19 Improving the enforcement of labour standards in the EU's free trade agreements

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The EU is an extremely active international actor in the area of trade, being widely involved in the negotiation and conclusion of free trade agreements (FTAs) with partner countries. All new-generation FTAs include a sustainable development clause between the parties promoting, among other things, a set of labour standards as well as Conventions of the International Labour Organization (ILO). For instance, most of the EU's FTAs contain provisions to protect the right to collective bargaining and freedom of associations or to forbid discrimination in the work place. On 17 December 2018, for the first time in history, the European Commission sought consultations with a partner state, South Korea, for failure to respect a labour standard obligation in an EU FTA, and panel proceedings may soon be initiated.[1] This is a notable development, which comes almost ten years after the entry into force of the agreement and the prolonged failure of the Asian EU partner to ratify and implement four of the eight fundamental ILO Conventions.

However, there is still a long way to go to rebalance the discrepancy between the enforcement of labour standards and of other obligations, concerning trade, investment and intellectual property, contained in the EU's FTAs. As a matter of fact, under the EU Trade Barriers Regulation (TBR), EU companies can file a complaint with the European Commission when a country is not respecting an obligation under an FTA.[2] This leads to a Commission investigation and a number of time-limited actions can follow against the state concerned. Various initiatives can be taken at the EU level before the more

1 See "EU steps up engagement with Republic of Korea over labour commitments under the trade agreement", European Commission press release (http://trade.ec.europa.eu/doclib/press/index.cfm?id=1961). By early April 2019, the EU seemed close to initiating panel proceedings (see https://en.yna.co.kr/view/AEN20190409006651315).

2 Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015, OJ L 272/1 (hereafter: the 'TBR'). For an introduction to the TBR see Bronckers and McNelis (2001).

burdensome and diplomatically taxing international dispute settlement mechanism is triggered. This system allows private parties to be actively involved in the enforcement of commitments made under FTAs, inspiring more confidence in their implementation.

Yet labour standards and environmental obligations are excluded for the time being from the set of rights which can be enforced via the TBR. This is the case even where EU FTAs already contain precise obligations to ratify and implement the relevant ILO Conventions including concerning core labour standards. This situation damages the capacity of the EU to uphold labour standards and leaves most labour violations unaddressed. This chapter puts forward a proposal to allow labour standards to be enforced, via a private complaint procedure in front of the European Commission. Only in the event that proceedings at the EU level do not lead to compliance would we then envisage a fully-fledged third-party adjudication system in the FTA itself, followed, if necessary, by financial and ultimately trade sanctions.

Modelling a private complaint procedure

It is not necessary to re-invent the wheel. We propose to model a private complaint procedure relating to violations of labour standards included in the EU's FTAs along the lines of the TBR, by amending that regulation. We discuss the main steps below.

Admissibility of a private complaint

It is important to design appropriate admissibility thresholds, since the Commission has limited resources and cannot be expected to investigate thoroughly and in a time-limited fashion each and every complaint it receives. Furthermore, engaging with a third country on the grounds that it may have violated its international obligations towards the EU also taxes diplomatic relations. Thus, complaints without sufficient merit should be filtered out.

Representativeness

When a social partner files a request, the European Commission would first check if the social partner is an interested party.

In our proposal trade unions would have a right to file a complaint independently. In fact, in our view, trade unions have their own interests in bringing a complaint with regard to labour standards violations and are in a position to autonomously provide sufficient evidence of the violation. Another reason to allow trade unions to complain independently about labour standard violations by an FTA partner of the EU is that trade

unions have a broader interest, also in the protection of shared values and fundamental rights.

We propose that the European Commission would accept complaints from social partners that are considered representative on the basis of the recognition procedure of Treaty on the Functioning of the European Union (TFEU) Article 154. This Article provides that whenever the European Commission is proposing EU legislation in the social policy field, management and labour unions shall be consulted. Such consultation can also lead to the conclusion of agreements between social partners and EU institutions.[3] To put this procedure into operation, the European Commission had to identify the social partners to be consulted whenever required by EU law. This led to the creation of a list[4] on the basis of studies that the EU Foundation for the Improvement of Living and Working Conditions (Eurofound 2013) conducts to identify social partners that are organised at the EU level and capable of being consulted and of negotiating agreements.

We submit that the same employer organisations and trade unions that are selected to take part in such procedures, and have extensive institutional experience in dealing with labour issues at the EU level, are also in a position to have the legal right to take action for the violation of one of the labour standards protected under EU FTAs. There is in fact already an institutional infrastructure in place allowing the European Commission to interact with these social partners (European Union 2012). The use of this list of social partners would drastically reduce the number of persons allowed to bring an action under the proposed procedure. The list includes umbrella organisations such as BusinessEurope and the European Trade Union Confederation (ETUC) as well as sectoral social partners.

Under our proposal, umbrella organisations would have legal standing to trigger an investigation for violations occurring in any economic area. Sectoral organisations would have legal standing for violations perpetrated in their sector of competence. Each organisation would be allowed to file a complaint independently. However, the European Commission could merge different complaints in the same procedure at a later stage.

Merits

When the European Commission receives a complaint from a representative social partner, it needs to conduct another check to filter out frivolous complaints, by

3 TFEU Art 155. See Barnard (2012: 47).

4 List of European social partners organisations consulted under Art 154, available at: ec.europa.eu/social/BlobServlet?docId=2154&langId=en.

assessing whether the complaint appears to have sufficient merit. In order to decide on admissibility it is sufficient for the Commission to conduct a preliminary analysis, which in the present TBR is based on sufficient evidence to initiate a procedure.

The TBR requires a petitioner to show that the FTA obligation establishes a right of action for the EU – a requirement that would not need to be adapted. In fact, according to the TBR, such a right of action exists when the relevant international rules "either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question".[5] This flexible formula captures violations of various types of labour standards currently found in FTAs – not just 'hard' obligations, but also 'softer' yet still meaningful standards.

A crucial point, however, is that the private complaint procedure should not require the demonstration of any effects on, or links with, trade, global trade patterns, or social dumping.[6] Presently, petitioners under the TBR have to demonstrate some sort of trade effect.[7] Already in respect of violations of trade agreements within third-country markets, this requirement is not to be interpreted stringently (Bronckers and McNelis: 441-442). Yet, this requirement would be entirely misplaced in respect of complaints concerning labour rights violations. In fact, experience has shown that it is very difficult to demonstrate the trade impact of labour right violations.[8]

The EU's interests

There is no need to modify the additional requirement present in the TBR that the investigation should be "in the interest" of the European Union. This leaves some discretion to the European Commission in deciding whether to open an in-depth investigation. Yet, the impact of this discretionary element in the Commission's assessment should not be overstated, as experience in the trade area has shown (Bronckers and McNelis: 449-51).[9] Indeed, once a private petitioner has shown it is entitled to bring a complaint (i.e. it is duly representative) and has brought sufficient evidence that a third country is likely to violate its FTA labour standards obligations, it would be politically very difficult for the Commission to decide that it would not be in the interest of the Union to even investigate such a complaint and to make inquiries with the third country. It should be recalled here that the Commission is obliged to

5 See TBR Art 2(1)(a).

6 *Dominican Republic – Central America – United States Free Trade Agreement, Arbitral Panel established pursuant to chapter twenty in the matter of Guatemala – Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR,* 14 July 2017, available at: bit.ly/2tiQos4.

7 See TBR Art 3.

8 See *Guatemala – Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR* (endnote 6); see also Polaski (2017).

9 See ECJ, Case 70/87 Fediol IV [1989] ECLI:EU:C:1989:254.

publish a reasoned decision in the Official Journal, and that such a decision is subject to judicial review.[10]

Internal investigation by the Commission

The present TBR defines the procedural steps to be taken by the European Commission when investigating the violations alleged in a private complaint it has declared admissible.[11] Most of these provisions can be utilised in an investigation of labour standards violations.

The Commission has the duty to inform the third country involved of the complaint. It also has the power, when necessary, to perform an investigation in the third country unless the country concerned objects.[12] Furthermore, the European Commission has an obligation to hear the parties concerned if they have made a written request for a hearing.[13] In principle, this system allows the Commission to hear social partners in the EU and in the third country so that they can contribute to the evidence collected in the case. The nature of labour rights obligations might require slight adaptations to ensure that the petitioners are heard by the Commission and to support the participation of the social partners and private persons affected by the violation in the third country. Thus, we could imagine an obligation on the European Commission to reach out and collect evidence from these interested parties, even if they did not register their intention to take part in the investigation after the publication of the notice in the Official Journal.

There are useful experiences in other countries where this advanced model of fact-finding concerning labour standards violations is already a reality. For example, in the context of the enforcement of the Canada–Colombia Agreement on Labour Cooperation (CCOALC), a side agreement to the Canada–Colombia FTA, Canadian authorities performed extensive investigations within Colombia.[14] When Canada concluded this investigation, it raised serious concerns about the protection of key labour rights in Colombia. Both governments then agreed on a three-year action plan to be undertaken by Colombia (2018-2021).[15]

10 TBR Art 13.4.
11 See, notably, TBR Art 9.
12 TBR Art 9.2.
13 TBR Art 9.5.
14 See "Review of public communication CAN 2016-1. Report issued pursuant to the Canada-Colombia Agreement on Labour Cooperation", available at: www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/2016-1-review.html.
15 Available at: https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/colombia-action-plan.html.

It also seems appropriate to stipulate explicitly that the European Commission is to examine whether the ILO has made any relevant findings regarding the alleged labour standard violations. The ILO has shied away from third-party adjudication on the compliance of Members with its norms (see Koroma and van der Heijden 2015). But the ILO does have supervisory mechanisms, though in most cases these are ultimately consensus-driven – and consensus has become more difficult to find amongst social partners, especially after the 2012 stalemate on the right to strike (van der Heijden 2017). Still, it would be useful for the European Commission in its investigation to take on board any fact-finding or reflections in ILO reports that could help to shed light on the alleged violations.

Regarding the type of evidence to be collected, the TBR would require some adaptations as well. Presently, the Commission is supposed to consider only trade-related factors (e.g. volume of imports or exports, prices, impact on EU industry, effects on trade) to establish whether the complaining industry has shown that it is injured by the third country's violation of its international obligations.[16] These factors are not particularly relevant for an investigation into violations of labour standards. As explained above, such violations may not, or not primarily, cause economic injury within the EU, but rather disrupt shared values that underlie the FTA with the third country. Establishing the violation itself, as well as such factors as its gravity and/or frequency, should be sufficient for a finding that the EU has a right of action against the third country concerned.

After an investigation of five or seven months,[17] there are several possible outcomes under the TBR. First, the European Commission can conclude that there was no violation of the labour standard included in the FTA and that no further action should be taken.[18] Second, without necessarily admitting to a violation, the third country might propose to take measures that would remove the need for the EU to take further action.[19] Third, the EU and the third country might find that the best way to resolve the dispute is to conclude a new agreement between them.[20] Finally, the European Commission might find there is a violation, even though this is not accepted by the third country. In that case, the Commission would normally want to initiate international dispute settlement proceedings under the FTA before taking any further action.[21]

16 TBR Art 11.
17 TBR Art 9.8.
18 TBR Art 12.1.
19 TBR Art 12.2.
20 TBR Art 12.3.
21 TBR Art 13.2.

International dispute settlement

In case the third country does not remedy the violation of the FTA's labour standards found by the Commission, the proposed procedure would move on to dispute settlement. To begin with, formal consultations are to be held involving the FTA's trade and sustainable development committee.[22] If, within a short period (say, three months),[23] the consultations do not resolve the issue, the new FTAs envisage dispute settlement in the form of independent third-party adjudication.

The EU–Canada Comprehensive Economic and Trade Agreement (CETA), for instance, provides that the Panel should submit a "final report setting out the findings of fact, its determinations on the matter including as to whether the responding Party has conformed with its obligations under this Chapter".[24] Compared to the general dispute settlement system of the FTA, the only thing missing is sanctions, as discussed below.

Taking enforcement of FTA labour standards more seriously is not just a matter of shoring up dispute settlement procedures, though. As discussed above, it also requires taking a second look at the patchwork of labour standards that have so far been included in the EU's FTAs, ranging from hard obligations to statements of intent that are as soft as butter.

Finally, in the event an FTA refers explicitly to an ILO norm, this should not stop adjudication by an international tribunal established under the FTA. This is similar to the the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which incorporates parts of the WIPO Conventions, such as the Paris Convention on Industrial Property[25] and the Berne Convention on Copyright.[26] Compliance with these conventions can therefore be sought in dispute settlement proceedings of the WTO.[27] However, when dealing with ILO-based norms FTA supervisory bodies or FTA panels should be encouraged to seek relevant information from the ILO,[28] while keeping in mind the limitations inherent in its consensus-based supervisory mechanisms (Koroma and van der Heijden 2015, van der Heijden 2017).

Sanctions

As the European Court of Justice recalled, should an EU treaty partner breach the sustainability provisions in an FTA, the EU would be entitled under general public

22 See, for instance, CETA Art 23.9.
23 See, for instance, CETA Art 23.10.
24 CETA Art 23.10 (11)
25 TRIPS Art 2.1.
26 TRIPS Art 9.1.
27 TRIPS Art 64.
28 See CETA Art 23.10 (9).

international law to suspend other commitments in the FTA or even terminate the agreement.[29] Yet, the EU's political institutions do not seem to consider this to be a viable threat to induce the EU's treaty partners to comply with their sustainability obligations. There is no public record of this ever having been seriously considered. In fact, rather than relying on principles of general international law, the debate in the EU has been whether to include any specific sanctions in its FTAs. For many years it was an article of faith for the EU to reject this. It was therefore noteworthy for the European Commission to raise the possibility that the EU might change this policy in its first non-paper of 2017. However, in its second non-paper of 2018 the Commission ultimately dismissed this idea (European Commission 2017, 2018).

We endorse the proposal of the European Parliament that an FTA panel should have the means to oblige a non-complying country to make financial payments as a temporary inducement until the date it brings itself into compliance with the labour standard it has been found to violate.[30] This is not unprecedented. As the European Commission itself noted, albeit only in its first non-paper of 2017 (European Commission 2017: 3). Canada for example envisages fines in the event of infringements of the sustainability chapters in its FTAs (other than CETA, notably because of resistance by the EU!). Furthermore, the EU itself has useful experiences too with financial penalties in the event of EU law infringements by member states. These can be demanded by the European Commission and imposed by the European Court of Justice. The amount of the penalties depends on factors such as the severity of the infringement, its duration, and the ability to pay of the offending country (i.e. its GDP).[31]

These experiences could be a source of inspiration when conceiving of a penalty scheme in relation to violations of FTA labour standards. The penalties that the offending country would pay could go into a fund which could be controlled by an independent body (e.g. the ILO), and which could help for instance to finance the development of international labour standards.

Finally, there are good reasons why the FTA should still include the option of imposing trade sanctions, including the suspension of trade preferences or of the entire agreement, if the country violating the labour standard does not bring itself into compliance and refuses to make financial payments. In our proposal, trade sanctions are in principle not to be used to enforce labour standards. However, the remedies in the general state-to-state dispute settlement could be extended to the sustainability chapter as extrema

29 See *Opinion 2/15* [2017] ECLI:EU:C:2016:992, at para. 161.

30 See "Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility" of 5 July 2016 (2015/2038(INI)), at para 22(d).

31 The Commission published an update of its calculus of lump sums and penalty payments in a Communication of 19 September 2018, available at: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm.

ratio. The CETA, for instance, includes several provisions to assure compliance with the final panel report concerning trade obligations. These include, after the expiration of a reasonable period for compliance, the right of the offended party to suspend obligations.[32]

In the WTO system, retaliation must be equivalent to the level of nullification or impairment of benefits, which means that the retaliatory response may not go beyond the level of harm caused by the other party.[33] This idea of economic injury to calculate the amount of the retaliation can be adapted to sustainability obligations, so that the value of the retaliation could approximate the financial penalties that the offending country is refusing to pay. For instance, a financial penalty of €10 million could be replaced by tariff increases on imports from the offending country amounting to €10 million.

So as to avoid any misunderstanding – sanctions are the final part, but not the main element of the reform we are proposing here. We are also not suggesting that private complaint procedures, coupled with sanctions, can or should replace dialogue between governmental and social partners in the implementation of international labour standards in the EU's FTAs. We do submit that more effective enforcement can be a useful complement to improve the implementation of these standards.

References

Barnard, C (2012), *EU Employment Law*, Oxford University Press.

Bronckers, M and N McNelis (2001), "The EU trade barriers regulation comes of age", 35 *Journal of World Trade* 427.

Eurofound (2013), "Representativeness of the social partners in the European cross-industry social dialogue".

European Commission (2017), "Trade and sustainable development chapters in EU free trade agreements", non-paper of the Commission services, 11 July.

European Commission (2018), "Feedback and way forward on improving the implementation and enforcement of trade and sustainable development chapters in EU free trade agreements", non-paper of the Commission services 26 February.

32 CETA Art 29.

33 "Countermeasures by the prevailing Member", WTO (available at: www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm).

European Union (2012), *Consulting European Social Partners: Understanding How it Works*.

Koroma, A and P van der Heijden (2015), *Review of ILO Supervisory Mechanism*, ILO.

Polaski, S (2017), "Twenty Years of Progress at Risk Labor and Environmental Protections in Trade Agreements", GEGI Policy Brief 004.

van der Heijden, P (2017), "De ILO: struikelend op weg naar de 100", 36 *Tijdschrift Recht en Arbeid* 3, 6.

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