

Sustainability, Social Rights and International Trade: The TTIP

Adalberto PERULLI^{*}

This article analyses the prospects opened up in the social field by the negotiation on the Transatlantic Trade and Investment Partnership (TTIP) between the European Union (EU) and United States (US), with reference to labour law and social sustainability. Trade integration between the two partners should lead to an inter-normative approach, incorporating Fundamental Social Rights into the Treaty. The author proposes the inclusion of a chapter dedicated to compliance with labour rights, containing a social clause inspired by Article 20 of the General Agreement on Tariffs and Trade (GATT), in accordance with the negotiation directives. The social clause should include references to the ILO Core Labour Standards, individual and collective labour rights, Corporate Social Responsibility (CSR), and the regulation in a social perspective of Foreign Direct Investment (FDI).

1 THE SOCIAL AND ECONOMIC VALUE OF THE TTIP

The ongoing negotiations between the United States (US) and the European Union (EU), aimed at concluding a transatlantic trade partnership, represent an historic step towards the creation of a global market regulated by free trade principles. Tariff and non-tariff barriers are intended to give way to a 'normalization' of regulatory standards and to promote commercial exchanges and investment between the two most important economic blocs in the world.¹ The Transatlantic Trade and Investment Partnership (TTIP) aims to revise standards, to evaluate compliance and to promote regulatory cooperation in order to maintain high international standards and enhance normative compatibility in the various economic and productive sectors. The implications of this agreement in social and work-related terms are significant for both continents. It is believed that the TTIP could create hundreds of thousands of new jobs, increase salaries and stimulate worker mobility towards expanding productive sectors.²

^{*} Ca' Foscari University, Venice, Italy.

¹ Although negotiations began in the summer of 2013, they are still under way. The European Commission launched a public consultation in March 2014 to give all stakeholders the chance to comment on the proposals.

² See EU Commission, Transatlantic Trade And Investment Partnership, The Economic Analysis Explained, September 2013 (trade.ec.europa.eu/doclib/html/151787.htm).

Although tariffs between the EU and the US are low (between 2.5% and 4% on average), the size of the EU and US economies and the trade between them suggest that a 'price-related dismantling' would bring benefits in terms of growth and employment. With regard to the impact on the labour market, the effect on salaries should reflect the greater productivity for companies as a result of cost savings linked to the elimination of non-tariff barriers. In this perspective, demand-related changes should consist in an increase of salaries, rather than an aggregate increase in employment levels. In sectoral terms, the EU workforce would be re-allocated/de-allocated at a rate between 0.2% and 0.5%, thanks to certain 'pull factors', such as the expansion of certain productive sectors (vehicle manufacturing) and flexibility in others (metalworking).³

In connection with these optimistic forecasts for growth, the TTIP raises a series of social concerns linked to competition arising from the (de)regulation of fundamental labour norms associated with this liberalization. The increasingly global process of liberalization of trade and investment has already resulted in alarming levels of social dumping. There has been a sharp increase in social inequalities, as a vast empirical literature shows,⁴ evaluating the impact of trade, capital transfer and migration, growing income inequality and the emergence of new areas of poverty in the advanced countries. Theoretical analysis and empirical studies have examined international capital flows, mostly in the form of Foreign Direct Investment (FDI), and their impact on salaries, employment and economic uncertainty.⁵ In addition, economic and social studies have observed a close relationship between the increase of social inequalities and declining unionization rates. These processes have affected the US in particular, associated with the neo-liberal ideology rooted in the Reagan and Thatcher era.⁶

In most OECD countries, social and economic inequalities have increased considerably in recent decades, not only in systems moving towards neo-liberalism, but also in Northern European countries, where political change

³ See the study for the European Commission by J. François et al., *Reducing Transatlantic Barriers to Trade and Investment*, 96 (Centre for Economic Policy Research, London, 2013).

⁴ See M. Lübker, *Globalization and perception of social inequality* (Policy Integration Department World Commission on the Social Dimension of Globalization, ILO, Geneva, 2005); *Asia-Pacific Labour Market Update* (ILO, Regional Office for Asia and the Pacific, February 2015); *World Employment and Social Outlook: Trends 2015* (ILO, Geneva, 2015).

⁵ B. Penfold, *Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities*, ILO, Geneva, Working Paper No. 95; C. Ernst, *The FDI – employment link in a globalizing world: The case of Argentina, Brazil and Mexico*, Employment Strategy Department, 2005/17; M. Keune, A. Toth, *Case Study of Area Responses to Globalization: Foreign Direct Investment, Local Suppliers and Employment* (ILO, Geneva, 2001).

⁶ R. Eisembrey & C. Gordon, *As unions decline, inequality rises*, Economic Policy Institute, <http://www.epi.org/publication/union-decline-inequality-rises/>.

has been less drastic, as in the case of Germany and Scandinavia.⁷ Due to the lack of a regulatory system capable of preventing social dumping, globalization produces a corrosion of social standards acting as a restraint to the dynamics of the free market. The social rigidity of the WTO agreement and annexes is notorious: no mention is made of ‘work’ and ‘worker’, as if the commodities exchanged on the global markets were conceived as ‘immaculate products’.⁸ The disregard for social issues shown by international economic institutions casts an alarming shadow on the transatlantic negotiations.⁹ In addition, the social value of a commercial liberalization agreement like the TTIP is doubtful, given the fact that an Investor-to-State Dispute Settlement (ISDS) clause might be invoked in order to protect investment and to contrast social policies in the EU and the US, when they appear to be in contrast with financial and economic interests. It is not at all clear whether an ISDS clause could be used by European companies to challenge US regulations, or by American companies to combat European social standards that are part of the so-called European social model, or of the labour law system of each Member State.¹⁰

As a result, the TTIP negotiations highlight the issue of linkage between international trade and social rights, in a perspective of inter-normativity and the relaunching of social regulation on the basis of the ILO international standards, by means of a social clause. This article aims to address the juridical issues arising from a ‘social chapter’ in the TTIP. In this perspective, I will analyse the materials produced during the negotiations, such as the EU position paper and the Council Guidelines, which are in favour of incorporating into the Treaty a chapter on sustainability of trade between the two continents, also from a social point of view. Further, I will examine the possible models of social clauses implemented at a multilateral level (the North American Agreement on Labor Cooperation, NAALC), or a bilateral level (Free Trade Agreement (FTA)). The structure of the article is as follows. After analysing the theoretical coordinates of

⁷ See the OECD Study *An Overview of Growing Income Inequalities in OECD Countries: Main Findings*, www.oecd.org/els/social/inequality.

⁸ See S. Charnovitz, *The (Neglected) Employment Dimension of the World Trade Organization*, in *Social Issues, Globalisation and International Institutions. Labour Rights and the EU, ILO, OECD and WTO* (V. A. Leary & D. Warner (eds), Martinus Nuhoff Publishers, Leiden-Boston, 2006, 125 ss).

⁹ I refer, in particular to the philosophy inspiring the action of the World Trade Organization (WTO). In the WTO Ministerial Declaration of Singapore (13 Dec. 1996), the parties, while renewing the commitment to compliance with core labour standards internationally acknowledged, stated: ‘We reject the use of labour standards for protectionistic purposes and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question’. The principle of comparative advantage is founded on the idea of an integration of the national economies into the international division of labour according to the competences and the wealth in terms of natural resources, workforce and capital. See A. Supiot, *L’esprit de Philadelphie. La justice sociale face au marché total*, Seuil, Paris, 2010.

¹⁰ See L. Compa, *Labor Rights and Labor Standard in Transatlantic Trade and Investment Negotiations: An American Perspective*, Johns Hopkins University, Working Paper Series (July 2014).

the TTIP in terms of the historical linkage between international trade and social rights (section 2), I will focus on the possible social issues of the Treaty (section 3), which should, in my view, include a chapter on social sustainability (section 3.1), with a mechanism for monitoring the social effects of the agreement (section 3.2), and a social clause inspired by Article 20 of the General Agreement on Tariffs and Trade (GATT) (section 3.3). The social clause should provide for compliance with the ILO Core Labour Standards (section 4), with trade and economic sanctions in the case of violation of these obligations. Provision should also be made for incentives to comply with social rights according to the Generalized Scheme of Preferences (GSP) European model (section 5). As regards the contents, the social clause should deal with compliance with the main norms of the ILO (section 6), additional basic collective and individual rights (section 7), certain aspects of the regulation of the labour market, geographic mobility, posting of workers and public procurement (section 8). It should also provide for the promotion of social rights through soft-law instruments of Corporate Social Responsibility (CSR) (section 9), and the regulation, in a social perspective, of FDI (section 10). In the conclusion (section 11), I envisage a Gold Standard Agreement, to meet the challenge that globalization (and the transnational integration of markets) poses for labour law systems in Europe and the US.

The question arises whether the TTIP will be a liberalistic instrument using trade as a Trojan horse to dismantle social protection and extend deregulation, or whether it will represent an opportunity to strengthen the link between the liberalization of trade and social rights, within a value system that traces its cultural and historical roots to the ILO Constitution.

2 TTIP THEORETICAL COORDINATES: GLOBALIZATION AND SUSTAINABLE DEVELOPMENT

In order to answer this question, it is necessary to consider in depth the theoretical coordinates on which the negotiation is based, and the terms of realization of the Atlantic Partnership. The TTIP represents the final stage of a long path in the history of liberalization of trade, which has its roots in the early stages of economic globalization, characterized by the 'universal competition doctrine'.¹¹ Envisaging a link between trade liberalization and sustainable development also means reconsidering in the context of economic globalization a fundamental issue which has historically been taken into account in the expansion of trade: the move towards economic regionalism, with the realization of Free Trade Areas, customs unions and common markets, implying forms of

¹¹ See A. Supiot, *Giustizia sociale e liberalizzazione del commercio internazionale*, 3 LD (2011), 501 ss.

economic integration beyond trade, addressing issues such as services and investments. The challenge the TTIP poses to labour law is enormous, since it concerns not only to economic-financial aspects of transatlantic trade, but also important issues of global governance, linked to the need for a 'transnational constitutionalism' and an international normative mechanism to make compliance with social rights mandatory for transnational private actors.¹²

From a European point of view, there should be no doubt about the need for a negotiating policy that is consistent with the shared values inspiring the EU treaties. The post-Lisbon European architecture implies a transition from free trade to fair trade, strengthening the link between international trade and the promotion of core labour standards.¹³ If inequality has become the Achilles' heel of market democracies,¹⁴ the TTIP European negotiators need to modify the overall purpose of the agreement, requiring compliance with the standards and values laid down in the Nice Charter. The EU negotiators need to avoid taking the 'low-road', ignoring labour law and social standards, and taking part in a race to the bottom (wage cuts, social security cuts, increasing inequality), in favour of a 'high-road', based on sustainable development and compliance with social rights.¹⁵

In order to deal with this regulatory challenge, the TTIP negotiators will have to go beyond the ambivalences that, mostly on the US side, are traditionally linked to the relationship between 'free trade' and 'labour',¹⁶ to merge the trade agenda with social concerns, in support of sustainable economic development, with the backing of Europe. It is necessary to conceive a new 'social clause' to include in the TTIP, taking as a starting point not only existing economic integration agreements (such as the North American Free Trade Agreement, NAFTA), but also unilateral trade policies linked to the promotion of social rights, such as the Generalized System of Preferences (GSP) adopted by the US and the EU in a perspective of 'inter-normativity' and 'co-regulation'.¹⁷

It should be emphasized that the US has adopted a strategy of linkage between international trade and social rights, as shown by their legislation based on the notion of fair trade. Section 301 of the Trade Act 1974 made it possible to extend the impact of fair trade, considering as unfair some of the procedures

¹² See on these issues G. Teubner, *Nuovi conflitti costituzionali* (Mondadori, Milan, 2012), 23 ss., 149 ss.

¹³ A. Lyon-Caen, *A proposito di dumping sociale*, 1 LD (2011).

¹⁴ A. Gallas, C. Scherer & M. Williams, *Les inégalités – le talon d'Achille de la démocratie de marché*, in *Journal international de recherche syndicale*, 6(1) (BIT, Geneva, 2014), 163 ss.

¹⁵ L. Compa, *Labor Rights and Labor Standard in Transatlantic Trade and Investment Negotiations: An American Perspective*, Johns Hopkins University, Working Paper Series (July 2014), 2.

¹⁶ For historical references, see E. B. Kapstein, *Sharing the Wealth. Workers and the World Economy*, Italian translation. *Governare la ricchezza. Il lavoro nell'economia globale*, Carocci, 2000.

¹⁷ See A. Perulli, *La responsabilità sociale dell'impresa: idee e prassi* (Il Mulino, Bologna, 2013), 9 ss.

of countries trading with the US.¹⁸ The inclusion of social clauses in a series of multilateral and bilateral treaties signed by the US confirms this approach, with significant progress over time in the identification of protected social rights in trade negotiations. The reference here is to the transition from a situation where countries state that they 'strive to ensure' compliance with international principles, to a more precise and demanding obligation to 'adopt and maintain' ILO core principles, with trade sanctions as an enforcement mechanism.¹⁹

As a result, in the context of social integration in trade relations, the US should not be compared to countries that are reactionary and averse to any kind of social conditionality. The fight against social dumping, the rejection of free trade based solely on the protection of the market, to the detriment of social and environmental interests, the ability to see beyond the Ricardian principle of comparative advantage applied to normative conditions, may be seen as aspects of the US approach to external relations. While the US will need to present plausible credentials in terms of the linkage between trade and social rights, the EU will need to promote core labour standards through international trade instruments. The 'trade-and' model of European integration is in keeping with the 'sustainable development' paradigm: according to the Final Report of the High Level Working Group on Jobs and Growth, the TTIP negotiations should aim to dedicate a chapter on Trade and Sustainable Development (TSD), conceived not as an external or accidental element of the agreement, but, on the contrary, to 'involve all the areas of the negotiated agreement'. The aims of sustainable development are confirmed in the Directive of negotiation on transatlantic Partnership for exchanges and investments between the EU and the USA. The directive states that the Preamble to the TTIP should take into account the fact that 'the partnership with USA is based on principles and common values that must be coherent with the principles and the aims of the external action of the Union', containing also: (1) shared values such as human rights, fundamental freedom, democracy and the rule of law; (2) the responsibility of the parties in favour of sustainable development and the contribution to international trade to sustainable development as regarding its social, environmental and economic aspects, economic development, full, productive and

¹⁸ We are referring to the procedures that American legislation considers to be 'unjustifiable', 'discriminatory' and 'unreasonable', including 'persistent pattern of conduct that: (i) denies workers the rights of association, (ii) denies workers the rights to organize and bargain collectively, (iii) permits any form of forced or compulsory labour, (iv) fails to provide a minimum age for the employment of children, or (v) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers'.

¹⁹ See L. Compa, *From Chile to Vietnam: International Labour Law and Workers' Rights in International Trade*, in: *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek*, Gráinne de Búrca, Claire Kilpatrick, Joanne Scott (eds), Bloomsbury Publishing, 2013, London – New Delhi – New York – Sydney, p. 143.

decorous employment, as well as the protection and conservation of environment and natural resources; (3) the right of the parties to undertake the measures intended to realize legitimate objectives of public policy on the basis of the level of health, safety, workers, consumers and environment protection, as well as the promotion of diversity of cultural expression.

There are some precedents in EU external relations, with sustainable development as an aim, and they are certainly useful to formulate the TSD chapter in the TTIP. The EU has for a long time adopted a regulatory model aiming to combine trade liberalization and respect for social rights through the GSP,²⁰ the preferential and non-mutual treatment granted to developing countries in the field of trade, notwithstanding GATT provisions.²¹ The GSP's social dimension thus represents a useful starting point to define the general principles which, according to the Directives of the Council, should characterize the Preamble to the TTIP.

3 THE TTIP CHAPTER ON SUSTAINABILITY

The TTIP chapter on sustainability should include the main operational indications derived from the most advanced cases of international trade regulation, in order to promote fundamental social rights. We now turn to some specific points for a strategy to define the Sustainability Chapter.

3.1 TTIP SUSTAINABILITY IMPACT ASSESSMENT IN SOCIAL MATTERS

First and foremost, the chapter on sustainability should envisage an assessment of the TTIP social impact clause coherent with the provisions of the EU, requiring 'specific attention to wide consultations and the involvement of the society in the sustainability impact assessment (SIA) that will be implemented in the course of the trade negotiations'.²² The Council Negotiation Directives adopt this perspective, providing for an SIA, aimed at verifying the social, economic and environmental impact of the TTIP, during the course of the negotiation in which civil society and all the components specified in the agreement will participate (point 33).

²⁰ F. Pantano, R. Salomone, *Trade and Labour within the European Union Generalized System of Preferences* (Jean Monnet WPS, New York University School of Law, 2008).

²¹ See T. M. Franck, *Fairness in International Law and Institution* (Oxford, 1995), 58; L. Bartels & C. Haberli, *Binding Tariff Preferences For Developing Countries Under Article II GATT*, 13(4) J. Intl. Econ. L. 969 (2010).

²² Communication of the Commission to the European Parliament, to the Counsel, to the Social and Economic European Committee and to the Region Committee, *Trade, Growth and World business. Trade Policy as an essential component of 2020 EU Strategy*. COM (2010) 612 def.

The assessment of the TTIP social consequences should represent a permanent mechanism to supply *ex ante* and *ex post* indications on the effects of the chapter on Sustainable Development, providing follow-up sessions to indicate the measures to be adopted to ensure the expected results.²³ In this perspective, monitoring the impact should involve the social partners, the interested NGOs and the European Economic and Social Committee (EESC) that has expressed its opinion on trade and sustainability, envisaging an assessment mechanism that involves civil society, to regularly reassess the risks and opportunities identified in the initial impact assessment.²⁴

In addition, this monitoring impact assessment should be combined with additional review and follow-up mechanisms, to be laid down in the agreement. They should include mutual learning and the sharing of good practices, to be adopted by means of shared guidelines, as part of an open coordination mechanism, on the basis of the EU directives to coordinate labour market policies of the Member States.²⁵

3.2 PERMANENT MONITORING OF THE SOCIAL EFFECTS OF THE AGREEMENT

Furthermore, the TTIP should envisage an adequate implementation mechanism for the agreement, to monitor its effectiveness and the fulfilment of the duties deriving from it, with particular reference to compliance with international obligations. In this connection, the agreement should envisage the appointment of an independent committee of experts, with an ILO member in a consultative capacity performing the following tasks: (a) drafting of periodic reports on the state of effectiveness of social standards, taking into consideration the information transmitted by governments and other institutions; (b) gathering and assessing any complaints, drafting recommendations, promoting consultative forums for the exchange of information between governments, the social partners and other stakeholders (based on the North American Agreement on Labor Cooperation (NAALC) model); (c) with reference to the NAALC model, transatlantic communication should be duly institutionalized through the setting up of a Forum for Trade Investment and Sustainable Development, which should regularly represent the location where the social matters linked to the TTIP should be publicly discussed. We need to observe, on the US side, that

²³ Also according to K. Lukas & A. Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements*, 11, 'A continuous repeated review of the impact of the agreements is also required'.

²⁴ See Opinion of the EESC, *Valutazioni d'impatto sulla sostenibilità (VIS) e politica commerciale UE* (2011/C 218/03). See Opinions of EESC on *Sustainability Impact assessment (VIS) and EU Trade Policy* (2011/C 218/03).

²⁵ See also T. Treu, *Labor and Industrial Relations in the transatlantic Free Trade Agreement guidelines*, Speech at 21 Nov. 2013 meeting at the Italian Cultural Institute in New York.

monitoring the effectiveness of the commitments relating to trade is on the basis of US foreign policies on trade and investment. For example the Central America Free Trade Agreement (CAFTA) envisages the setting up of a Labor Affairs Council (LAC), performing a periodic assessment of the state of implementation of the agreement, with consultation between the parties to the agreement, as well as a Capacity Building Mechanism, aimed at promoting and strengthening cooperation, to improve labour standards and to favour meetings between the parties. In the case of the TTIP, one option would be to set up a US-EU monitoring body, to be involved in ILO monitoring activity.

3.3 A SOCIAL CONDITIONALITY CLAUSE INSPIRED BY ARTICLE 20 OF THE GATT

Although the TTIP chapter on sustainability is likely to envisage soft-law mechanisms for disseminating good practices in labour matters, (in accordance with the Open Method of Coordination), this will not be sufficient to guarantee the effectiveness of the social provisions of the agreement, particularly with regard to compliance with minimum standards laid down in the relevant legislation.²⁶ The TTIP needs to adopt a ‘mandatory rule-oriented dispute settlement system’, not simply make a declaration of good intentions. This mandatory system should be able to deal with the disputes concerning compliance with social commitments by companies and governments, where necessary applying economic or trade sanctions. An authoritative discussion of this issue is to be found in the Council Negotiation Directives, noting that ‘the agreement must include a clause on general exceptions, inspired by Articles 20 and 21 of the GATT’ (Article 12). It is common knowledge that, thanks to Article 20 of the GATT, providing for ‘general exceptions’, these matters are dealt with by the domestic jurisdiction of the countries concerned. They are authorized to allow national policy exceptions to the obligations under the trade liberalization agreements. The exception relating to prison labour (Article 20 (e)) is an example of the extraterritorial effect clause of the national law protecting labour. It is intended to guarantee a ‘protection competence’ that may be applied beyond national borders, relating to productive processes, in contrast with the provisions in international trade law.²⁷ This is crucial in order to evaluate compliance with fundamental social rights that are guaranteed (or violated) in productive processes, and cannot be evaluated on the basis of an analysis of the

²⁶ An argument in favour of an approach that would not be rigidly prescriptive is to be found in T. Treu, *supra*, n. 25.

²⁷ It is well known that international trade law does not take account of how a product is made, but merely evaluates the product itself; see D. Carreau, P. Juillard, *Droit international économique*, Dalloz, 207, p. 268.

product in itself. Thanks to Article 20, the only provision in the GATT which may be considered to be a ‘social clause’, states are authorized to adopt restrictive measures in international trade (including embargoes on exports, and boycotts on imports) to protect their markets from products manufactured with low-cost labour.²⁸ Article 20 requires WTO Member States not to adopt such measures for the purposes of ‘arbitrary or unjustified discrimination’ against countries, and they should not constitute a ‘disguised restriction on international trade’. In this connection, the Appellate Body of the WTO has upheld the French ban on importing white asbestos from Canada, for health and safety reasons, justifying such a measure by the need to protect public health.²⁹ The same reasoning applies with regard to the protection and conservation of marine turtles in relation to American restrictions on shrimp imports from Malaysia, justified by Article 20 of the GATT.³⁰

In examining these measures, we can highlight the need to reformulate Article 20 of the GATT, with the provision of new general exceptions, relating to failure to comply with fundamental social rights not envisaged by the current part (e). However, a proper interpretation of the measures to protect ‘public morals’, as well as ‘to protect human, animal or plant life or health’ needs to take account of certain fundamental rights such as the ban of forced labour (not only ILO Convention 105/1957, but also Article 8 of the International Covenant on Civil and Political Rights), the ban on ‘the worst forms of child labour’ (ILO Convention 182/1989), the ban on working in conditions resulting in ‘inhuman and degrading treatment’ (Article 7 of the International Covenant on Civil and Political Rights), the need to safeguard the minimum norms of ‘occupational safety and health’ (ILO Convention 187/2006), thus allowing countries subject to social dumping to adopt restrictive measures on imports.³¹ In support of this position, the WTO Appellate Body has highlighted the need to interpret the protection of the environment in connection with international instruments and

²⁸ Cfr. WTO Appellate Body, *Japan-Taxes on Alcoholic Beverages*, Report 4 Oct. 1996, WT/DS8/AB/R, and *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 Jul. 1997.

²⁹ 12 Mar. 2001, WT/DS 135/AB/R, where it stated that: ‘In the light of France’s public health objectives as presented by the European Communities, the Panel concludes that the EC has made a prima facie case for the non-existence of a reasonably available alternative to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC’s position is confirmed by the comments of the experts consulted in the course of this proceeding.’

³⁰ WT/DS58/AB/RW 22 Oct. 2001 United States – Import Prohibition of certain Shrimps and Shrimp products. Recourse to Art. 21.5 of the DSU by Malaysia.

³¹ For an interpretation of Art. 20 GATT on general exceptions, see W. Benedek, *The World Trade Organization and Human Rights*, in *Economic Globalisation and Human Rights* (W. Benedek, K. De Feyter & F. Marrella, Cambridge, University Press, 2007), 156; A. Perulli, *Globalisation and Social Rights*, in *Economic Globalisation and Human Rights* (W. Benedek, K. De Feyter & F. Marrella, Cambridge, University Press, 2007), 111; A. Perulli, *Clausola sociale*, in *Enciclopedia del diritto* (2014).

declarations,³² citing, for example, the Rio Declaration on the Environment and Development (1992), and the principle of international consensus. In addition, the ILO and the WTO Secretariat have shown with empirical evidence that respect for social rights does not undermine competitiveness.³³

This methodological approach to social and environmental sustainability matters would make it possible to take the ILO core labour standards as the key normative provisions in social matters. Taking these standards as a benchmark in the TTIP clause inspired by Article 20 of the GATT seems to be in line not only with the ‘sustainability’ aims of the agreement, but also with international labour law and international trade law. The reference in the negotiation directives to the need for a TTIP clause on ‘general exceptions’ inspired by Article 20 of the GATT can provide the opportunity to reinterpret the norm according to recent developments in international law on human rights. In this respect, the TTIP provides an opportunity to go beyond international trade-regulating principles, by hypothesizing the extraterritorial application of social standards. As a result, we need to identify the ‘model’ of social clause that may be most suitable to the TTIP, evaluating all the existing possibilities and the possible new options to explore during negotiations.

4 THE SOCIAL CLAUSE: COMPLIANCE WITH NATIONAL LEGISLATION OR COMPLIANCE WITH INTERNATIONALLY ACKNOWLEDGED SOCIAL RIGHTS?

The first model to be considered is the NAALC, which adopts norms to encourage labour protection through a procedural mechanism regulating trade liberalization and compliance with fundamental social rights.³⁴ The labour side accord (or side agreement) provides a monitoring and cooperation procedure among partner countries, which may lead to sanctions in the case of

³² See S. E. Gaines & B. Egelund Olsen, *Trade and social objectives*, in *Liberalising Trade in the EU and The WTO* (S. E. Gaines, B. Egelund Olsen & K. Engsig Sorensen, Cambridge University Press, 2012), 2013 ss.; R. Howse & R. G. Teitel, *Beyond the divide: the International Covenant on Economic, Social and Political Rights and the World Trade Organization*, in *The World Trade Organization and Human Rights. Interdisciplinary Perspectives* (S. Joseph, D. Kinley & J. Waincymer, Edward Elgar, 2009), 39 s.

³³ International Labour Office and the Secretariat of the World Trade Organization, *Trade and Employment: Challenges for Policy Research* (ILO and WTO, Geneva, 2007).

³⁴ Jefferson Cowie & John D. French, *Nafta's Labor Side Accord: A Textual Analysis*, in *Latin American Labor News No. 9* (1993–1994), Center for Labor Research and Studies of Fla. Int'l University, p. 5; M. A. Moreau, *La clause sociale dans les traités internationaux: Bilan et Perspectives*, Nantes, 20 mars 1995; M. A. Moreau & G. Trudeau, *La clause sociale dans l'Accord de libre échange nord-américain*, Rev. Int. Dr. Écon. (1995), 395 ss.; P. Staelens, *Les conséquences sociales de l'intégration nord-américaine sur le Mexique*, Syndicalisme et société (1998), 97 ss. See also R.E. Scott et al., *Revisiting NAFTA – Still not working for North America's workers*, EPI Briefing paper, 28 Sep. 2006.

non-compliance. As a result, this mechanism can be interpreted as a social clause, which, in contrast with the tradition of international labour law, does not require formal compliance with a minimum supranational standard, but the effectiveness of national social standards. The NAALC criteria within the TTIP, that is to say compliance with the national standards of each country, should incorporate the international norms (ILO) relating to compliance with labour principles. The application of sanctions within the NAALC is severely limited: they become effective only if the agreement violations are persistent, 'trade related' and 'covered by mutually recognized labour laws' (NAALC, Article 49, Definitions). If the TTIP were to adopt this model, not every violation of social matters would be subject to sanctions, but only those appearing as significant in terms of social and economic integration under the agreement. These violations result from an attempt to obtain an undue comparative advantage. As a result, following this model, a European administrative structure (EU-NAO) and an equivalent USA structure (USA-NAO) could be envisaged, to receive reports and to implement transatlantic ministerial consultations. The adoption of a social clause, supported by real sanctions (going beyond 'moral pressure' and the 'mobilization of shame') within the TTIP would constitute an unprecedented development.³⁵

A second model of social clause that should be considered by the TTIP negotiators is based on existing FTAs. Unlike the NAALC, this model requires compliance with international standards, with the parties undertaking to promote labour standards, to comply with their respective international commitments, to strengthen their collaboration and to guarantee efficient implementation of national labour law systems. This model seems to be coherent with the European Position Paper, that refers to 'adherence to core labour standards'. In my opinion, the second model is undoubtedly preferable, as it should be more effective in terms of compliance with the principles of international labour law. In addition, it reflects the terms of other trade agreements signed by the US, providing that the domestic measures should be integrated in compliance with international standards. In particular, reference should be made to the provisions of Article 6.1 US-Jordan FTA, which, after making reference to the ILO membership of the signatories, and their commitment to the ILO Declaration on Fundamental Principles and Rights at Work (1998), commits the parties to 'strive to ensure' the protection of 'labour principles and internationally recognized labour rights', by national legislation, verifying compliance of the labour standards with the

³⁵ See I. Garvey, *Trade Law and Quality of Life-Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, *Am. J. Int. L.*, 89 (1995), p. 453, which, in this perspective, sees the NAALC as revolutionary.

principles of international (labour) law and committing them to their improvement. The US-Jordan FTA refers to international labour standards as a benchmark to evaluate the effectiveness of domestic labour laws. This model represents a step forward in safeguarding workers' rights, also because the labour provisions are placed in the body of the FTA. Unlike the case of NAALC, we are not dealing with a mere side agreement, but with a list of social principles integrating the agreement, such provisions regulating trade.

This model provides for a dispute resolution procedure to be applied to all violations without exception, thus ensuring that labour disputes have access to the same mechanism as provided for trade disputes. The strength of the obligations related to labour issues is directly correlated to the multi-step executive mechanism laid down in the agreement. In the event of a violation, the parties must first of all make every effort to reach a mutually acceptable solution through consultations. If the dispute is not resolved within sixty days, each party has the right to refer the matter to a Joint Committee, a permanent body, consisting of representatives of the parties, set up to monitor the implementation of the Agreement. The Joint Committee has ninety days to resolve the dispute, after which the parties may refer the matter to a Dispute Settlement Panel, authorized to hand down non-binding recommendations, which the Joint Committee must take into account, in order to resolve the dispute in the following thirty days. If at the end of the procedure the dispute is still unresolved 'the affected Party shall be entitled to take any appropriate and commensurate measure', including trade sanctions, fines, cuts to international development funding and others.

Another well-known model is to be found in the FTA between the US and Cambodia in the textile industry.³⁶ The implementation of this hybridization model between *hard* (social clauses) and *soft* (technical assistance, ILO cooperation) techniques has promoted competitiveness founded on the improvement of working conditions and productivity increases, thus compensating for higher labour costs, giving rise to macroeconomic benefits and political stability.

In both models, the chapter on sustainability should be assisted by a 'non-execution clause', to ensure that non-compliance with social provisions is subject to the same treatment as non-compliance with other provisions of the agreement. In particular, the dispute resolution mechanisms envisaged by the TTIP should extend to social matters, following an integrated approach employed by new generation TFAs.

³⁶ See A. di Caprio, *Are labor provisions protectionist? Evidence from nine labour-augmented US trade arrangements*, 26(1) *Comp.Lab. L. & Policy J.* (2004), 10 ss.

5 CARROT AND STICK: INCENTIVES AND SANCTIONS

Regardless of the model of social clause adopted, it may be argued that a merely voluntaristic approach, or one founded on moral suasion, would not be in line with the standards of social conditionality in the European and North American traditions. After a reasonable period of time of soft-law mechanisms (ministerial consultations, recommendations of committees of experts, consultative public forums, and so on), the widespread failure of company to comply with labour standards should lead to financial or commercial sanctions, on the basis of dispute resolution procedures. The sanctions could take the form of a suspension of benefits (on the NAALC model), and/or Monetary Enforcement Assessment (on the model of some FTAs and the Generalized System of Preferences). At the same time, sanctions of this kind should be applied to those sectors in which non-compliance with the obligations in the chapter on sustainability has occurred repeatedly, in spite of the technical/administrative support of the committee of experts and international organizations such as the ILO, with whom close collaboration is necessary.

The use of sanctions as a last resort does not rule out, and actually presupposes, the coexistence of other compliance instruments: cooperation and the technical support from multilateral agencies, notably the ILO. However, the TTIP should also envisage mechanisms founded on a promotional philosophy, including incentives, like those characterizing in particular the European GSP Model.

6 PROVISIONS OF THE TTIP SOCIAL CLAUSE: FUNDAMENTAL SOCIAL RIGHTS

In the Position Paper outlining the European expectations at the beginning of the negotiations, the EU explicitly declared an interest in the protection of social rights within the TTIP, referring to both the 1998 ILO Declaration on Core Labour Standards, and the 2008 ILO Declaration on Social Justice for a Fair Globalization. These represent the normative framework for international labour law to incorporate into transatlantic trade agreements. In particular, as noted in the Position Paper, the ILO core labour standards are ‘an essential element to be integrated in the context of the commercial agreement’, and should act as ‘a support to other standards and relevant ILO conventions, and as means to promote the decent-work agenda’.³⁷ This ambitious position was confirmed during the last negotiating session (July 2014), when it is stated that:

³⁷ European Commission, EU-US Transatlantic Trade and Investment Partnership, Trade and Sustainable Development, Initial EU Position Paper, point 8.

Discussions to date have allowed for a detailed exchange of views on the possible scope of Trade and Sustainable Development provisions, covering both substantive Environment and Labour issues, with a view to preparing the ground for an exchange of textual proposals. Key issues discussed include the prevention of a race-to-the-bottom on labour and environment, adherence to core labour standards, the protection of natural resources (wildlife, timber, fisheries), and the promotion of cooperation on trade-related sustainable development issues both bilaterally and at global level.³⁸

The fundamental document to support this social responsibility strategy is undoubtedly the June 1998 Geneva Declaration³⁹ dealing with compliance with the core labour standards: freedom of association, the right to collective bargaining and the ban on discrimination.⁴⁰ This set of core labour standards should be considered to be universally applicable insofar as the ILO requires compliance on the part of Member States merely due to the fact that they belong to the organization, regardless of their ratification of the related conventions.⁴¹

7 THE INDIVIDUAL AND COLLECTIVE DIMENSION

The protection of workers' rights is the starting point for a bilateral normative framework that goes beyond the basic principles of the 1998 ILO Declaration, in a wider value perspective which includes other social rights. The focus is on human dignity, which is central to the EU institutional perspective in all its dimensions, and activated in US public regulations 'only when doing so would produce net social gain'.⁴² This welfare economics approach that evaluates regulation not in monetary terms is adopted by the Equal Employment Opportunity Commission (EEOC), to promote values such as: equity, human dignity and self-respect, the reduction of social exclusion and humiliation.⁴³ An *ex ante* evaluation of the effects of trade liberalization should be implemented in all the sectors potentially involved, in order to promote respect for human dignity in all its aspects connected to labour law. For example, with reference to health and safety in the workplace in the American tradition, the focus is on the 'duty to safeguard lives and the well-being of employees', that is linked to the

³⁸ European Commission, State of Play of TTIP negotiations after the sixth round, 29 Jul. 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152699.pdf dated 09/04/14.

³⁹ The declaration is divided into a preamble, a pronouncement and an original control procedure (*mécanisme de suivi; follow-up mechanism*); for a description see Kellerson, *La Déclaration de 1998 de l'Dit sur les principes et droits fondamentaux: un défi pour l'avenir?*, Rev. Int. Trav. (1999), 244 ss.

⁴⁰ For an analysis of these fundamental social rights see L. Betten, *International Labour Law*, Deventer, 1993.

⁴¹ See A. Bronstein, *International and Comparative Labour Law. Current Challenges* (Palgrave MacMillan-ILO, 2009), 96 ss.

⁴² See R. Bayefsky, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123(6) Yale L. J. (2014), 1736.

⁴³ See R. Bayefsky, *supra* n. 42, 1760.

'duty of care', a well-known concept in all the common law systems. However, the co-regulation of individual rights, with a certain amount of harmonization on a transatlantic basis, increasing the level of the negotiation up to possible disciplinary intersections, for example in relation to dismissal regulation, highlights the significance of the gap between the two continents. Some ideas for a common reflection are to be found in the European debate on Flexicurity and the Single Employment Contract, also related to the debate about the relationship between the reduction of employment protection, the promotion of stable employment, the regulation of non-standard employment and the prohibition of discrimination.⁴⁴

The TTIP also provides the opportunity to lay the foundations for a certain amount of harmonization of fundamental collective/union rights, creating a virtuous transatlantic connection, to provide a positive stimulus to the industrial relation systems of both continents. In this connection, the decline in trade union power and collective rights is not limited to developing countries alone, but also to more advanced countries, in relation to competitive deregulation and labour market flexibility, as well as transnational operations.⁴⁵ The European tradition is based on the constitutional acknowledgement of trade union rights, on labour law safeguards with a supranational source (Article 11 ECHR), on the promotion of sectoral and inter-sectoral social dialogue, as well as on the activation of participant institutions broadly speaking (European Works Councils, for example). In this context, the European tradition must represent the starting point for a strategy to combat the decline of collective rights.

On the other hand, the Americanization of industrial relations brought about by the TTIP would represent an unacceptable step back for the European Social Model, undermining the aim of the EU to consolidate and disseminate its fundamental values (Article 3(5) TEU). It should be pointed out that in the US, the labour market is characterized by widespread anti-union procedures. They consist in the threat to close down the company if employees show an inclination to set up a union branch in the workplace, as well as the threat to dismiss between 5% and 20 % of unionized workers. Further, entrepreneurs tend to be inclined to undermine negotiations, invalidating their results by taking legal action to overturn the results of union elections.⁴⁶ In US labour law, there is a

⁴⁴ See M. Rönmar, *Flexicurity, Labour Law and the Notion of Equal Treatment*, in *Labour Law, Fundamental Rights and Social Europe* (M. Rönmar (ed.), Hart, Oxford and Portland, Oregon, 2011), 153 ss.; G. Casale, A. Perulli, *Towards the Single Employment Contract: Comparative Reflections* (Hart, 2014).

⁴⁵ See S. L. Kang, *Human Rights and Labor Solidarity. Trade Unions in the Global Economy* (University of Pennsylvania Press, Philadelphia), 34.

⁴⁶ See ITUC-CSI-IGB, *Países en situación de Riesgo. Violaciones de los derechos sindicales* (2013), 52.

direct relationship between collective bargaining, considered to be ‘incompatible with the forms of contemporary labour organizations’, and the decline of labour unions, theorizing ‘disaggregated’ forms of unions disconnected from bargaining, in favour of other forms of political organizing.⁴⁷

As a result, European TTIP negotiators should work towards the adoption of measures safeguarding collective rights, in order to prevent such a scenario, in accordance with the European principles of encouraging collective bargaining between employers and employees (Article 156 TFEU). These mechanisms should be in line with compliance with ILO standards (Conventions no. 87, 98, 135 and Recommendation no. 143), encouraging the coordination of the normative provisions to promote national collective bargaining, and in the process of transnationalization of industrial relations, through the promotion and the dissemination of transnational company-level agreements. (TCA, see *infra*).

The existing literature has long highlighted the virtuous link between EWCs and the development, negotiation and implementation of TCAs, as a result of the participation procedures of promoted by EWCs.⁴⁸ In this connection, the idea of an extraterritorial application of the directive on the EWC (Dir. 45/95 EC and Dir. 38/09 EC) to European companies working in the US has been put forward. This would provide North American workers with the opportunity to benefit from the same rights of information and consultation as their European colleagues.⁴⁹ Following on from this, the dissemination of TCAs can be a useful reference point for TTIP negotiators, inasmuch as the promotion of those agreements is aimed at setting up transnational structures of employee representation in the workplace, not only in multinational companies, but also in supply chains, subsidiaries and subcontractors.⁵⁰ Such agreements could have a significant impact on three levels: promotion of freedom of association, organization and collective bargaining, establishment of industrial relations at a company level (most of all in countries with a low levels of unionization) and the development of labour protection in the sectors involved.⁵¹

⁴⁷ See B. I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123(1) Yale L.J. (2013), 148 ss.

⁴⁸ See K. Papadakis, *Globalizing industrial relations: what role for International Framework Agreements?*, in *The Role of Collective Bargaining in the Global Economy* (S. Hayter (ed.), Edward Elgar, ILO, 2011), 277 ss.

⁴⁹ Compa, *Labor Rights and Labor Standard in Transatlantic Trade and Investment Negotiation: An American Perspective*, *supra* n. 15.

⁵⁰ See I. Schömann, *The Impact of Transnational Company Agreements on Social Dialogue and Industrial Relations*, in *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (K. Papadakis (ed.), Palgrave Macmillan, 2011), 29.

⁵¹ See D. Miller, *Global Social Relations and Corporate Social Responsibility in Outsourced Apparel Supply Chains: The Inditex Global Framework Agreement*, in *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (K. Papadakis (ed.), Palgrave Macmillan, 2011), 179 ss.

8 LABOUR MARKET, GEOGRAPHIC LABOUR MOBILITY, POSTING OF WORKERS, PUBLIC PROCUREMENT

Labour market regulation, including measures to promote labour market participation by means of infrastructure, public services and active labour market policies, is a crucial policy area in European societies. The TTIP might be profitably integrated with an activation paradigm⁵² including flexicurity measures, in order to represent the European response to liberalistic policies based on deregulation of labour market in the US.⁵³ European labour markets cannot be Americanized by means of downward harmonization, though the process of dismantling labour law protection is widespread in many European systems, in order to attract foreign investment. In this case as well, the Investor-to-State Dispute Settlement (ISDS) clause should not give multinational companies an instrument to challenge labour market and social security policies as a trade violation, imposing 'US-Style labour market deregulation'.⁵⁴ However, it is not enough to leave labour law out of the equation, thus making it immune to attempts at harmonization. It is necessary for TTIP negotiators to promote bottom-up harmonization, using all the instruments available within the regulation of trade, in order to implement active labour market measures as part of a set of coordinated instruments to integrate (and re-integrate) workers into the labour market.

The TTIP must offer the US and the EU 'new opportunities for high and low-skilled workers'.⁵⁵ It is evident that this aim can be achieved also by developing transatlantic labour mobility, adopting suitable regulatory standards in order to deal with the tension between social norms (the collective bargaining rights, in particular) and trade rules (right of establishment and provision of services) that have come to light in Europe as well, in *Laval*, *Rüffert*, and *Commission v. Germany*. A good example of this tension, with the risk of social dumping, is represented by the international posting of workers, regulated by a (controversial) EU directive dealing with the provision of services (96/71/EC), the underlying philosophy of which could serve as a useful starting point for the TTIP. The TTIP should contemplate a set of minimum rights for posted

⁵² S. Betzelt & S. Bothfeld (eds.) *Activation and Labour Market Reforms in Europe* (Palgrave Macmillan, 2011).

⁵³ On the emergence of flexicurity European model, see M. De Vos, *Flexicurity and The European Globalisation Adjustment fund: Propaganda or panacea?*, in *European Union Internal Market and Labour Law: Friends or Foes?* (Intersentia, Antwerp-Oxford-Portland, 2009), 105 ss.

⁵⁴ See L. Compa, *Labor Rights and Labor Standard in Transatlantic Trade and Investment Negotiations: An American Perspective* *supra* n. 15.

⁵⁵ *Independent study outlines benefits of EU-US trade agreement*, EU Commission, 12 Mar. 2013.

workers, according to the host state control principle, with an exception, as laid down in the European Directives (Article 3.7), for the application of preferential treatment provided by the home state, or the possibility for the host state to request the application of other terms and conditions not specified by the 'hard core'.

Further, the TTIP chapter on Sustainability could provide the opportunity to relaunch the use of public procurement to implement labour safeguards as agreed by the parties, requiring national and multinational companies to comply with social clauses, as specified in European Directive 181/2004.⁵⁶ On the basis of this regulatory model, the public body awarding the contract should specify the obligations regarding safety and working conditions in force in the Member State, the region or place where the service is to be provided, to be applied to work and services on the construction site, or in the execution of the contract. This kind of procedure might be extended to the private sector, involving all the companies taking part in a tendering process, in connection with CSR.

9 CORPORATE SOCIAL RESPONSIBILITY

In the TTIP, sustainability and social issues might be promoted also by means of CSR, with a view to widening the obligations of the contracting parties, and in particular, multinational companies. The different approaches to CSR (in the EU mainly focused on contractual commitments to labour standards, in the US on codes of conduct and voluntary compliance) should not prevent a shared vision about the need to increase cooperation between private stakeholders and countries.⁵⁷ The TTIP could provide a new impulse to the external action of the EU as regards CSR. In particular, the TTIP social guidelines should be linked to trade policies, providing a new normative basis, in order to promote an extra-territoriality principle, thus allowing countries to demand compliance with their social legislation, also in the case of multinational companies operating beyond their national borders.⁵⁸ The initiatives regarding CSR are linked to actions of coordination in areas of transatlantic interest, such as common policies on investment, which should be driven by the principles and objectives of EU

⁵⁶ On this issue, see C. Barnard, *Using Procurement Law to Enforce Labour Standards*, in *The Idea of Labour Law* (G. Davidov & B. Langille (eds), Oxford University Press, 2011), 256 ss.

⁵⁷ See A. Bronstein, *International and Comparative Labor Law. Current challenges* (Palgrave Macmillan – ILO, 2009), 111 s.

⁵⁸ See D. Augenstein et al., *Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside the European Union*, Study for the European Commission, ENTR/09/045 (2010).

external action,⁵⁹ specific policies on child labour,⁶⁰ forced labour, trafficking in human beings and on conditions in the mining sector.

A further particularly relevant area of interest is to be found in the link between CSR and transnational collective bargaining. In this connection reference should be made to international (global) framework agreements, negotiated between a multinational company and international trade unions (such as the Global Union Federation), in order to adopt codes of conduct in line with CSR principles and, in particular, require the company to respect the same social standards in all the countries it is operating in.⁶¹ The development of transatlantic framework agreements may represent a realistic objective for the TTIP negotiators, with a view to laying the foundations of a transatlantic bridge in industrial relations and to ensure compliance with ILO core labour standards. Although a European juridical framework is lacking, the TTIP should promote the conclusion of TCAs, providing an optional juridical framework in the chapter on sustainability. In order to achieve this, the TTIP should acknowledge the main results of surveys carried out on this issue, which have shed light on a series of deficiencies due to the lack of a legal framework for this kind of transnational bargaining.⁶²

In the Directives on negotiation, there is a reference to the presence in the agreement of 'provisions sustaining internationally acknowledged norms, in the field of companies social responsibility', providing for a 'mechanism based on the participation of society', to monitor the execution of such regulations and a 'mechanism of resolution of controversies'. We are dealing with important and demanding statements, broadening the spectrum of social matters within the TTIP, with the addition of an arbitration mechanism supplying an enforcement dimension to norms related to CSR. Thanks to this transatlantic agreement, we may expect further promotion of fundamental social rights due to the insertion in the TTIP of a CSR clause, obliging companies to undertake social due

⁵⁹ Communication of the Commission 'Towards a Comprehensive European International Investment Policy', COM (2010) 343 final.

⁶⁰ EU's Council, Council conclusion on child labour, http://www.concilium.europa.eu/eudocs/cms_Data_docs/pressdata/EN/foraff/115180.pdf.

⁶¹ See I. Schomann et al., *Transnational Collective Bargaining at Company Level*, ETUI, 2012.

⁶² 'A lack of clear capacity/legitimacy of negotiating and signatory parties, A lack of procedural rules for negotiation, A lack of consistency in the implementation of TCAs between countries and subsidiaries resulting from the absence of rules or practice as to the effects and implementation of such agreements, Risks associated with the uncertainties as to the legal effects of TCAs and to the application of private international law rules to disputes, Resentment among managers' and workers' representatives at lower levels about the top-down imposition of measures agreed at an upper level', Cfr. ETUC Resolution: *Proposal for an Optional Legal Framework for transnational negotiations in multinational companies*, March 2014; see also *Report to the European Trade Union Confederation* by Silvana Sciarra, Maximilian Fuchs & André Sobczak, *Towards a Legal Framework for Transnational Company Agreements* (2014).

diligence, and to adopt preventive measures of compliance with human rights in their outsourced production chains. The provision of an obligation for companies to make CSR 'balance sheets' public might be usefully adopted by the TTIP, endorsing a responsibility of the parties in social matters in addition to the elimination of tariff and non-tariff barriers envisaged in the agreement.

10 FOREIGN DIRECT INVESTMENT

Foreign Direct Investment (FDI) represents one of the most significant drivers of the global economy. The empirical literature on the relationship between FDI and social rights is focused on the alternative between the 'race to the top' and a 'trade-related race to the bottom'. This alternative depends on the way production on a multinational scale is organized. Direct investors can be encouraged and motivated to comply with core labour standards in their overseas production facilities through a variety of instruments and mechanisms. Basically, the protection of social rights is an outcome which depends to a large extent on the capability of policies to guide the behaviour of direct investors. For this reason, and considering the differences in social protection between the US and the EU, it is necessary to avoid the deregulatory approach of the US labour market becoming a magnet for European companies. European policy-makers should not be tempted to adopt deregulation and the competitive devaluation of social policy in order to attract American FDI.⁶³

The EU Position Paper envisages that the TSD chapter of the Transatlantic Agreement should reflect an attitude to investments (and trade) respecting fundamental rights, in the sense that 'the respective domestic authorities will not fail to enforce, and will not relax, domestic labour or environmental domestic law as an encouragement of trade and investment'. The same policy is reaffirmed in the Negotiation Directive of the Council, where it is envisaged that 'the agreement must acknowledge that the parties will not promote exchanges or foreign direct investments, decreasing the strictness of the legislation and the national norms on environment, labour, health and labour security, as well as the policies and fundamental labour norms or legislative regulation aimed to the protection and the promotion of cultural diversity' (point 8). A further clarification relating to investor prerogatives is offered by the Negotiation Directive, particularly regarding the risk of employing ISDS provisions to circumvent social policy. The Directive appears to protect the principles and social rights in the European model, while upholding the sovereignty of Member

⁶³ See Compa, *Labor Rights and Labor Standard in Transatlantic Trade and Investment Negotiations: An American Perspective* *supra* n. 15.

States (also) in the field of labour law. In particular, the Negotiation Directive envisages the protection of investments and the ISDS clause should not undermine EU's and Member States' right to 'adopt and apply, according to their respective competences, the measures geared to non-discriminatorily fulfil legitimate interests of public policy, in social, environmental, national security, financial system stability, public health and security fields' (p. 23). In this Directive, the TTIP should specify that US and EU companies cannot appeal to the ISDS clause against labour law legislations offering preferential treatment, as in wage matters, or in case of application of collective agreements providing for improved conditions compared to the legal minimum, or in case of public regulation in the field of welfare and public health.⁶⁴

As a result, the TTIP social clause should contemplate the commitment of the parties to establish and harmonize FDI policies, enforcing application of core labour rights and the Conventions of the ILO. However, FDI should not be encouraged by lowering labour standards or by compromising internal legislation on social matters, or through competitive deregulation of core labour standards.⁶⁵

11 CONCLUSION: THE TTIP AS A GOLD STANDARD AGREEMENT

In the alarming scenario of economic globalization, characterized by a growing gap between markets and regulation, the TTIP can represent a fundamental step towards a renewed commitment by the EU and the US to promote core labour standards, with compliance rooted in mutually agreed trade policies and in the regulation of FDI. Projecting labour law onto a transatlantic scale may give it new life and legitimacy, with an expanding world economy founded on sustainability, respecting democratic principles and human rights. European trade unions and North American labour unions are hoping that the TTIP will not strengthen the hegemony of multinational companies, promoting the privatization of profit and socialization of losses, but that it will provide the opportunity to formalize a 'gold standard agreement', increasing social rights, welfare and working conditions on both continents.⁶⁶ If the TTIP includes a social clause and/or a chapter on Sustainability, it will provide social conditionality in EU external relations, in the framework of North American trade integration (with implications also for central and southern America) and a new generation of FTAs. The TTIP should reinforce the linkage between social

⁶⁴ See L. Compa, *Labor Rights and Labor Standard in Transatlantic Trade and Investment Negotiations: An American Perspective*, *supra* n. 15, which refers, for example, to the Living Wage Movement in the USA.

⁶⁵ See in this sense, Art. 72 of EU-Cariforum Agreement.

⁶⁶ See Declaration of Joint Principles ETUC/AFL-CIO, titled *TTIP must work for the people, or it won't work at all*.

rights and international trade, and the fight against social dumping, adopting the comparative advantage principle as a basis for international trade policies.⁶⁷

International trade regulation must be strictly linked to an appropriate labour policy, and Governments must be able to connect social and economic objectives in their external policies, providing adequate instruments to effectively promote the values of decent work. It remains to be seen, however, whether the TTIP will be able to interpret these values and to become the ‘gold standard agreement’ of the twenty-first century.

⁶⁷ See M. A. Cabin, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, *Colo. L. Rev.* (2009), 1047 s.; for a synthetic analysis, see K. Lukas, A. Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements*. (Ludwig Boltzmann Institute, Vienna, June 2010); *Social Dimension of Free Trade Agreements* (ILO, Geneva, 2013).