more seriously.

Recommendation 8: More studies into effects of labour provisions in FTAs

As discussed at length in section two, our knowledge about the effects of liberalisation on labour protection, the effects of labour protection on trade performance and the effects of labour provisions in trade agreements on labour protection is incomplete. Further research on these questions may improve evidence-based trade policy-making in the EU. Especially more quantitative and qualitative research into the effects of labour provisions in trade agreements could be useful to improve the design of chapters on trade and sustainable development.

To overcome the multiple challenges of measuring the impact of labour provisions on labour conditions (data, long causal chains, etc., see supra) Aissi, Peels and Samaan (2016) and ILO (2016) propose a **combination of possible solutions**, including: splitting labour provisions up in the policy levers they include (pre-ratification requirements; technical

cooperation; monitoring; economic (dis)incentives; dispute settlement)¹⁶; distinguishing between proximate and distant outcomes; addressing the problem of establishing causality by focusing on the process of how change is brought about and combining qualitative and quantitative methods. Implementing this research agenda could increase our future knowledge on the relationship between labour provisions and labour conditions.

¹⁶ In the ILO study (2016), the four policy levers are called 'legislative reform', 'capacity building activities', 'monitoring and progress reports' and 'dispute settlement and sanctions'. In the Appendix 1 to the relevant Chapter, the policy levers are somewhat more specified as: 'pre-ratification requirements', 'dialogue and technical cooperation', 'stakeholder involvement', 'monitoring and progress reports', 'dispute settlement' and 'economic (dis)incentives'.

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ANNEX: PROPOSAL FOR LABOUR DISPUTE SETTLEMENT MECHANISM UNDER TTIP

A new dispute settlement mechanism to solve labour disputes, where sanctions are the ultimate threat, could be structured in **three steps**. The examples set out below are a combination of different agreements which, combined, could become a 'best practice'. The examples here focus on labour, but could equally be applicable to environmental issues.

1. **Cooperative government consultations** (under labour / SD chapter)

- First of all, in case of a suspected labour violation, government consultations can be started. See art. 13.14 (Government consultations) under the EU-Korea agreement
 1. *A Party may request consultations with the other Party regarding any matter of mutual interest arising under this Chapter, including the communications of the Domestic Advisory Group(s) referred to in Article 13.12, by delivering a written request to the contact point of the other Party. Consultations shall commence promptly after a Party delivers a request for consultations.*
 2. *The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter. The Parties shall ensure that the resolution reflects the activities of the ILO or relevant multilateral environmental organisations or bodies so as to promote greater cooperation and coherence between the work of the Parties and these organisations.*

Where relevant, subject to the agreement of the Parties, they can seek advice of these organisations or bodies.
 3. *If a Party considers that the matter needs further discussion, this Party may request that the Committee on Trade and Sustainable Development be convened to consider the matter by delivering a written request to the contact point of the other Party. The Committee shall convene promptly and endeavor to agree on a resolution of the matter. The resolution of the Committee shall be made public unless the Committee otherwise decides.*
 4. *The Committee may seek the advice of either or both Domestic Advisory Group(s) and each Party may seek the advice of its own Domestic Advisory Group(s). A Domestic Advisory Group of a Party may also submit communications on its own initiative to that Party or to the Committee.*
- Important here is to take into account **input** from (i) the **domestic advisory groups / transnational civil society mechanism** and from (ii) the **ILO**
- It should also be clear that 'the **public**' can file a **public submission**, as is the case in US agreements – see for example art. 17.5 of the US-Peru labour chapter:
 5. *Each Party shall designate an office within its labor ministry or equivalent entity that shall serve as a **contact point** with the other Parties and with the public. The contact points of each Party shall meet as often as they consider necessary or at the request of the Council. Each Party's contact point shall: (c) provide for the **submission, receipt, and consideration of communications from persons of a Party** on matters related to this Chapter and make such communications available to the other Party and, as appropriate, to the public;*
 6. *Each Party shall **review communications** received under paragraph 5(c) in accordance with **domestic procedures**.*
- The model of filing submissions of the US can provide a good example: <http://www.dol.gov/ilab/media/pdf/2006021837.pdf>.

2. Panel of Experts (under labour / SD chapter)

- When a matter cannot be resolved in cooperative government consultations, the matter should be referred to an 'objective' Panel of Experts – see for example art. 284 (Group of experts) of the EU-Peru-Colombia agreement
 1. *Unless the consulting Parties agree otherwise, a consulting Party may, after 90 days of the delivery of a request for consultations, request that a Group of Experts be convened to examine the matter that has not been satisfactorily addressed through governmental consultations under Article 283.*
 2. *The Group of Experts selected according to the procedures set out in paragraphs 3 and 4 shall determine whether a Party has fulfilled its obligations under this Title.*
 3. ***At the entry into force of this Agreement, the Parties shall submit to the Trade Committee a list of at least 15 persons with expertise on the issues covered by this Title, of which at least five shall not be nationals of any Party and who shall be available to serve as chairperson of the Group of Experts. Such list shall be endorsed at the first meeting of the Trade Committee. The experts shall be independent of, and not take instructions from, any of the Parties.***
 4. *Each Party to a procedure shall select one expert from the list of experts within 30 days of the receipt of the request for the establishment of a Group of Experts. The Parties to the procedure may agree to appoint experts not included in the list to serve in the Group of Experts when they deem it necessary. If a Party to the procedure fails to select its expert within such period, the other Party to the procedure shall select from the list of experts a national of the Party that has failed to select an expert. The two selected experts shall agree on the chairperson, who shall not be a national of either Party to the procedure. In case of disagreement, the chairperson shall be selected by lot. The Group of Experts shall be established within 40 days following the date of receipt of the request for its establishment.*
 5. *The Parties to the procedure may present submissions to the Group of Experts. The Group of Experts may request and receive written submissions or any other information from organisations, institutions, and persons with relevant information or specialised knowledge, including written submissions or information from the relevant international organisations and bodies, on matters concerning the international conventions and agreements referred to in Articles 269 and 270.*
 6. *At the entry into force of this Agreement, the Parties shall submit to the Trade Committee, for adoption at its first meeting, rules of procedure, for the Group of Experts.*
 - While the procedure set out above provides a good example with for example strict deadlines and the need to agree on the list of experts already at the entry into force of the agreement. However, this could be improved on different fronts. First, the **ILO** should be involved in making the **list of experts** (as is the case in art. 22.1(b) of the Canada-Chile labour agreement). Second, the agreement should foresee a budget for such proceedings (as, again, is the case in art. 22.3 of the Canada-Chile labour agreement).
3. Dispute Settlement (FTA in general)
- In the case of EU agreements no sanctions are foreseen in case the final report by the Panel of Experts is not implemented. Therefore, we suggest to follow the US model which provides for the possibility to rely on the **general dispute settlement mechanism** of the trade agreement after government consultations and a panel of experts have failed – see for example art. 17.7 under the US-Peru labour chapter.

- Such a dispute settlement mechanism could result in **trade or financial sanctions**. It would be useful to have financial sanctions to contribute to a **jointly managed fund for labour cooperation activities**.

Apart from this it might be considered to include a provision in the agreement for **(bi-) annual assessments of the impact** of the agreement on core labour rights and employment.

NOTES

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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